

**IN THE HIGH COURT OF MADHYA PRADESH**

**AT INDORE**

**BEFORE**

**HON'BLE SHRI JUSTICE ANIL VERMA**

**RESERVED ON 29<sup>TH</sup> OF JUNE, 2022**

**DELIVERED ON THIS 11<sup>TH</sup> OF JULY, 2022**

**CRIMINAL APPEAL No. 958 of 1998**

Between:-

KAILASH S/O BALCHAND KUMAWAT,  
AGED – 28 YEARS,  
OCCUPATION – AGRICULTURE,  
R/O – SONGARH, DISTRICT DHAR,  
(MADHYA PRADESH)

**.....APPELLANT**

**(BY SHRI JITENDRA MANDLOI, ADV.)**

**AND**

1. GORDHAN S/O BABU,  
AGED – 28 YEARS,
2. JANI BAI W/O KAILASH,  
AGED – 27 YEARS,
3. BABU S/O GANGARAM,  
AGED – 47 YEARS,
4. GOVIND S/O GANGARAM,  
AGED – 37 YEARS,
5. GOPAL S/O RANCHOD KUMAWAT,  
AGED – 45 YEARS,

ALL R/O – SONGARH, DISTRICT DHAR,  
(MADHYA PRADESH)

.....RESPONDENTS

**(BY SHRI VIVEK SINGH, ADV. AND  
SHRI RAMESH CHANDRA MEHARA, ADV. APPOINTED  
THROUGH LEGAL AID)**

*This appeal coming on for final hearing this day, the court  
passed the following:*

**J U D G M E N T**

The appellant has preferred this appeal under Section 378 of Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') being aggrieved by the judgment of acquittal dated 31/03/1997 passed by Judicial Magistrate First Class, Sardarpur, District Dhar, whereby the respondents / accused persons were acquitted from the charges under Section 494 and 143 of Indian Penal Code, 1860 (in short 'IPC').

**02-** As per the prosecution story, the marriage of the appellant Kailash was solemnized with the respondent No.2 Jani Bai as per the Hindu rites and rituals and they lived together as husband and wife. But thereafter, the respondent No.2 Jani Bai got second marriage with the respondent No.1 Gordhan with the active help of the other accused persons / respondents No.3 to 5 knowing very well that first marriage of the Jani Bai is still in existence and without obtaining divorce from the appellant, respondent No.1 had performed the second marriage with the respondent No.1.

**03-** Appellant had filed a complaint against the respondents before the trial Court. The trial Court took the statement of various witnesses under Section 200 and 202 of the Cr.P.C. and the complaint was registered. Thereafter, the respondents were summoned. The trial Court examined various witnesses and an opportunity of cross-examination was given to the appellant and thereafter, charges under Section 494 and 143 of IPC were framed and trial was proceeded. After completion of the trial and appreciating the evidence available on record, the trial Court acquitted all the respondents from all the charges, therefore, after obtaining the special leave to appeal, this criminal appeal has been filed before this Court.

**04-** Learned counsel for the appellant submits that the judgment passed by the trial Court is erroneous on the facts and law. The trial Court has failed to appreciate the evidence available on record. The complainant has proved his case with the evidence of his father. The trial Court has committed illegality in counting the number of witnesses, instead of valuing their evidences. The complaint is based on the customs prevailed in their community, therefore, it is not required to prove ceremony of *Saptpadi*. The judgment passed by the trial Court is illegal, erroneous and without jurisdiction. Hence, he prayed that the impugned judgment of acquittal dated 31/03/1997 be set set aside and the respondents be convicted accordingly.

**05-** *Per contra*, learned counsel for the respondents opposed the

appeal and prays for its rejection by submitting that the trial Court has appreciated the evidence available on record. The appellant failed to prove his case, therefore, there is no need of interference in the findings of the trial Court.

**06-** Learned counsel for both the parties are heard at length and perused the entire record.

**07-** Short question arises for consideration of this Court is whether the second marriage entered into by the respondent No.2 with respondent No.1 was a valid marriage under Hindu Law so as to constitute an offence under Section 494 of IPC. The essential ingredients of the offence under Section 494 of IPC are: (i) the accused must have contracted the first marriage; (ii) she must have married again; (iii) first marriage must be subsisting and no divorce has taken place; and (iv) the first spouse must be living.

**08-** In the instant case, Jani Bai (PW-2) in her statement recorded under Section 313 of Cr.P.C. has categorically denied her marriage with the appellant. Other respondents have also denied the same fact in their statements under Section 313 of Cr.P.C., therefore, burden of proof to prove first marriage of the appellant with the respondent No.2 lies upon the appellant.

**09-** In order to bring home the charges, the appellant / complainant has examined Gangaram (PW-1), Kailash (PW-2), Kashiram (PW-3) and Balchand (PW-4) before the trial Court under Section 244 of

Cr.P.C. but after framing of charges Gangaram and Kashiram were not examined and opportunity of their cross-examination was not given to the respondents, therefore, their incomplete statement cannot be considered in the evidence. In fact, only two witnesses have been finally examined by the complainant, one is complainant himself and second is his father Balchand.

