

principles or all the guidelines. Approach of Courts while appreciating evidence must be in the standard of an ordinary prudent man, should be more based on equity though law cannot be totally ignored since law must bend before justice at times and should be based on common sense too and justice should not be defeated on trivial legal technicalities unless they touch the very root of the matter by virtue of which the hands of Court are tied thus preventing the Court to take any other possible view in a given situation.

Appreciation of evidence in civil cases may stand on a different footing from criminal cases. Likewise, appreciation of evidence *vis-a-vis* observance of principles of natural Justice or affording reasonable opportunity also will be on a different footing. Evidence broadly may be:

oral or documentary
direct or circumstantial
primary or secondary
expert evidence
report of Commissioner
inspection by Court

all other modes permissible by law.

Examination of witnesses, chief-examination, cross-examination, re-examination, marking of documents are certain other important facets. Court putting questions too is another important aspect. Witnesses can be parties to the litigation, the power of attorney agents, independent witnesses, interested witnesses, child witnesses, dumb, duff, disabled witnesses, partisan witnesses, solitary witness, hostile witnesses, police witnesses, expert evidence like medical evidence, ballistic expert, finger prints, forensic experts and all other persons who can be brought under the expression "expert". Apart from Section 45 of Indian Evidence Act, Sections 291 to 294 of Cr.P.C. also deal with expert evidence in specified instances.

Competency and credibility of witnesses
 - See 2002 (3) Indian Civil Cases 65. If plaintiff wants to give evidence, she should give evidence at the first instance - 2002 (3) Indian Civil Cases 79.

I do confess that I touched only certain aspects of the topic.

OFFENCE OF BIGAMY – LEGISLATIVE LACUNA

By

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An important question of law is being confronted by the Magistrates in the State of A.P. as to whether the Court can take cognizance of the offence under Section 494 of Indian Penal Code (for brevity 'IPC') basing on the police report filed by a police officer under Section 173 (2) of the Code of Criminal Procedure (for brevity 'Cr.PC') after completion of investigation.

2. Section 494 IPC falls under Chapter XX of IPC which deals with offences relating to marriage. Initially Section 494 IPC was non-cognizable and bailable offence. It was deemed to be cognizable when it was associated with offence under Section 498-A IPC by virtue of Section 155(4) of Cr.PC. However, by amendment (A.P. Act No.3 of 1992) brought

to the First Schedule of Cr.PC it was made cognizable and non-bailable. Undoubtedly police has ample power to investigate into a cognizable offence (Section 154 Cr.PC). The real problem arises when charge-sheet/challan/police report is filed before the Court under Section 173 (2) Cr.PC. by police.

3. Section 190 Cr.PC is the main source of power for the Magistrate to take cognizance of an offence by three modes. Section 195 to 199 Cr.PC operate as exceptions to Sections 190 Cr.PC. In other words, the absolute power given to the Magistrate under Section 190 Cr.PC is controlled by Sections 195 to 199 Cr.PC. For the present purpose Section 198 Cr.PC is relevant. Section 198 Cr.PC deals with the procedure in respect of prosecution for offences against marriage. Section 494 IPC falls within the ambit of Section 198 Cr.PC. It lays down that no Court shall take cognizance of an offence punishable under Chapter XX IPC except upon a complaint made by some person aggrieved by the offence. Some classes of persons are mentioned in the said section who are empowered to set the criminal law in motion. The word 'complaint' alone is mentioned in Section 198 Cr.PC. The word 'police report' is absent in Section 198 Cr.PC.

