

Harekrishna Mondal Vs Smt. Kalpana Naskar and Others

Court: Calcutta High Court

Date of Decision: Dec. 12, 1989

Acts Referred: Evidence Act, 1872 " Section 41, 44
Penal Code, 1860 (IPC) " Section 493, 495, 496

Citation: (1990) 1 CALLT 119

Hon'ble Judges: J.N. Hore, J; Ajit K. Sengupta, J

Bench: Division Bench

Advocate: Balai Roy and Pulak Mondal, for the Appellant; Shagarbandu Mondal and Kalpana Khal Mondal, for the Respondent

Judgement

J.N. Hore, J.

Petitioner Harekrishna Mondal was convicted by the learned Judicial Magistrate, Alipore, 2nd Court under Sections 493,

495 and 496, Indian Penal Code. For his conviction u/s 495, Indian Penal Code, the petitioner was sentenced to rigorous imprisonment for 3

years and a fine of Rs. 5000 in default further rigorous imprisonment for 9 months and for his conviction u/s 493, Indian Penal Code, the petitioner

was sentenced to rigorous imprisonment for 2 years. The sentences were its run consecutively. No separate sentence was passed for conviction

u/s 496, Indian Penal Code. On appeal the learned Additional Sessions Judge, 2nd Court, Alipore confirmed the order of conviction under

Sections 493, 495 and 496, Indian Penal Code but reduced the sentence. The sentence u/s 495, Indian Penal Code was reduced to imprisonment

for 2 years and a fine of Rs. 3000 in default rigorous imprisonment for 6 months. The sentence u/s 493, Indian Penal Code was reduced to

imprisonment for 1 year and the sentences were ordered to run concurrently. Being aggrieved the petitioner has moved this court in revision and

obtained the present Rule.

2. Briefly stated, the prosecution case was that petitioner Harekrishna Mondal falsely represented himself as a bachelor and relying on the said

representation complainant Smt. Kalpana Naskar, respondent No. 1 agreed to marry him. They were married on 9th February, 1977 according to

Hindu Rites. The petitioner and the complainant lived as husband and wife for about 8/9 months after the aforesaid marriage.

3. Subsequently, the complainant came to know that petitioner Harekrishna Mondal had a another wife named Shanti with two children and that he

suppressed that fact and fraudulently married the complainant during the subsistence of that marriage. A dispute arose between the complainant

and the petitioner and the complainant was driven out of the petitioner"s house. The complainant then filed a matrimonial suit being Mat. Suit No.

15/78 against the petitioner Harekrishna Mondal and got a decree in her favour declaring her marriage with the petitioner as void.

4. The defence case was a denial of the alleged second marriage of the accused with complainant Kalpana and the alleged cohabitation with her.

The further defence case was that the complainant filed the complaint in order to extract some money from accused Harekrishna Mondal. The

alleged first marriage with Shanti was not disputed at the time of trial.

5. The learned Magistrate held that the petitioner married respondent No. 1 after observance of the usual rites and ceremonies. He further held that

this marriage was contracted during the subsistence of the previous marriage with Shanti upon suppression of the said fact.

6. In the appeal the petitioner did not challenge the finding of the learned Magistrate regarding his marriage with respondent No. 1 according to

Hindu Rites. It was contended before the learned Additional Sessions Judge that the finding of the learned Magistrate regarding the alleged first

marriage with Shanti being based on the judgment passed in the matrimonial suit and there being no independent evidence regarding the essential

formalities of the marriage was erroneous and as such the conviction could not be sustained. This contention was negatived by the learned

Additional Sessions Judge who held that u/s 41 of the Evidence Act, final judgment of a competent court in the exercise of matrimonial jurisdiction

is a conclusive proof that the legal character which it confers or takes away accrued or ceased at the time declared in the judgment for that

purpose and that the judgment passed in the matrimonial suit between the parties was a conclusive proof that the petitioner was married to Shanti

and during the subsistence of that marriage the petitioner again married respondent No. 1. He accordingly affirmed the order of conviction but

reduced the sentence as stated earlier.

