

## **Smt. Radha Wife Of Late Sri Karuna ... vs State Of U.P. And Arvind Kumar S/O ... on 11 December, 2007**

### **JUDGMENT**

Shiv Charan, J.

1. The instant application has been moved by Smt. Radha for cancellation of bail granted by this Court vide order dated 15.10.2004 in Crime No. 106 of 2003, under Sections 498-A, 304-B, 201 I.P.C. and 3/4 D.P. Act, P.S. Rampura, District Jalaun in Criminal Misc. Bail Application No. 7936 of 2004 Arvind Kumar v. State of U.P. The facts of the case in brief are as follows:

2. The applicant/complainant lodged an F.I.R. at the Police Station on 31.8.2003 at about 1:20 PM. with the allegations that the marriage of her daughter Iksha Kumari alias Babli was solemnized with Arvind Kumar alias Gunnu Misra on 26.6.1997 according to Hindu rites. She delivered dowry in marriage according to her capacity and capability. For the last two years opposite party No. 2 and other relations started pressurising her to transfer the immovable property in their name. And inspite of giving assurance by the complainant that after her death the entire property would dissolve on them even then they continued to pressuring her to transfer the property. They subjected to cruelty to Iksha Kumari alias Babli for non fulfilment of demand of dowry. On dated 30/31.8.2003 at about 10:00 PM, the accused persons came at the house of the complainant and stated that the condition of Babil is very critical. On it all the relations of the complainant rushed to the village of the accused persons but Iksha Kumari was not there. On quarry the accused persons informed that Babli has hanged herself at the house of her mother. At the house Arvind Kumar opened the lock of the house and they found the dead body of Iksha Kumari was lying on the floor.

3. After rejection of the bail application of Arvind Kumar by the Sessions Judge, Jalaun, Arvind Kumar moved bail application No. 7936 of 2004 before this Court. It was alleged in the application that the marriage of the deceased with the applicant was solemnized on 24.5.1995. As the marriage was solemnized more than 7 years ago, hence no offence is made out punishable under Section 304-B I.P.C. It was also alleged in the bail application that the first son out of the wed-lock of Arvind Kumar and the deceased was born on 9.5.1996. Hence there was no question of marriage being solemnized on 26.6.1997 as alleged by the prosecution. The date of birth of Ujjwal Mishra has been mentioned in the mark-sheet of K.G.II. It was also alleged in the bail application that the prosecution moved an application before the trial court for framing the charge under Sections 302 & 306 I.P.C. Hence in view of the own contention of the prosecution marriage was solemnized more then 7 years earlier Considering all these facts as stated in the application this Court on 15.10.2004 had granted bail to opposite party No. 2.

4. Smt. Radha moved an application for cancellation of bail mainly on the ground that material facts have been concealed by the opposite party No. 2 in obtaining bail order from this Court. That the

applicant played fraud on the court in obtaining the order of bail. It has also been alleged that the applicant had given education to her daughter Iksha Kumari up to M.A. And thereafter the marriage was solemnized with opposite party No. 2 on 26.6.1997, as it is evident from the invitation card. At the time of marriage opposite party No. 2 was serving as Fitter in the South Eastern Railway and he was posted at Kargo Road, district Bilashpur, Chhatisgarh. That prior to 5.3.1997 opposite party No. 2 never lived at Kargo Road, Bilashpur, Chhatisgarh. Iksha Kumari delivered her first male child in S.C.C. Railway Hospital Bilashpur on 17.5.1998. The birth certificate was issued under sign and seal of Registrar (Birth-death). Ichcha Kumari delivered second male child on 20.6.1999 in S.E.T. Railway Hospital Bilashpur. Annexure-4 is the birth certificate of II male child Prajjwal Misra. Opposite party No. 2 falsely alleged that the marriage was solemnized on 24.5.1995. She delivered her first male child Ujjwal Misra on 9.5.1996. It was wrong to allege that applicant moved an application before the trial court for framing charge for the offence under Section 302 & 306 I.P.C. It is a case of dowry death punishable under Section 304-B I.P.C. and by putting wrong facts on the basis of forged documents order of bail was obtained. Under these circumstances the bail is liable to be cancelled.

