

A MANJU RAM KALITA
 v.
 STATE OF ASSAM
(Criminal Appeal No. 299 of 2003)

B MAY 29, 2009

[DR. MUKUNDAKAM SHARMA AND DR. B.S.
CHAUHAN, JJ.]

C *Penal Code, 1860:*

ss.498A, 494 – *Bigamy and cruelty on account of dowry demand – Complainant-wife left matrimonial house in 1993 – In 1997, she found that husband married another woman – Thereafter complaint filed under ss.498A/494 – Conviction under ss.498A/494 by courts below – On appeal, Held: Courts below arrived at a concurrent finding of fact regarding the factum of second marriage – Therefore, finding of fact on issue of bigamy is not interfered with – Conviction under s.494 is maintained – As regards cruelty, s.498A is attracted if woman is subjected to cruelty continuously or at least in close proximity of time of lodging the complaint – Complainant had left her matrimonial house in 1993 and she lodged complaint of cruelty in 1997 – There was no complaint for the period 1993-1997 – None of witnesses deposed that there was continuous physical or mental torture after 1993 – Therefore, conviction under s.498-A is set aside – Jurisdiction of higher court to interfere with the concurrent finding of fact.*

G *Prosecution case was that the complainant was married to appellant in 1992. The relationship between husband and wife were not cordial and wife was allegedly tortured mentally and physically by the appellant. She left the matrimonial home in 1993 though she was seven months pregnant at that time. She gave*

birth to a male child and the appellant did not even come A to see the child. In 1997 she came to know that the appellant married one 'RS'. Thereafter she filed an FIR against the appellant. Appellant was charged under Sections 498A/494 IPC. The Trial Court found both the charges proved against the appellant beyond reasonable B doubt and convicted him under Section 498A IPC and Section 494 and sentenced him accordingly. First appellate Court dismissed appeal filed by appellant. His second appeal before High Court was also dismissed. Hence the present appeal. C

Partly allowing the appeal, the Court

Held: 1. The issue no. 1 as to whether the appellant got married with 'RS' is a pure question of fact. All the three courts below gave concurrent finding regarding the factum of marriage and its validity. It was held to be a valid marriage. It is settled legal proposition that if the courts below record the finding of fact, the question of re-appreciation of evidence by the third court would not arise unless it is found to be totally perverse. The higher court does not sit as a regular court of appeal. It's function is to ensure that law is being properly administered. Such a court cannot embark upon fruitless task of determining the issues by re-appreciating the evidence. This Court would not ordinarily interfere with the concurrent findings on pure questions of fact and review the evidence again unless there are exceptional circumstances justifying the departure from the normal practice. Where the court below considered the material facts and did not take into consideration any inadmissible evidence etc., the interference is not required by court on third instance. [Paras 9, 10 and 11] [908-G-H; 909-A-D-E] G

A **1951 SC 177; M/s. Tulsi Das Khimji v. The Workmen, AIR 1963 SC 1007; and Pentakota Satyanarayana & Ors. v. Pentakota Seetharatnam & Ors., AIR 2005 SC 4362; Madhavan Nair v. Bhaskar Pillai (2005) 10 SCC 553, relied on.**

B **1.2. It is evident that this Court being the fourth Court should not interfere with the exercise of discretion by the courts below even if two views are possible on the question of fact as the said courts have exercised their discretion in good faith giving due weight to relevant material and without being swayed by any irrelevant material. The finding of fact so far as the issue of bigamy is concerned and the quantum of punishment on this count is not required to be interfered with. [Paras 12 and 13] [909-F-G; 910-A]**

C **2.1. "Cruelty" for the purpose of Section 498-A I.P.C. is to be established in the context of Section 498-A IPC as it may be a different from other statutory provisions. It is to be determined/inferred by considering the conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide etc. It is to be established that the woman was subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as 'cruelty' to attract the provisions of Section 498-A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty. [Para 22] [913-E-G]**

D **S. Hanumantha Rao v. S. Ramani, AIR 1999 SC 1318
V. Bhagat v. Mrs. D. Bhagat, AIR 1994 SC 710, Mohd. Hoshan v. State of A.P.; (2002) 7 SCC 414, Smt. Raj Rani v. State (Delhi Administration; AIR 2000 SC 3559, Sushil Kumar**

E **Sharma vs. Union of India AIR 2005 SC 3100 Girdhar**

Shankar Tawade v. State of Maharashtra, AIR 2002 SC 2078, A
relied on.