4. There is a clear distinction between a complaint and a police report in Cr.PC. The term complaint, as defined in Section 2(d) Cr.PC., means any allegation made orally or in writing to a Magistrate with a view to his taking action under Cr.PC but does not include a police report. Explanation to Section 2(d) lays a circumstance where a report by the police officer is deemed to be a complaint which is not applicable to Section 494 IPC. Section 2(r) defines 'police report' forwarded by a police officer to a Magistrate under Section 173 (2) Cr.PC. By no stretch of imagination it can be called as a complaint. Section 198 Cr.PC impose

an embargo on the Court to take cognizance of offences under Chapter XX IPC except upon a complaint. A reading of Section 190, 198, 154 and 173 (2) Cr.PC and the definitions contained in Section 2 Cr.PC leave no room for doubt that a Magistrate cannot take cognizance of offence under Section 494 IPC based on police report.

5. To understand the above legal position in a comparative manner Section 498-A IPC may be referred to. Chapter XX-A was introduced by Criminal Law Amendment Act 46 of 1983 incorporating Section 498-A IPC which is also a matrimonial offence. Simultaneously similar amendment was brought in the same amendment incorporating Section 198-A Cr.PC. It reads as follows:

“Prosecution of offence under Section 498-A of the Indian Penal Code:—No Court shall take cognizance of an offence punishable under Section 498-A of the Indian Penal Code except upon a police report of facts which constitutes such offence or upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister or by her father's or mother's brother or sister or with the leave of the Court, by any other person related to her by blood, marriage or adoption.” (emphasis supplied)

The Legislature advisedly used both the terms 'police report' and 'complaint' in Section 198-A Cr.PC. Unless both the above terms are used in 198-A Cr.PC, there could have been any amount of controversy. Since both the terms viz., complaint and police report are mentioned in Section 198-A Cr.PC. Court has got power to take cognizance of the offence under Section 498-A IPC either based on police report submitted under Section 173(2) Cr.PC. or based on the complaint filed before it after conducting due enquiry under Section 202 Cr.PC.

6. Reverting to Section 494 IPC, such an amendment was not brought by the legislature so far to Section 198 Cr.PC. No independent Section similar to the language of Section 198-A Cr.PC is also incorporated to give full effect to amendment brought to Section 494 IPC in First Schedule. Though the legislature was quick enough in making the offence under Section 494 IPC as cognizable and non-bailable some how it escaped its attention to bring similar amendment to Section 198 Cr.PC. Because of this legislative lacuna the power given to the police officer to investigate into the offence under Section 494 IPC became redundant. There will be no use in giving power to the police officer to investigate into the offence under Section 494 IPC without conferring power on the Magistrate to take cognizance of such an offence basing on the police report. In other words, the police report filed under Section 173 (2) Cr.PC has to be thrown into dust bin. Though the Magistrate is at liberty to conduct enquiry under Section 202 Cr.PC. ignoring police report filed under Section 173 (2) Cr.PC it will multiply the work of Courts which are already burdened with heavy work.

7. Now I deal with the judicial pronouncements. Reference has to be made to the decision of Hon'ble Apex Court in *State of Orissa v. Sharathchandra Sahu* reported in AIR 1997 SC 1. Wife of *Sahu* made a complaint to Women's Commission of State of Orissa alleging cruelty and bigamous marriage attracting the ingredients of Sections 498-A and 494 IPC. It was sent to police who registered a case and filed charge-sheet, cognizance was taken by Court and charges under Sections 498-A and 494 IPC were framed. At that stage *Sahu* invoked Section 482 Cr.PC in High Court of Orissa. High Court partly allowed the petition and quashed the charge framed under Section 494 IPC which was challenged before the Hon'ble Apex Court by State of Orissa. It must be borne in mind that at the relevant

time in Orissa Section 494 IPC was non-cognizable one. The Apex Court held that the judgment of the High Court so far as it related to the quashing of the charge under Section 494 IPC was wholly erroneous and was based on complete ignorance of the relevant statutory provisions.

8. The Apex Court referred to Section 198 Cr.PC, Chapter XX of IPC and Section 155 Cr.PC with particular reference to sub-section (4). Referring to its earlier decisions in *Praveen Chandra Mody v. State of A.P.* reported in AIR 1965 SC 1185 the Hon'ble Supreme Court held that since the offence under Section 498-A IPC was cognizable the offence under Section 494 IPC which is non-cognizable is deemed to be cognizable by virtue of Section 155 (4) Cr.PC and, as such, the police had power to investigate into the offence under Section 494 IPC. The power of police to investigate into a non-cognizable offence when it is associated with a cognizable offence is not in dispute.