5. On this application of cancellation of bail notice was issued to opposite party No. 2 and appearance was put in on behalf of opposite party No. 2. This Court after hearing the parties passed an order on 16.3.2007 for conducting the enquiry about the genuineness of the certificates filed by the applicant along with the bail application. It was ordered for the C.J.M. "Accordingly, it is hereby directed that the C.J.M. concerned will hold an enquiry and find out if the certificate submitted before the court is a forged document and submit his report within a period of maximum two months. The parties are directed to assist the court in this regard and submit all those documents there which are necessary for the present enquiry."

6. In pursuance of the order of this Court C.J.M., Jaluan conducted the enquiry and submitted the report on 6.9.2007 after considering all materials submitted before the C.J.M. by the parties, he arrived at the conclusion that the certificates of School of Ujjwal Misra and Prajjwal Misra filed by opposite party No. 2 before this Court are forged and the birth certificate filed by the applicant are genuine.

7. After receipt of the report from the C.J.M., objection supported with an affidavit was filed on behalf of opposite party No. 2. It has been alleged in the affidavit of Arvind Kumar Mishra that as the house of Smt. Radha Rani complainant and opposite party No. 2 are the adjacent to each other at Village Jagammanpur and Ichchha Kumar was studying with opposite party No. 2. hence she developed love affairs with opposite party No. 2. And in pursuance of love affairs marriage was solemnized on 24.5.1995. And the invitation card was filed before the CJM. On 9.5.1996 Smt. Iksha Kumari gave birth to one male child at village Jagammanpur at the house of opposite party No. 2. This male child was named as Ujjawal Mishra. Opposite party No. 2 joined railway service on 5.3.1997 and prior to it he was living at village Jagammanpur, District Jalaun. Smt. Iksha Kumari gave birth to second male child at Railway Hospital Vilaspur on 9.5.1998 and he was named as Prateek Kumar Mishra. But unfortunately Prateek Kumar Mishra died on 27.12.1998. The death certificate of Prateek Kumar Mishra has been filed. Smt. Ichchha Kumari given birth to 3rd male child at Railway Hospital Vilaspur on 20.7.2002 and he was named as Prajjwal Mishra. This fact is

clear from the discharge certificate and by the birth certificate. Only Ujjawal Mishra and Prajjawal Mishra were survived. Smt. Iksha Kumari died at the house of her mother. There was no demand of dowry as alleged. Inquest report was prepared of dead body of Smt. Iksha Kumar. In the post mortem report except ligature mark no other injury was found on the dead body. In the bail application opposite party No. 2 alleged the date of marriage as 24.5.1995. Although regarding the birth of Ujjawal Mishra on 9.5.1996. Ujjawal Mishra was admitted in the Bhartiya aVidyapith Prathmik and Purvamadhyamik Vidyalaya, Kota Kargi Road, District Vilaspur, Chhatisgarh. On the basis of School certificate in the bail application it was alleged that the marriage was solemnized more than 7 years earlier from the date of death. No specific denial was made in the counter affidavit filed on behalf of the complainant before this Court regarding the date of marriage and date of death of first male child Prateek Mishra.

8. Sri B.N. Singh appeared on behalf of the complainant. Supplementary affidavit was also filed on behalf of the complainant Smt. Radha Rani through Advocate Sri M.K. Sharma. But nothing has been alleged in the counter affidavit regarding educational certificate. The applicant had shown exact date of marriage. The plea taken in the cancellation of bail is forged and fraudulent. Further alleged that CJM has not conducted the enquiry properly. The health Inspector Mahtam Yadav has also not been interrogated to verify the fact of date of birth of Ujjawal Mishra. The factum of death certificate of Prateek Mishra has also not been taken into consideration by the CJM. Proper inquiry was not conducted and he only completed the formalities. There is no reliable ground for cancellation of bail. The application for cancellation of bail is liable to rejected.

9. I have heard at length Sri Tapan Ghosh, Sernior Advocate for the applicant Smt. Radha Rani and Sri Satish Trivedi, Senior Advocate for opposite party as well as Sri K. Chaturvedi, Advocate for opposite party and perused the entire material on record.

