

Gauhati High Court

Gopal Lekharu vs State Of Assam And Anr. on 1 July, 2005

Equivalent citations: 2005 CriLJ 4719, (2006) 3 GLR 640

Author: P Agarwal

Bench: P Agarwal

ORDER P.G. Agarwal, J.

1. The respondent/ complainant Smt. Hira Lekharu filed a complaint being CR Case No. 742/1988 alleging inter alia that she was married to the accused-petitioner Gopal Lekharu on 9-5-1981 as per Hindu rites and thereafter they lived as husband and wife. She was, however, subjected to cruelty on the ground that she has not brought sufficient dowry and subsequently she was driven out of the house on 1-3-1983. The petitioner-husband filed a divorce suit No. 16/83 for dissolution of the marriage but the said suit was dismissed against which the petitioner filed First Appeal No. 32/86 and the appeal was also dismissed. The complainant further alleged that on 27-11-1987 during the subsistence of the earlier marriage and while his spouse was living, the accused-petitioner has entered into a second marriage with one Anupama Lekharu and at present he is living with the said second wife. The trial Court framed charges under Section 494, IPC on the basis of the evidence of the six witnesses and thereafter on conclusion of the trial, vide judgment dated 24-1-1992 the accused petitioner was convicted under Section 494, IPC and sentenced to simple imprisonment for two years and to pay a fine of Rs. 2000/- in default further imprisonment for four months.

2. Feeling aggrieved, the petitioner preferred Criminal Appeal No. 9/92 before the Additional Sessions Judge, Kamrup, Guwahati and vide order dated 20-10-1993 the Appellate Court dismissed the appeal maintaining the order of conviction and sentence and hence the present revision.

3. We have heard Mr. J. M. Choudhury, learned Senior Advocate assisted by Mr. B. M. Choudhury, learned Counsel for the petitioner and Mr. A. K. Bhattacharyya, learned Senior Advocate assisted by Mr. G. P. Bhowmick, learned Counsel for the respondent No. 2 and the learned Public Prosecutor for the respondent No. 1.

4. The main thrust of the arguments put forth by Mr. Choudhury is that in a proceeding under Section 494, IPC, the prosecution is required to prove and establish that both the marriages i.e. the first marriage as well as the alleged second marriage were solemnized in accordance with law/rites governing the matter and all the necessary ceremonies were performed.

5. The next submission of Mr. Choudhury is that in the present case the trial Court has proceeded on the basis of the alleged admission of the petitioner and on drawal of presumption that as the petitioner-accused had instituted Divorce Suit No. 16/83 and the First Appeal No. 32/86, the marriage between the complainant and the petitioner-accused is well established. Mr. Choudhury has, however, submitted that in view of the provisions of Section 50 of the Evidence Act the existence of the divorce suit is not relevant.

6. Before entering into the factual matrix of the case we would like to recapitulate the legal questions or the legal requirements/ingredients which are required to be established for bringing home the

charge under Section 494, IPC.

7. In the case of Bhaurao Shankar Lokhande v. State of Maharashtra, the Apex Court while interpreting the provisions of Section 494, IPC held :--

"Prima facie, the expression 'whoever... marries' must mean 'whoever... marries validly' or 'whoever... marries' and whose marriage is a valid one. If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law. The bare fact of a man and a woman living as husband and wife does not, at any rate, normally give them the status of husband and wife even though they may hold themselves out before society as husband and wife and the society treats them as husband and wife."

"5. The word 'solemnize' means, in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form', according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is 'celebrated or performed with proper ceremonies and due form it cannot be said to be 'solemnised' It is, therefore, essential, for the purpose of Section 17 of the Act, that the marriage to which Section 494, IPC applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make the ceremonies prescribed by law or approved by any established custom."

8. The decision in Bhaurao Shankar Lokhande (supra) was reiterated in the case of Kanwal Ram v. Himachal Pradesh Administration, wherein the Apex Court held 'in a bigamy case, the second marriage as a fact, that is to say, the essential ceremonies constituting it, must be proved. Admission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or bigamy case'.