**10-** I have perused the statement of appellant / complainant Kailash (PW-2) and his father Balchand (PW-4). Both the witnesses in their statements have deposed that the marriage of the appellant was solemnized with the respondent No.2 Jani Bai as per the Hindu rites and rituals and Jani Bai was living with the appellant Kailash as his wife. The father of the Jani Bai, Gopal took Jani Bai at his home for celebrating the festival of *Rakhi* but after that Jani Bai did not come back. The appellant Kailash (PW-2) categorically stated in his statement that his relationship with his wife Jani Bai is still continuing, despite Jani Bai has contacted second marriage with respondent No.1 Gordhan. At that time Babu and Govind threatened all the persons by showing guns that if anybody tried to restrain the marriage of Jani Bai, they will kill them, other respondents were also present there. Balchand (PW-4) also deposed in the same manner and further stated that Jani Bai is still living with the respondent No.1 Gordhan as his wife.

**11-** Appellant Kailash (PW-2) stated in paragraph No.4 and 10 of

his statement that "मैं जाति से कुमावत हूँ और धर्म से हिन्दु हूँ। जानीबाई भी हिन्दु होकर कुमावत है। ..... शादी के समय मेरी आयु, 17-18 वर्ष थी, जानी बाई की उम्र उस समय 20-21 वर्ष थी। वह मेरे से बड़ी थी। वह शादी दुल्ला दुल्हन बनने और छेडा गाठन के द्वारा हुई थी।" From perusal of the statement of Kailash (PW-2) and Balchand (PW-4) it is apparent that both the witnesses have neither deposed anything regarding the performance of *Saptpadi* nor any other customary ritual prevailing in their community concerning the marriage.

**12-** The appellant had not examined any family members or relatives or any other independent witness to prove his marriage with Jani Bai. Balchand (PW-4) admits in his cross-examination that in the election voter list Jani Bai was named as wife of appellant Kailash, but the appellant did not produce the aforesaid relevant documents in his evidence. He did not produce any ration card or any other documents in which the name of Jani Bai was described as the wife of appellant.

**13-** The appellant Kailash stated that he has given a written complaint regarding the second marriage of Jani Bai before the Collector and Superintendent of Police and Jani Bai had also executed an affidavit, but appellant has failed to prove such written report and affidavit in his evidence, therefore, adverse inference can be drawn against the appellant.

**14-** Admittedly Balchand (PW-4) is the father of the appellant Kailash, therefore, he is interested witness. Appellant did not examined any independent witness in support of his marriage with the Jani Bai. Even did not produce any relevant documentary evidence for the same purpose. In absence of the material, substantive and independent evidence, the trial Court has rightly held that the appellant has failed to prove the factum of his valid marriage with respondent No.2 Jani Bai as per the Hindu rites and rituals.

**15-** Hon'ble the apex Court in the case of ***Lingari Obulamma Vs. L.Venkata Reddy*** reported in ***(1979) 3 SCC 80*** and ***Smt. Priya Bala Ghosh Vs. Suresh Chandra Ghosh*** reported in ***1971(1) SCC 864***, has held that the second marriage should be proved in accordance with the essential religious rites applicable to the parties otherwise no conviction can be directed for the offence under Section 494 of the IPC. In case of ***Smt. Priya Bala Ghosh (Supra)*** it is mentioned by Hon'ble the apex Court that admission by the accused that he had contracted second marriage is not enough.

**16-** The co-ordinate Bench of this Court in the case of ***Bhunda Vs. Chetram*** reported in ***1976 J LJ 621*** has observed that if it is held that the first marriage was not valid, the question with regard to the second marriage being legally performed or not would not arise. In the aforesaid case the co-ordinate Bench has also held as under:-

*“In a prosecution under Section 497 and 494 of the*

*Indian Penal Code the question of marriage must be strictly proved and any inference, tacit or otherwise, for example, a tacit admission on the part of the husband or wife that they are husband and wife would not be sufficient to prove the factum of first marriage. In a case of this kind it is necessary for the complaint or some other person in his or her behalf to give strict proof of the marriage.*

*Under Section 50 of the Evidence Act a presumption which arises under the first part of the section as to the relationship is particularly excluded in cases in which the relationship of husband and wife is in issue.*

*Amongst a large majority of people of this country marriage is concluded with much ceremonies and publicity and as such there cannot be any difficulty on the part of the prosecution for leading evidence to prove the legality of the marriage by adducing evidence. In the absence of such evidence, mere statement of the complaint that he was legally married is difficult to be relied upon. ILR 5 Cal. 566 & ILR 42 All. 401 relied on.”*

Applying the aforesaid rule to the facts of the present case, I find that the appellant Kailash (PW-2) only speaks that Jani Bai's second marriage was performed by “दुल्हा दुल्हन बनना, मिठाई बांटना”. Although he has admitted in his cross-examination that he was not personally present in the aforesaid second marriage of Jani Bai. Balchand (PW-4) has also stated that Jani Bai's second marriage was solemnized by way of “रंग गुलाल लगाना, बताशे व नारियल बांटना, रसोई पानी and दुल्हा दुल्हन बनना”. He also admits that he was not personally present in the second marriage of respondent No.2 Jani Bai. No other independent witnesses have been examined by the appellant. From



perusal of the statement of Kailash (PW-2) and Balchand (PW-4) it reveals that they did not attend the alleged second marriage of Jani Bai with Gordhan, therefore, their evidence cannot be relied upon.