10. It is undisputed fact that on behalf of the opposite party No. 2 Misc. Bail Application No. 7936 of 2004 was moved and this Court vide order dated 15.10.2004 granted bail to the applicant. The order of the bail passed on 15.10.2004 is as follows:

Heard learned Counsel for the parties.

The learned Counsel for the applicant submitted that by many stretch this case cannot be treated as one under Section 304-B I.P.C. and the presumption of commission of offence, as available under law, cannot be drawn against the husband of the deceased, He has referred to copy of certificate issued from the School where the applicant's son had been studying and this shows the date of birth of his son Arvind Kumar as 9.5.1996. With the help of this if the applicant's son, got out of the wedlock with the deceased, the duration of marriage on the date of incident is calculated, it would be beyond seven years. The learned Counsel has also filed the certified copy of the application moved from the side of the prosecution before the court below for framing charges against the applicant-accused under Sections 302/306 IPC. This application dated 21.9.2004 has been allowed vide order dated 23.9.2004 passed by the Trial Court and charges for the offences under Section 302/

306 IPC have been framed. It also goes to depict that the present case may not be treated as a case of dowry death in which the presumption under the Evidence Act can be drawn.

The learned Counsel appearing for the complainant and the learned AGA have tried to emphasise that it is a case of dowry death and as such the strongest presumption under the law is against the applicant/husband.

From the facts and circumstances as demonstrated above, it appears to be a fit case for release on bail.

Let the applicant, Arvimnd Kumar S/o Kailash Narayan, involved in case crime No. 106 of 2003, under Sections 304-B, 498-A and 201 IPC and  $\frac{3}{4}$  of Dowry Prohibition Act, P.S. Rampura, District Jalaun, be released on bail on his furnishing personal bond with two sureties each in the like amount to the satisfaction of CJM, concerned.

11. Hence the perusal of order shows that the applicant was granted bail by this Court by placing reliance on the averments of the applicant that the marriage of Arvind Kumar with Smt. Iksha Kumari was solemnized on 24.5.1995. For determining this fact of marriage reliance was placed on the school certificate of Ujjawal Mishra and birth certificate of Ujjawal Mishra as 9.5.1996. The contention of the prosecution was that the marriage of Smt. Iksha Kumari was solemnized with opposite party No. 2 on 26.6.1997 and it was shown by the opposite party No. 2 at the time of granting the bail that the date of marriage is 24.5.1995 and the first male child was bom our of the wedlock of the parties on 9.5.1996 and it will be presumed that the marriage was solemnized at least one year earlier to the date of birth of his first male child. Moreover, it was alleged in the bail application that on behalf of the applicant/complainant an application was moved for framing charges under Section 302 & 306 IPC and on the basis of this fact it was argued on behalf of the applicant that the prosecution has also not placed reliance on the date of marriage. The marriage was solemnized about more than 7 years earlier hence no offence can be said made out under Section 304-B IPC. It is also fact that at the time of granting bail to the opposite party No. 2 counsel for the complainant also appeared. Counsel for the opposite party No. 2 argued that now no reliance can be placed on the evidence produced by the complainant. The report of CJM is also not reliable because he has not cared of summoning the persons who issued birth certificate. For the disposal of this application for cancellation of bail it is only to be seen that whether the certificate filed by the opposite party No. 2 at the time of moving the bail application is forged or genuine. Although this material fact shall be decided by the trial court at the time of final disposal of the case that whether the marriage of the deceased was solemnized with opposite party No. 2 on 26.6.1997 as alleged by the applicant or was solemnized on 24.5.1995. But for disposal of this application this fact is also to be seen that whether there was any reliable evidence to show that the marriage was solemnized as alleged by the prosecution. It has been argued by the applicant's counsel that it is definite case of the prosecution that the marriage of Smt. Iksha Kumar alias Babli was solemnized with opposite party No. 2 Arvind Kumar Mishra on 26.6.1997. The FIR was lodged for the offence under Section 304-B IPC. The most important circumstance to show that the date of marriage is of 26.6.1997, is that the first child was born out of wedlock of the deceased and opposite party No. 2 on 9.5.1998. It is also

undisputed fact that opposite party No. 2 was selected in the Railway Service as Fitter in the South Eastern Railway and his first posting was at Kargi, District Vilaspur State of Chhatisgarh and he joined on 5.3.1997. Opposite party No. 2 in the affidavit in para 6 admitted that respondent came to Railway service on 5.3.1997 and prior to this he was residing at the Village Jagammanpur district Jalaun.

