

CASE NO.:
Appeal (crl.) 1066 of 2004

PETITIONER:
Kunti Devi

RESPONDENT:
Som Raj and Ors.

DATE OF JUDGMENT: 23/09/2004

BENCH:
ARIJIT PASAYAT & C.K. THAKKER

JUDGMENT:
J U D G M E N T
(Arising out of SLP(Crl.)No. 349 of 2004)

ARIJIT PASAYAT, J

Leave granted.

Appellant calls in question legality of the judgment passed by a learned Single Judge of the High Court of Jammu and Kashmir quashing the proceedings registered on the basis of a complaint filed by the appellant, in exercise of powers under Section 561-A of the Jammu & Kashmir Code of Criminal Procedure, 1989 (in short 'J&K Cr.P.C.') which is akin to Section 482 of the Code of Criminal Procedure, 1973 (in short the 'Code').

Background facts necessary for disposal of the appeal in a nutshell are as follows:

The appellant (hereinafter referred to as the 'wife') and respondent No.1 (hereinafter referred to as the 'husband') entered into wedlock on 8.5.1989. Alleging that the husband had abandoned her company, the wife filed a petition under Section 9 of the Hindu Marriage Act, 1955 (in short the 'Marriage Act') for restitution of conjugal rights. The husband also filed a similar petition on 11.2.1994. The petition filed by the wife was dismissed under Order IX Rule 8 of the Code of Civil Procedure, 1908 (in short the 'CPC'), as the husband agreed to take the wife along with him. The order was passed on 24.11.1995. On 15.12.1995, the husband filed a petition under Section 13 of the Marriage Act, inter alia, praying for a decree of dissolution of marriage in the court of learned Additional District Judge, Gurdaspur. By judgment dated 9.3.1999, the learned Additional District Judge, Gurdaspur passed a decree for dissolution of marriage on the ground of desertion. On 8.12.1999, an appeal was filed in terms of Section 28 of the Marriage Act before the Punjab and Haryana High Court. A prayer was also made for staying operation of the decree dated 9.3.1999. It was also prayed that the husband should be restrained from re-marrying. As there was delay in filing the appeal, the High Court first took up the application for condonation of delay. By a detailed order dated 14.8.2000 in CM No.945-C1 of 2000 in FAO No.14-M of 2000, the delay was condoned. The condonation application was taken up after due notice to the respondents in the first appeal and learned counsel for the parties were heard on the question of condonation of delay. Subsequently on 24.11.2000, the High Court passed an order that the husband shall not re-marry till further orders and the operation of the

judgment and decree passed by the learned Additional District Judge, Gurdaspur was stayed. This order has great relevance to the dispute involved in the present appeal. Subsequently, according to the wife, the husband re-married on 8.3.2001. The decree of divorce passed by the learned Additional District Judge, Gurdaspur was set aside by the High Court by judgment dated 1.5.2001. During the pendency of the appeal, on 19.7.2000, a plea was taken by the husband before the High Court that he had already remarried after the decree of divorce was passed. On 19.7.2000, a Division Bench of the High Court adjourned the matter to 27.7.2000 to produce the certificate of marriage, as in the affidavit of the husband, it was not stated that he had re-married or when he had re-married. Apparently, the relevant details were not brought to the notice of the High Court. Subsequently, as noted above, on 14.8.2000, the Court condoned the delay in filing of the appeal and passed the order of restraint on 24.11.2000. On 22.11.2001, a complaint was filed before the learned Chief Judicial Magistrate, Jammu alleging commission of offence punishable under Section 494 of the Ranbir Penal Code, 1989 (1932 AD) (in short the 'RPC') read with Section 109 RPC alleging that during subsistence of a valid marriage, the husband had contracted second marriage with respondent No.3- Smt. Usha on 8.3.2001. The learned Judicial Magistrate Ist Class cum Sub-Judge, Jammu took cognizance of the offence and issued bailable warrants against accused No.1 (the husband), accused No.2 (father of the husband) and accused No.4 (father of Smt. Usha). Though in the complaint, eight persons were named as accused persons, as noted above, bailable warrants were issued in respect of three persons and it was noticed that the offence punishable under Section 494 RPC was exclusively triable by the Court of Sessions. The date for appearance before the Court of Sessions was fixed to 15.3.2001. All the eight persons, who were impleaded as accused persons in the complaint petition filed a petition in terms of Section 561-A primarily on the ground that after passing of the decree, and before the same was set aside by the High Court of Punjab and Haryana on 1.5.2001, the marriage between the husband and Smt. Usha was solemnized. Placing reliance on a decision of this Court in Krishna Gopal Divedi v. Prabha Divedi (AIR 2002 SC 389), it was held by the High Court that the offence punishable under Section 494 RPC was not made out. Accordingly, the proceedings on the basis of the complaint in File No.142 instituted on 24.11.2001 pending before the learned Judicial Magistrate cum Sub-Judge, Jammu and the order dated 12.2.2003 taking cognizance of the offence and directing process were quashed.

In support of the appeal, learned counsel for the appellant submitted that the High Court did not take note of the fact that there was an order of restraint passed by a Division Bench of the High Court of Punjab and Haryana on 24.11.2000. The said order was within the knowledge of husband. This fact is evident from the fact that the application for condonation of delay was contested by him and the application was allowed and delay was condoned. The second marriage was solemnized when the order of stay was in operation. The decision in Krishna Gopal's case (supra) has no application because in that case, there was no order of stay in operation. Without analyzing the fact situation, the High Court unfortunately held that the matter in dispute was covered by the said judgment.

In response, learned counsel for the respondent-State submitted that the marriage in fact was solemnized before the order of stay was passed. There is no reference to the alleged second marriage by complainant in the complaint petition, apparently because she knew that the marriage was solemnized even before the appeal was admitted. In any event, according to him, the complaint petition, read as a whole, did not disclose commission of any offence and the High Court has rightly exercised jurisdiction under Section 561-A of the J&K Cr.P.C.

One significant thing is noticed which has great bearing on the dispute. The impugned order of the learned Single Judge does not refer

to the order of stay passed by a Division Bench of the High Court of Punjab and Haryana and the effect of such order. It is not in dispute that the order dated 24.11.2000 clearly restrained the husband from re-marriage and the operation of the decree of divorce was stayed. It proceeded on the basis that the marriage between the husband and Usha took place on 8.3.2001 and applying the ratio in Krishna Gopal's case (supra) it was held that no offence was made out. As noted above, the High Court proceeded on the basis as if the marriage took place on 8.3.2001. There is a great deal of factual distinction between Krishna Gopal's case (supra) and the case at hand. In Krishna Gopal's case (supra) the factual position noticed by this Court goes to show that there was no order of stay restraining re-marriage. Again it has to be noted that there is a dispute, as presently raised by the respondent-husband, that the date of marriage was much before the date on which the order of stay was passed and subsequent to the date on which the decree for dissolution of marriage was passed.

In view of the aforesaid factual controversy, we consider this to be a fit case where the matter needs to be re-heard by the High Court. While considering the matter afresh, the effect of the order of stay dated 24.11.2000 passed by a Division Bench of the Punjab and Haryana High Court shall be taken note of. Much would depend on the date when the marriage took place. It is to be noted that there is no dispute that the respondent-husband has married Usha. The crucial question is when the marriage took place. All these aspects are to be adjudicated by the High Court while dealing with the matter afresh. Learned Judicial Magistrate issued process only in respect of accused Nos. 1, 2 and 4. That order was not questioned by the appellant before the higher court. The present appeal stands dismissed against rest of the accused persons.

The appeal is accordingly disposed of.