2.2. Undoubtedly, there was a complaint of physical and mental torture by the wife upto 1993 when she left the matrimonial home and started living with her father. The complaint of cruelty was lodged by filing an FIR on 23.5.1997 i.e. after four years of leaving the matrimonial home. More so, the mental or physical torture was not continuous on the part of the appellant as there was no complaint against him between 1993 to 1997 i.e. leaving the matrimonial home by the wife and performing the second marriage by the husband. [Para 23] [913-G-H; 914-A-B]

2.3. The complainant deposed that she was tortured physically and mentally but there was no allegation that she was subjected to physical or mental torture after the birth of the child in 1993. Similarly, the father of the complainant did not mention any incident of physical or mental torture after 1993. None of the witnesses examined in this respect deposed that there was a continuous physical or mental torture and some untoward incident occurred between the husband and wife after 1993. The Trial Court itself was of the view that there was no evidence of cruelty on the part of the appellant with a view to drive the complainant to commit suicide. The appellate Forum reached the conclusion that mental torture was of the magnitude that the complainant had to leave her matrimonial home during her pregnancy. The Revisional court did not find that the complainant had been subjected to cruelty continuously. Thus, all the three courts below erred in not considering the case in correct perspective. The findings so recorded by the courts below may be relevant for granting the relief in a matrimonial dispute i.e. divorce etc. but could not bring home the charge under Section 498-A IPC. Thus,

A conviction of the appellant under Section 498-A IPC and punishment for the said offence awarded by the courts below are set aside. However, conviction and sentence under Section 494 IPC are maintained. [Paras 24, 28 and 30] [914-B-D; 915-E-H; 916-A-B]

B Case Law Reference:

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|---|---------------------|-----------|---------|
| | AIR 1951 SC 177 | relied on | Para 10 |
| | AIR 1963 SC 1007 | relied on | Para 10 |
| C | AIR 2005 SC 4362 | relied on | Para 10 |
| | (2005) 10 SCC 553 | relied on | Para 11 |
| | AIR 1999 SC 1318 | relied on | Para 15 |
| D | AIR 1994 SC 710, | relied on | Para 17 |
| | AIR(2002) 7 SCC 414 | relied on | Para 18 |
| | AIR 2000 SC 3559 | relied on | Para 19 |
| E | AIR 2005 SC 3100 | relied on | Para 20 |
| | AIR 2002 SC 2078 | relied on | Para 21 |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 299 of 2003.

F From the Judgment & Order dated 21.12.2001 of the High Court of Guwahati in Criminal Revision (P) No. 578 of 2000.

S.K. Bhattacharya, Babita Sant and Pravir Choudhary for the Appellants.

G Riku Sharma and Corporate Law Group for the Respondents.

The Judgment of the Court was delivered by

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DR. B.S. CHAUHAN, J. 1. This Appeal has been preferred against the Judgment and Order dated 21st December, 2001 of the High Court of Gauhati in Criminal Revision (P) No. 578 of 2000 by which the High Court concurred with the finding of facts, recorded by the Trial Court dated 22.12.1999 passed by the Addl. Chief Judicial Magistrate, Kamrup, Guwahati in Case No. G.R.1957/1997; and of the Appellate Court, the Sessions Judge, Kamrup dated 13.10.2000 passed in Criminal Appeal No.3 of 2000 that the appellant was guilty of committing the offences under Sections 494 and 498A of the Indian Penal Code (in short "I.P.C") and sentenced him to undergo rigorous imprisonment for 2 years u/S 498A and for 3 years u/S 494 I.P.C. However, both the sentences were directed to run concurrently.

2. The facts and circumstances giving rise to this appeal are that the appellant, a Government servant, got married with Smt. Minati Das (Kalita), the complainant on 5.2.1992 as per Hindu rites. Smt. Minati Das (Kalita) gave birth to a male child on 10.3.1993. However, the relationship between the husband and wife were not cordial as it was alleged by the wife that she was being tortured mentally and physically by the Appellant. She left the matrimonial home and started living with her father and was residing therein since 1993. In 1997, she came to know that the appellant got married with one Ranju Sarma on 2.2.1997 at Tukeswari Temple. Thus, she filed an FIR against the appellant.