12. The applicants counsel argued that the marriage of deceased with opposite party No. 2 was solemnized after joining the Railway Service by opposite party No. 2 on 26.6.1997. And that is why Ujjwal Mishra first son was born on 9.5.1998 at S.E.C. Railway Hospital Bilashpur. Annexure 3 is the copy of the birth certificate of Ujjwal Mishra. This certificate was issued by the Registrar (birth-death) Chhatisgarh Government. The perusal of this certificate shows that the registration was made in the (birth-death) register on 9.5.1998 the date on which the son was born. According to certificate the child was born in S.E.C. Railway, Bilashpur, Chhatisgarh. There is no denial from the side of opposite party No. 2 of this fact that no male child was born of the applicant with opposite party No. 2 on 9.5.1998 at Railway Hospital, Bilaspur. But learned Counsel for the opposite party No. 2 argued that the child was born on 9.5.1998 was not Ujjwal Mishra. Rather he was Prateek Mishra. And Prateek Mishra died on 27.12.1998. The death certificate of Prateek has been filed as Annexure-1 of the affidavit. But the date of registration of this newly born child most material in the present case. If the entry might have been made in the death certificate as 27.12.1998 then this certificate might have been reliable. But the date of registration is dated 17.2.2005. The entry purposely and intentionally was made on 17.2.2005. Because the incident took place on 30/31.8.2003 and the bail was granted to opposite party No. 2 on 15.10.2004. And the application for cancellation of bail was moved November, 2004. In order to fabricate false evidence this death certificate was obtained otherwise, there was no reason and justification to draw the inference that the son who was born on 9.5.1998 had died on 27.12.1998. The reliance can be placed on such certificate regarding genuineness the entry might have been made on 27.12.1998 when Prateek Mishra had died. And as this certificate procured by making entry on dated 17.2.2005, hence this is not reliable. This can be said a forged document. Hence I disagree with the contention of learned Counsel for the opposite party No. 2, that on 9.5.1998 Prateek Mishra was born and not Ujjwal Mishra and this child died on 27.12.1998. This is a concocted story of birth of Prateek Mishra. Undisputedly at this time two sons are alive. But in order to falsified the theory of the applicant of the birth of Ujjwal Mishra, this certificate has been procured.

13. The certificate of birth of Ujjwal Mishra, annexure No. 3 is reliable. This certificate has been filed by the applicant after obtaining the copy from the Registrar (birth-death) and the entry according to register and entry according to certificate was made in the register, on 9.5.1998 when the male child was born. And the theory alleged by opposite party No. 2 regarding the birth of second child Prateek Mishra is wholly unreliable. There is no dispute of date of birth of Prajjwal Mishra, the second survived child. Prajjwal Mishra was born on 20.7.2002. The dispute is only of Ujjawal Mishra. Because, this date of birth is crucial for deciding the date of marriage of the deceased and opposite party No. 2.

14. Learned Counsel for the applicant argued that the certificate was issued by the competent authority regarding the birth of Ujjawal Mishra. And it is a public document. The authority is

required to maintain a register to make entry regarding the birth and death of a person. In view of Section 74 of the Evidence Act, such a document is public document and have got evidentiary value. It is provided under Section 74 of the Evidence Act.

74. Public documents- The following documents are public documents-

(1) Documents forming the act or record of the acts-

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive (of any part of India or of the Commonwealth), or of a foreign country;....

15. In view of the definition of public document, the documents forming part of document of official bodies are also the public document. The local self government of a city is expected to maintain a register regarding the birth and death of a child and entry in the register is to be made by a person in the discharge of official duty. It has also been provided under Section 74 of the Evidence Act, that the competent authorities are authorized to issue certified copy of public document. And Section 77 of the Evidence Act provides that as to how the public document is to be proved which has been provided under Section 77 of Evidence Act "such certified copies may be issued in proof of the contents of public documents or parts of the public documents of which they purport to be the copies".