9. Relying on the above two decisions of the Apex Court this Court in the case of Boloram Baruati v. Mt. Suriya Baruati, AIR 1969 Assam 90 : 1969 Cri LJ 858, held "The offence, which is known in English law as bigamy, is directed against the second marriage. The second marriage must be a legally valid marriage so as to come within the mischief of Section 494. In order to appreciate whether the second marriage is void under the law, where the parties are Hindus, Court has to refer to Section 17 of the Hindu Marriage Act. Section 17 pointedly refers to solemnization of marriage after the commencement of the Act. Prosecution, therefore, is under an obligation to satisfactorily establish by evidence that the second marriage has been solemnized in accordance with law or custom which is applicable to the parties."

10. In the case of Laxmi Devi (Smt.) v. Satya Narayan, , the question before the Apex Court was that though 'saptapadi a fact has not been proved, there is enough evidence of eye-witnesses who have seen the marriage and thus the factum of second marriage stands established. The Apex Court refused to accept the above submission stating inter alia that in the absence of proof of such a ceremony, the factum of second marriage cannot be held to have been made out. The Apex Court also referred to its earlier decision in Priya Bala Ghosh v. Suresh Chandra Ghosh, AIR 1971 SC 1153 :

1971 Cri LJ 939 referring to the following portions of paras 10 and 25 :--

"According to Mr. Majumdar, when once the priest has given evidence to the effect that the marriage between the respondent and Sandhya Rani has been performed, it follows that all the essential ceremonies that are necessary to constitute a valid marriage must be presumed to have been performed. In any event, when there is evidence to show that the marriage as a fact has taken place, the presumption is that it has taken place according to law. In this connection Mr. Majumdar referred us to various English decisions where on the basis of certain evidence regarding the taking place of marriage between the parties a presumption has been drawn that the marriage must have been solemnized according to law. In our opinion, it is unnecessary to refer to those cases cited by the learned Counsel as the position is concluded against the appellant by the decisions of this Court on both points."

11. In the present case both the parties before us i.e. the petitioner accused as well as the complainant are Hindus and the complainant as well as her witness Arabinda Sarma the priest P.W. 4 has deposed about the solemnization of marriage between the concerned parties. The priest has stated that the marriage was solemnised as per 'prajapati' 'Jayurved' on performance of 'homa' and 'saptapadi as per Hindu rites.

12. In view of the provisions of Section 7 of, the Hindu Marriage Act, a valid Hindu marriage can be solemnized in accordance with the customs, rites and ceremonies, by either party thereto. It further provides that where such rites and ceremonies include 'saptapadi' (i.e. the taking of seven steps by the bridegroom and the bride jointly before the sacred fire) the marriage becomes complete and binding when the seventh step is taken. It is, therefore, essential that the marriage should be proved to have taken place and the essential ceremonies constituting the same have gone through. According to Mr. Choudhury. the prosecution was required to lead evidence and prove the solemnization of the first marriage between the complainant and the accused as well as the alleged second marriage between the petitioner and Anupama Lekharu (since acquitted), It is also submitted that the prosecution's evidence on both these counts is lacking.

13. We have been taken through the statements of the complainant Hira Lekharu wherein she has stated that her marriage with the accused petitioner Gopal Lekharu was solemnized as per Hindu rites. However, she has not deposed anything as to how the marriage was solemnized and whether the essential ingredients of 'saptapadi' and 'homa' were performed or not. No other witness of the prosecution has deposed as to how the complainant had married the accused petitioner and whether the essential ceremonies were gone through. We, therefore, find force in the submission of Mr. Choudhury that the prosecution has failed to prove the performance of valid marriage between the complainant and the accused petitioner.

14. Now coming to the solemnization of the alleged second marriage of the petitioner accused with Anupama as stated above, the complainant P.W. 1 was not present and she is not a witness to the function. Hareswar Patowari P.W. 2 is a stranger and he claims to be an eye-witness. He is a chance witness in the sense that according to him while he suddenly met the accused petitioner on the road the accused asked him to accompany him to Sipajhar to attend his second marriage. P.W. 2 claims

that he accordingly accompanied the accused and witnessed the solemnization of marriage. P.W. 2 does not know as to how the accused got married and with whom. He does not know any of the other persons who were present in the said marriage or the names of the persons in the marriage party. The accused petitioner is an educated person and if he was going to contract a second marriage during the subsistence of the first marriage, he was admittedly conscious of its consequences and naturally the entire thing will be carried out in a hush-hush manner so that nobody can come to know about it. We find it difficult to believe that the accused petitioner will pick up P.W. 2 from nowhere and invite him to accompany him to solemnization of an illegal marriage so that P.W. 2 can become a witness. So far P.W. 3 is concerned; the witness has admitted in his deposition that he was not present when the alleged second marriage was solemnized.