17- Trial Court has rightly observed that appellant and respondent No.2 Jani Bai and respondent No.1 Gordhan belongs to the Hindu religion, therefore, *Saptpadi* are essential rites for their marriage according to the law governing the parties, but there is no evidence that all these essentials have been performed when the respondent No.2 Jani Bai was remarrying with respondent No.1 Gordhan. Therefore, the appellant has failed to prove that alleged second marriage of Jani Bai was solemnized with proper ceremonies in a due form under Section 17 of the Hindu Marriage Act.

18- Hon'ble the apex Court in the case of ***Bhaurao Shankar Lokhande and Another Vs. State of Maharashtra and Another*** reported in ***AIR 1965 SC 1565*** has held that the question arises whether in a prosecution for bigamy under Section 494, I.P.C., it was necessary to establish that the second marriage had been duly performed in accordance with the essential religious rites applicable to the form of marriage gone through.

19- Hon'ble apex Court in the case of ***Smt. Priya Bala Ghosh (Supra)*** in paragraph No.16 has held as under:

*“16. From the above quotations it is clear that if the alleged second marriage is not a valid one according to law*

*applicable to the parties, it will not be void by reason of its taking place during the life of the husband or the wife of the person marrying so as to attract s. 494 I.P.C. Again in order to hold that the second marriage has been solemnized so as to attract s. 17 of the Act, it is essential that the second marriage should have been celebrated with proper ceremonies and-in due form.”*

**20-** Learned counsel for the appellant contended that the respondent Jani Bai in her statement under Section 313 admits that her marriage was solemnized with the Gordhan. She is legally wedded wife of Gordhan. In my opinion such an admission on the part of the accused person cannot amount to confession and relieve the burden of the prosecution to prove the legality of second marriage in the strict form. In a prosecution for matrimonial offences, the burden of proof lies upon the prosecution to prove the first marriage and also to prove the legality of second marriage. Therefore, reference to the aforesaid admissions on the part of the accused persons / respondents about the said marriage does not in any way advance the cause of the prosecution and on that basis it cannot be held that the first marriage and second marriage were legally performed.

**21-** In the present case, the trial Court has rightly held that on the basis of the evidence that complainant / appellant completely failed to establish legality of his marriage with the respondent No.2 Jani Bai. That being so, the trial Court has also rightly held that no evidence is

available against the respondent No.2, which establish that the respondent No.2 Jani Bai is the wife of the appellant Kailash. The trial Court has also held that even the marriage of respondent No.2 with respondent No.1 has also not been legally proved. In this connection I would refer to the case of ***Bhaurao Shankar Lokhande (Supra)*** and ***Smt. Priya Bala Ghosh (Supra)***. In view of the aforesaid legal position there is a lack of strict proof of bigamy alleged to have been committed by the respondent No.2.

**22-** Considering the aforesaid case laws, facts and entire evidence available on record, there is no hesitation in holding that the appellant has failed to prove the charges against the respondents beyond any reasonable doubt, therefore, the trial Court has rightly acquitted the respondents from all the charges. Impugned judgment passed by the trial Court is just and proper and does not warrant any interference by this Court.

**23-** Resultantly, this appeal is hereby dismissed and the judgment of acquittal passed by the trial Court is hereby affirmed. Let a copy of the judgment along with the record of the trial Court be sent to the concerned trial Court for information.

Certified copy as per rules.

(ANIL VERMA)  
J U D G E

**IN THE HIGH COURT OF MADHYA PRADESH  
AT INDORE  
BEFORE  
HON'BLE SHRI JUSTICE ANIL VERMA**

|    |                                       |  |
|----|---------------------------------------|--|
| 1  | <b>Case No.</b>                       | Criminal Appeal No.958 of 1998   |
| 2  | <b>Parties Name</b>                   | <b>Kailash Vs. Gordhan and Others</b>  |
| 3  | <b>Reserved on</b>                    | 29/06/2022   |
| 4  | <b>Judgment delivered on</b>          | 11/07/2022   |
| 5  | <b>Bench constituted of</b>           | Hon'ble Shri Justice Anil Verma  |
| 6  | <b>Judgment delivered by</b>          | Hon'ble Shri Justice Anil Verma  |
| 7  | <b>Whether approved for reporting</b> | Yes  |
| 8  | <b>Name of counsels for parties.</b>  | Shri Jitendra Mandloi, learned counsel for the appellant.<br>Shri Vivek Singh and Shri Ramesh Chandra Mehara (appointed through Legal Aid), learned counsel for the respondents. |
| 9  | <b>Law laid down</b>                  | In a prosecution for matrimonial offences, the burden of proof lies upon the prosecution to prove the first marriage and also to prove the legality of second marriage.          |
| 10 | <b>Significant paragraphs</b>         | Paragraph No.15 to 21  |

**(ANIL VERMA)  
J U D G E**