16. In my opinion, the birth certificate (Annexure No. 3) of Ujjawal Mishra is a public document and admissible under Section 77 of Evidence Act. The reliance can not be placed on the death certificate filed on behalf of the opposite party No. 2 because the entry in the certificate was made on 17.2.2005 whereas, Prateek Mishra allegedly died on 27.12.1998. According to the certificate filed by the applicant the entry in the birth register was made on 9.5.1998 the date on which Ujjawal Mishra was born. It has been argued by the Learned Counsel for the opposite party No. 2 regarding the genuineness of birth certificate of Ujjawal Mishra. It has been argued that this entry can also be made in the register surreptitiously if any column is lying blank. He also argued that for the proof of this document CJM should have summoned the person who maintain the register and who issued this certificate. And without proof of this certificate, this document is not admissible in evidence. I disagree with the argument of the learned Counsel for the opposite party No. 2. As I have stated above that public document is admissible in evidence. No formal proof is required. Moreover, the trial court may also look into the matter for the proof of this document. But at this stage I am of the opinion that this document is a public document and the certified copy of public document is admissible in evidence. And entry in the birth register was made by the competent authority in the discharge of the official duties on the very date on which child was born.

17. In order to prove the date of marriage copy of invitation card has been filed which is annexure No. 2. This document will also be seen during the trial. But I am concern only regarding the date of birth of Ujjawal Mishra. At the time of disposal of bail application the date of marriage was

challenged by showing school certificate of Ujjawal Mishra. It was also alleged that Ujjawal Mishra was born out of wedlock of the deceased and the applicant, hence there is no question of marriage being solemnized on 26.6.1997. The invitation card was also been placed. But reliance was placed on the Transfer Certificate of Ujjawal Mishra. According to this Transfer Certificate of Ujjawal Mishra he was admitted in Prathamik Vidya Peeth Kota, District Vilaspur, M.P. on 1st April, 2003 and was withdrawn from the school on 15.10.2003. Ujjawal Mishra has studied in the school for a very short period. It has been alleged on behalf of the applicant that this Transfer Certificate was procured after the incident on 30/31-8-2003 for the purpose of this case. And no reliance can be placed on this school certificate. It is a fact that Transfer Certificate was issued on dated 15.10.2003. The counsel for the opposite party No. 2 argued that opposite party No. 2 went in jail, hence it was not possible for Ujjawal Mishra to continue his studies in school at Kota, Vilaspur, M.P. Hence he was withdrawn from the school and the Transfer Certificate was issued. But if it may be presumed that Ujjawal Mishra was born on 9.5.1996 as alleged by opposite party No. 2 then it is expected that he was admitted in the school for Nursery or K.G. in the age of 3 or 4 years. He was admitted firstly in the year 2003 in the school in the age of 7 years, hence on the basis of it, the certificate appears false that Ujjawal Mishra passed KG-II in the year 2003. Where and in which school Ujjawal Mishra remained admitted earlier has not been shown by opposite party No. 2. Mark-sheet of KG-1st of Ujjawal Mishra was also produced. But it has not been alleged that in which year he was admitted in KG-1st or Nursery, hence on the basis of reason mentioned above I am of the opinion, that the birth certificate filed by the applicant is more reliable and believable. The marriage was solemnized on 26.6.1997 as alleged by the prosecution and not on 24.5.1995 as alleged by the opposite party No. 2. Ujjawal Mishra was born on 9.5.1998 and not on 9.5.1996. The educational certificate also supports the contention of the prosecution. The entry in birth register can not be disbelieved, due to this reason that a child born on 9, May 1998 can not be named as Ujjawal Mishra on the date of birth. There is a specific ritual to be performed which is known as 'Namekaran Sanskar'. But according to birth register filed by applicant the child was born on 9.5.1998 has been described as Ujjwal Mishra and this fact has also been falsely contended by the applicant. This matter is to be decided during the trial. And in my opinion this certificate cannot be disbelieved due to certain reasons as alleged by the counsel for the opposite party No. 2. Moreover this birth certificate is also being supported by other circumstances which has been alleged by opposite party No. 2 also. And opposite party No. 2 admitted that the son was born on 9.5.1998 but his name was Prateek Mishra and he died in the month of December, 1998. But this certificate is also not reliable. In my opinion the C.J.M. conducted the enquiry properly and his conclusion is perfectly justified that Ujjwal Mishra was born on 9.5.1998 and the date of birth mentioned in the School leaving certificate as 9.5.1996 is on the face of it is false. In my opinion, in order to obtain bail order and to challenge the date of marriage, this school certificate containing the date of birth opposite party No. 2 has been procured. I am also of the opinion that for obtaining the bail order false certificates were filed.