9. Recently our own Hon'ble High Court confronted with similar legal question. In *K. Vijaya Lakshmi v. K. Lakshmi Narayana* reported in 2000 (2) ALD (CrI) 184 it was held that there was a specific prohibition for taking cognizance of any offence punishable under Chapter XX IPC except upon a complaint made by a person aggrieved. In *T. Vijaya Lakshmi v. D. Sanjeeva Reddy* reported in 2000 (2) ALD (CrI) 200 (A.P) our High Court pointed out the legislative lacune (see para 3 of said decision). In the said case the S.I of Police, Musheerabad filed charge-sheet for the offence under Sections 498-A and 494 IPC for which cognizance was taken and trial was conducted. The Hon'ble High Court held that the entire trial was vitiated as the initial cognizance taken by the Court based on charge-sheet was itself bad. It was further held that the bar enjoined under Section 198 Cr.PC is for the Court but not for the

investigating agency. The State Amendment brought to Section 494 IPC in First Schedule cannot take precedence, over Section 196 Cr.PC which is the legislation passed by Parliament.

10. In this regard reference has to be made to the article entitled “The Anomaly of Bigamy” published in 2001 (1) ALT (Crl.) (Part-4) wherein it was opined that the decision of our High Court in *Sanjeeva Reddy’s Case* (supra) is in conflict with decision of Hon’ble Apex Court in *Sahu’s case* (supra). It was also opined that when the offence under Section 494 IPC is associated with Section 498-A IPC basing on police report filed under Section 173 (2) Cr.PC. Court can take cognizance of offence under Section 494 IPC as the bar imposed under Section 198 Cr.PC would not apply. In other words, when the police report discloses the ingredients of offence under Section 494 IPC alone Court cannot take cognizance. In my considered opinion the said view is incorrect.

11. Whether Section 494 IPC is deemed to be cognizable by virtue of Section 155(4) Cr.PC when it is associated with a cognizable offence (as in *Sahu’s case*) or whether Section 494 IPC is cognizable by virtue of amendment in State of A.P. the embargo imposed on Court under Section 198 Cr.PC remains to be there. Admittedly, based on police report cognizance was taken by the lower Court against *Sahu*. The word ‘complaint’ contained in Section 198 Cr.PC was not highlighted/focused by both sides before the Apex Court in *Sahu’s case*. Thus,

the Apex Court had no opportunity of dealing with Section 198 Cr.PC extensively with particular reference to the competence of the Court to take cognizance of offence under Section 494 IPC basing on police report.

12. That apart, in *Sahu’s case* the offence under Section 494 IPC was non-cognizable in Orissa. As already stated, in our State the said offence is made cognizable by Act. No.3 of 1992. Hence, the said decision of Hon’ble Apex Court has no application to our State. Thus, it cannot be stated that our High Court’s decision in *Sanjeevareddy’s cases* is in conflict with the decision of Apex Court in *Sahu’s case*.

To sum up, Magistrate has no power to take cognizance of the offence under Section 494 IPC based on the police report/charge sheet/challan under Section 173 (2) Cr.P.C whether it is associated with offence under Section 498-A IPC or not. While the legislative lacuna is causing injustice to real victims in several cases it is a boon in the hands of erring persons to make a nice cat walk escaping from the clutches of law. It is expected that the legislature would rise to the occasion and bring out an amendment to Section 198 Cr.PC. very soon in consonance with State Amendment brought to Section 494 in First Schedule. As a stop gap arrangement it is advisable that police should restrain themselves from investigating into the offence under Section 494 IPC and leave the matter to the Court to conduct enquiry and take cognizance by following the procedure under Section 202 Cr.PC.