15. P.W. 4 Arabinda Sarma is the star witness of the complainant as he is the priest, who allegedly performed the second marriage between the accused and Anupama Lekharu. The witness has deposed about certain ceremonies which were performed by him, However, the entire evidence of this witness stands demolished in the cross-examination when the witness says that he does not remember as to in which year the marriage was solemnized. He also does not remember the name of the priest belonging to the accused and although he claims that he is the family priest of Anupama, he does not remember as to who did the 'Kanyadan'. The entire evidence of P.W. 4 falls to pieces when P.W. 4 states in his cross-examination 'I cannot say definitely whether the accused person in the dock (accused Gopal Lekharu) was the bride groom or not, whose marriage was solemnized again'.

16. In view of the above, the evidence of P.W. 4 is of no help to hold that, there was alleged second marriage of the accused petitioner.

17. The evidence of P.W. 5 and P.W. 6 is in respect of certain bail bonds submitted by Anupama Lekharu in the above criminal case. We will refer to them at a later stage.

18. On consideration of the evidence on record we have no hesitation whatsoever, to hold that the learned trial Court as well as the appellate Court has failed to appreciate the evidence on record in proper perspective and in the light of the settled position of law as regards the essential ingredients of the offence under Section 494, IPC.

19. P.W. 5 and P.W. 6 have deposed that in the above criminal case the co-accused had filed bail bonds etc. wherein the name of the present accused Gopal Lekharu appears as husband of Anupama Lekharu. The trial court, therefore, held that it is the admission of the accused that Anupama Lekharu is his wife.

20. The learned Counsel for the respondent, have also submitted that as the petitioner accused had Instituted a divorce suit and taken the matter in First Appeal No. 32/ 86 the factum of a valid marriage between the parties stands well established as there could not have been any scope for filing a divorce suit without valid marriage between the parties. Section 50 of the Evidence Act reads as follows :--

"50. Opinion on relationship, when relevant.-- When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Divorce Act, 1869 (4 of 1869) or in prosecutions under Sections 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860).

21. In Kanwal Ram (1966 Cri LJ 472) (supra) the Apex Court has held that admission of the accused regarding marriage is not evidence of it for the purpose of proving marriage-in a bigamy case: Mr. Choudhury has also referred to the observation of the Andhra Pradesh High Court in the case of Yelainanchali Nageswari v. Yelamanchali Venkata Prasada Rao, 1998 Cri LJ 4128 wherein the accused had filed a petition for mutual divorce with his second Wife. The Hon'ble Andhra Pradesh High Court held that the admission of the second marriage by the accused in the divorce case is not admissible and not sufficient to establish the charge under Section 494, IPC in absence of proof regarding solemnization of second marriage.

22. In the case of Rabindra Kumar Bhattacharjee v. Smt. Prativa Bhattacharjee. AIR 1970 Tripura 30 : 1970 Cri LJ 838 it was rightly held that in view of the proviso of Section 50 of the Evidence Act, the above Section cannot be invoked to prove the factum of solemnization of so-called second marriage. We thus find that the evidence under Section 50 is not admissible in a proceeding before a Court under Section 494, IPC.

23. In view of the aforesaid, we have no hesitation to hold that the respondent complainant has failed to establish solemnization of valid marriage between the parties and as such no offence under Section 494, IPC has been committed by the accused petitioner Gopal Lekharu.

24. The Criminal Revision is allowed. The order of conviction and sentence entered into by the trial Court and affirmed by the Appellate Court stands set aside. The accused petitioner is acquitted and set at liberty forthwith. The accused is on bail. He need not. surrender to his bail bonds.