

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 18.07.2022
Pronounced on: 24.08.2022

CRMC No.73/2019

BASHIR AHMAD DADA & ORS. ... PETITIONER(S)

Through: - Mr. S. R. Hussain, Advocate.

Vs.

GHULAM MOHI UD DIN ... RESPONDENT(S)

Through: - Mr. Hilal Noorani, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioners have challenged the complaint filed by the respondent against them alleging commission of offences under Section 420 and 506 RPC. Challenge has also been thrown to order dated 04.06.2018, whereby learned Forest Magistrate, Srinagar, has taken cognizance of the complaint and after recording the satisfaction that offence under Section 420 RPC is made out against the petitioners is made out, issued process against them.

2) It appears that the respondent herein has filed the impugned complaint before the trial Magistrate against the petitioners alleging therein that his son got in touch with petitioner No.3 herein through internet communication and the two developed liking for each other. It is further alleged that the respondent approached petitioner Nos.1 and 2, who happen to be the parents of petitioner No.1, for formalizing the

marriage between their children. It is averred that the marriage between son of the respondent and petitioner No.3 was solemnized on 5th February, 2011 at Delhi. It is alleged that it came to the knowledge of the son of the respondent that the petitioners have practised fraud upon him by concealing the fact that petitioner No.3 had a subsisting marriage with one Sheikh Arshul Firdousi. Along with the complaint, the respondent placed on record a copy of the marriage agreement entered between petitioner No.3 and aforesaid Sheikh Arshul Firdousi. It is further averred in the complaint that out of the wedlock between son of the respondent and petitioner No.3, one female baby is born. The respondent has alleged in the complaint that the petitioners under a design and a criminal plot played fraud upon him and his son by concealing the factum of previous marriage between petitioner No.3 and aforesaid Sheikh Arshul Firdousi. It is also averred in the complaint that due to this, the relations between son of the respondent and petitioner No.3 became strained and ultimately resulted in a divorce. Son of the respondent is presently stated to be residing in Thailand where he has established his own business. It is also alleged in the complaint that the respondent is directly and indirectly getting threats from the petitioners.

3) The learned trial Magistrate has, after recording preliminary evidence, recorded satisfaction that offence under Section 420 RPC is made out against the petitioner and issued process against them in terms of impugned order dated 04.06.2018.

4) It has been contended in the petition that the impugned complaint has not been filed by the son of the respondent who is the aggrieved person but the same has been filed by the respondent who has no locus standi to file the same. It has been further contended that the learned Magistrate has issued the process against the petitioners in a mechanical manner without applying his mind to the facts and material available before him and, as such, the order passed by the learned Magistrate deserves to be quashed. It is also contended that the contents of the impugned complaint do not disclose commission of any offence by the petitioners.

5) No response reply has been filed by the respondent.

6) Heard learned counsel for the parties and perused the material on record.

7) The main ground that has been urged by learned counsel for the petitioners for impugning the complaint filed against the petitioners is that the same has been filed by father of the person who had entered into wedlock with petitioner No.3 and not by the said person. According to the petitioners, the complaint filed by father on behalf of the aggrieved person is not maintainable.

8) The allegations made in the impugned complaint that the petitioners, particularly petitioner No.3, concealed the fact that she was already having a subsisting marriage with a third person and thereafter she entered into a wedlock with son of the respondent/complainant. The concealment of former marriage from the person with whom

subsequent marriage is contracted has been specifically made as an offence in terms of Section 496 of the RPC, which reads as under:

495. Same offence with concealment of former marriage from person with whom subsequent marriage is contracted. — Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

9) From a perusal of the aforesaid provision, it is clear that whoever commits an offence defined in Section 494 RPC after having concealed the former marriage from the person with whom subsequent marriage is contracted, is liable to be punished under Section 495 of RPC.

10) Section 494 of the RPC makes punishable an act of marrying during the life time of husband or wife when such marriage is void by reason of its taking place during the life of such husband or wife. Thus, a Muslim wife, if she marries during the subsistence of her marriage with her husband or during the lifetime of her husband, exposes herself to prosecution for offence under Section 494 of RPC and her subsequent marriage is rendered void and when such a lady conceals the factum of her former marriage from the person with whom she contracts subsequent marriage, she is liable to be prosecuted for offence under Section 495 of RPC.

11) In the instant case, petitioner No.3, as per the allegations made in the impugned complaint, had a subsisting marriage with Mr. Sheikh Ashraful Firdousi and she concealed this fact from the son of the

respondent at the time she entered into wedlock with him. Thus, her alleged act squarely falls within the definition of offence under Section 495 of the RPC. The respondent, instead of choosing to prosecute the petitioners for offence under Section 495 of RPC, has chosen to prosecute them for offence under Section 420 of RPC. This appears to this Court, as a case where the respondent is trying to evade the bar to taking of cognizance of offence under Section 495 RPC created under Section 198 of the Cr. P. C. As per the provisions contained in Section 198 of the Cr. P. C, a Court cannot take cognizance of an offences falling under Section 493 to 496 of RPC except upon the complaint made by some person aggrieved by such offences.

12) In the instant case, the father of the person, from whom petitioner No.3 is alleged to have concealed the factum of her earlier marriage, has filed the complaint. It is only that person, from whom the factum of earlier marriage has been concealed which has led to his contracting subsequent marriage, would come within the definition of 'aggrieved person' as contained in Section 198 of the Cr. P. C. Though first and second proviso to said provision do provide for exceptional circumstances where a complaint can be made by some other person with the leave of the Court on behalf of the 'aggrieved person' but in the case of a husband, for prosecution of wife for an offence under Section 495 of RPC, no such provision has been made. Therefore, the complaint filed by father on behalf of his son for prosecuting the wife and her relatives for offence under Section 495 RPC is clearly barred by law.

13) The respondent has, in order to circumvent the aforesaid legal bar to filing of the complaint on behalf of his son, changed the label of the offence by making it one under Section 420 RPC instead of Section 495 RPC so as to avoid the legal bar contained in Section 198 of the Cr. P. C. Merely by changing the garb or label of an offence which is essentially an offence covered by the provisions of Section 198 of the Cr. P. C, the prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it. On this ground alone, the proceedings as against the petitioners are liable to be quashed.

14) Apart from the above, if we have a look at the impugned complaint, the knowledge of respondent/complainant about concealment of earlier marriage of respondent No.3 from his son is based upon what the respondent has been conveyed by his son. This is clearly discernible from the contents of the impugned complaint. The respondent/complainant has not even cited his son as a witness to the complaint nor has the learned Magistrate taken trouble to record the statement of the son of the complainant at the time of recording preliminary evidence. The statements of the respondent/complainant and his witnesses that they were informed by son of the respondent that petitioner No.3 has concealed the factum of her earlier marriage, does not become legal evidence as the same is hearsay in nature. On the basis of legally inadmissible evidence, the learned Magistrate could not have recorded his satisfaction about the commission of offence and proceed against the petitioners. Even the person with whom petitioner

No.3 is alleged to be having a subsisting marriage has not been cited as a witness to the complaint. Thus, continuance of criminal proceedings against the petitioners on the basis of such a defective complaint would be an abuse of process of law.

15) For the foregoing reasons, the impugned complaint and the proceedings deserve to be quashed. The petition is, accordingly, allowed and the impugned complaint and the proceedings emanating therefrom against the petitioners are quashed.

16) A copy of this order be sent to the learned trial court for information.

Srinagar,
24.08.2022
"Bhat Altaf, PS"

(SANJAY DHAR)
JUDGE

*Whether the order is speaking:
Whether the order is reportable:*

Yes/No
Yes/No