18. The learned Counsel for the applicant argued that as material facts were concealed, hence it is fit ground for cancellation of bail. I have also decided above that forged and fabricated School certificate was procured in order to challenge the date of marriage of deceased and opposite party No. 2. In view of the Sub-section 2 of Section 439 Cr.P.C. bail granted earlier may be cancelled. And the applicant's counsel further argued that as bail was obtained playing fraud on the court by producing forged and fraudulent T.C., hence the bail is to be cancelled. In view of the judgment of

Hon'ble Apex Court reported in ACC 2004 (48) 623 Mehboob Dawood Shaikh v. State of Maharashtra and Supreme Court Cases (2005) 4 pages 634 Arvind Mohan Johri and Anr. v. State of U.P. and Anr. bail granted earlier may be cancelled on the ground of suppressing of material facts.

19. Learned Counsel for the opposite party No. 2 has also not challenged the maintainability of application, hence if a person obtained bail by suppression of material facts from the court then such bail is liable to be cancelled on the application of other party. Hence I am of the opinion that in view of the pronouncement of judgment of Hon'ble Apex Court on the ground of suppression of material facts from the court the bail is liable to be cancelled. The Hon'ble Apex Court also held that cancellation of bail and grant of bail are different matters and it must be decided by different yard stick. The Hon'ble High Court in JIC 2005 (2) 982, Arvind Mohan Johri and Anr. v. State of U.P. and Anr. held that if bail has been cancelled on any ground then the opposite party has got every right to move any fresh application for bail on other grounds. Hence I am of the opinion that opposite party has got every right to move fresh application for bail on other grounds. But bail obtained on the ground that marriage was solemnized more than 7 years earlier of the incident is liable to be cancelled.

20. Learned Counsel for the opposite party No. 2 also advanced the sentimental argument that there are two School going children of the deceased and opposite party No. 2 and in case the bail of opposite party No. 2 is cancelled then their study shall be effected adversely. On the basis of this fact he argued that it will not be in the interest of children to cancel the bail. But this can be a ground to be considered at the time of disposal of fresh bail application on fresh ground. But the ground of studying of the minor children cannot be a ground for the rejection of application for cancellation of bail when the bail was obtained on false and fabricated grounds. For the reasons mentioned above, I am of the opinion that opposite party No. 2 in obtaining bail filed forged and fabricated documents. The marriage with the deceased was challenged by showing that the first child was born on 9.5.1996 whereas the case of the prosecution is that the marriage was solemnized on 26.6.1997. And by proving with the help of T.C. the date of marriage was challenged and the court by relying the certificate granted bail to opposite party No. 2. I have decided above that in view of birth certificate Ujjwal Mishra was born on 9.5.1998 and this fact is sufficient to show at this stage that the marriage was solemnized on 26.6.1997. As the bail was obtained by suppressing the material facts, hence the bail is liable to be cancelled. And the application for cancellation of bail of the applicant deserves to be allowed.

21. Application for cancellation of bail is allowed. The bail granted to opposite party No. 2 by this Court vide order dated 15.10.2004, in Crime No. 106 of 2003 under Sections 304-B, 498-A, 201 I.P.C. and ¾ D.P. Act, P.S. Rampur, district Jalaun is cancelled. The opposite party No. 2, Arvind Kumar is directed to surrender before the court of C.J.M. Within 30 days from the date of this order and in case opposite party No. 2 failed to surrender in the court then the C.J.M. Concerned shall issue N.B.W. and notice to the sureties. Copy of this order be sent to the C.J.M. Concerned for compliance.