7. There was evidence by the complainant and her witnesses that the accused had a wife named Shanti but there was no evidence on the point of

performance of religious rites and ceremonies. There was no independent proof of the alleged marriage between the petitioner and Shanti. Inspite

of issue of summons followed by warrant the attendance of Shanti could not be secured and Shanti could not be examined. Both the courts below

mainly relied upon the judgment passed in the matrimonial suit being No. 15/78 in proof of marriage of the petitioner with Shanti. Mr. Roy, learned

Advocate for the petitioner has contended that the judgment passed in the matrimonial suit is, relevant in a criminal proceeding only with regard to

the declaration that the marriage of the petitioner with respondent No. 1 is void and the evidence and the grounds on which the final decision is

based being not admissible in the criminal proceeding both the courts committed an error in relying upon the said judgment in proof of the

subsistence of the alleged first marriage. Mr. Mondal, learned Advocate for the respondent No. 1 has, on the other hand, contended that the

judgment is a conclusive proof of the subsistence of the first marriage u/s 41 of the Evidence Act.

8. Section 41 of the Evidence Act inter alia provides that a final judgment of a competent court in the exercise of matrimonial jurisdiction is

conclusive proof that the legal character which it confers or takes away accrued or ceased at the time declared in the judgment for that purpose.

The judgment is conclusive as regards the status but not as regards the evidence or the grounds on which it is based against third parties. A

judgment in rem u/s 41 is conclusive in a criminal as well as in a civil proceeding. In *Survepalli Siddaiah Vs. Survepalli Panchalamma*, it has been

held that any decision given in the exercise of matrimonial jurisdiction would be conclusive not only against the parties to the proceedings but

against the whole world. In other words, such judgment would operate as judgment in rem. In *Smt. Satya Vs. Shri Teja Singh*, , the Supreme

Court has held that u/s 41 of the Evidence Act, a final judgment of a competent court in the exercise of matrimonial jurisdiction is conclusive proof

of the legal character which it confers or takes away, but the judgment has to be of a "competent court", that is, a court having jurisdiction over the

parties and the subject matter. Even a judgment in rem is, therefore, open to attack on grounds specified in Section 44. Fraud, in any case hearing

on jurisdictional facts vitiates all judicial acts whether in rem or in personam. In the instant case, the judgment was passed by a competent court

having jurisdiction over the parties and the subject matter and there is no challenge of the said judgment on the ground of fraud. It is, therefore,

conclusive with regard to the matrimonial status conferred or taken away by the said judgment. In the case of *R. Viswanathan Vs. Rukn-UI-Mulk*

Syed Abdul Wajid, , the Supreme Court has held that collusiveness, from the point of view of law of evidence will attach to a judgment, order or

decree if it falls within the categories mentioned in Section 41. Once a judgment falls within it, the law dispenses with the proof of the fact and the

conclusion of the former judgment about legal character which it confers or declares, together with the declarations of the property arising from that

legal character is final. Now, in the previous judgment passed by a competent court of matrimonial jurisdiction, the marriage of the petitioner with

respondent No. 1 was declared to be void being contracted during the subsistence of a previous marriage with Shanti. The declaration of the

marriage of the petitioner with respondent No. 1 as being void is inextricably bound up with the finding that the first marriage with Shanti was

subsisting at the time of the second marriage. In effect the judgment declares the status of Shanti as wife of the petitioner at the time of the second

marriage with respondent No. 1 and consequently declares the second marriage with respondent No. 1 as void. The judgment is, therefore,

conclusive regarding the factum of first marriage with Shanti and its subsistence at the time of the second marriage with respondent No. 1 which

was void and law dispenses with the independent proof of the said fact. The courts below were, therefore, right in relying upon the judgment in the

matrimonial suit between the parties as conclusive proof of subsistence of the first marriage with Shanti when he took the second wife. It may be

mentioned here that during trial the petitioner did not dispute the first marriage of the petitioner with Shanti.

9. In view of what has been stated above, the order of conviction as passed by the lower appellate court does not suffer from any illegality or

infirmity and must be sustained. We are, however, inclined to reduce the sentence to rigorous imprisonment for 1 year and a fine of Rs. 3000, in

default further rigorous imprisonment for 3 months for the conviction u/s 495, Indian Penal Code and to rigorous imprisonment for 6 months for

committing an offence u/s 493, Indian Penal Code. Both the sentences will run concurrently. The order of conviction is affirmed but the sentence is

reduced as indicated above.

The Rule is disposed of accordingly.

Ajit K. Sengupta, J.

10. I agree.