3. The appellant was charged under Sections 498A/494 IPC by CJM, Guwahati. The appellant defended himself before the Trial Court denying all the charges. However, considering the evidence on record, the Trial Court found both the charges proved against the appellant beyond reasonable doubt and after convicting him, for the said offences, awarded the sentences as mentioned here-in-above, vide judgment and order dated 22.12.1999. (Annexure P-12)

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- A 4. Being aggrieved, the appellant preferred Appeal No.3 of 2000 which was dismissed by the Appellate Court vide Judgment and Order dated 13.10.2000 (Annexure P-13).
- B 5. The appellant further approached Gauhati High Court by filing Criminal Revision (P) No. 578 of 2000 which has been dismissed by the impugned Judgment and Order dated 21st December, 2001. Hence, this Appeal.
- C 6. Shri S.K. Bhattacharya, learned counsel appearing for the appellant has raised all the contentions which the appellant has raised before the courts below, inter alia, that there was no valid marriage with Smt. Ranju Sarma as the marriage had taken place before a Hindu Deity and that there was no case of mental or physical torture to bring home the charges under Section 498A IPC. Thus, the appeal deserved to be allowed.
- D 7. On the contrary, Mr. Riku Sharma, learned counsel appearing on behalf of the respondent State submitted that there are concurrent finding of facts by three courts below so far as the issue of marriage of the appellant with Smt. Ranju Sarma is concerned. This Court should not interfere with the findings so recorded, being the fourth court entertaining this matter. So far as the attraction of the provisions of Section 498 A is concerned, it was submitted that the appellant subjected the complainant (legally wedded wife) to physical and mental torture and agony; thus the charges have rightly been found proved against him by all the three courts. Therefore, there is no occasion for this Court to interfere in the matter. The appeal is liable to be dismissed.
- E 8. We have considered the rival submissions made by learned counsel for the parties and perused the record.
- F 9. So far as issue no. 1 is concerned i.e. as to whether the appellant got married with Smt. Ranju Sarma, is a pure question of fact. All the three courts below have given concurrent
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finding regarding the factum of marriage and its validity. It has A
been held to be a valid marriage.

10. It is settled legal proposition that if the courts below have recorded the finding of fact, the question of re-appreciation of evidence by the third court does not arise unless it is found to be totally perverse. The higher court does not sit as a regular court of appeal. Its function is to ensure that law is being properly administered. Such a court cannot embark upon fruitless task of determining the issues by re-appreciating the evidence. This Court would not ordinarily interfere with the concurrent findings on pure questions of fact and review the evidence again unless there are exceptional circumstances justifying the departure from the normal practice. The position may undoubtedly be different if the inference is one of law from the facts admitted and proved or where the finding of fact is materially affected by violation of any rule of law or procedure. (Vide *Firm Sriniwas Ram Kumar Vs. Mahabir Prasad & Ors.*, AIR 1951 SC 177; *M/s. Tulsi Das Khimji Vs. The Workmen*, AIR 1963 SC 1007; and *Pentakota Satyanarayana & Ors. Vs. Pentakota Seetharatnam & Ors.*, AIR 2005 SC 4362). E

11. Where the court below considered the material facts and did not take into consideration any inadmissible evidence etc., the interference is not required by court on third instance. (vide *Madhavan Nair vs. Bhaskar Pillai*, (2005) 10 SCC 553.) F

12. Thus, it is evident from the above that this Court being the fourth Court should not interfere with the exercise of discretion by the courts below as the said courts have exercised their discretion in good faith giving due weight to relevant material and without being swayed by any irrelevant material. Even if two views are possible on the question of fact, we, being the fourth court, should not interfere even though we may exercise discretion differently had the case come before us initially. G

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A 13. In view of the above, we are not inclined to interfere with the finding of fact so far as the issue of bigamy is concerned nor the quantum of punishment on this count required to be interfered with.

B 14. Issue no. 2 relates to the applicability of 498A I.P.C. As it has been alleged by the complainant that she had been given physical and mental torture by the appellant and it was not possible for her to stay with the appellant after 1993 though she was having seven months' pregnancy at that time. She gave birth to a male child in the hospital and the appellant did not even come to see the child. The question would arise as to whether in the facts and circumstances where the complainant had left the matrimonial home and started living with her father in 1993, could a case be registered against the appellant under Section 498A I.P.C. in 1997?

D 15. The provisions of Section 498A IPC read as under :

E "498A. Husband or relative of husband of a woman subjecting her to cruelty. – Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

F Explanation. – For the purposes of this section 'cruelty' means –

G (a) any welful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman;

H (b) harassment of the woman where such harassment is with a view to coercing her to any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her

or any person related to her to meet such demand."

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Cruelty has been defined by the explanation added to the Section itself. The basic ingredients of Section 498A I.P.C. are cruelty and harassment. In the instant case, as the allegation of demand of dowry is not there, we are not concerned with clause (b) of the explanation. The elements of cruelty so far as clause (a) is concerned, have been classified as follows :

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- (i) any 'wilful' conduct which is of such a nature as is likely to drive the woman to commit suicide; or
- (ii) any 'wilful' conduct which is likely to cause grave injury to the woman; or
- (iii) any 'wilful' act which is likely to cause danger to life, limb or health, whether physical or mental of the woman.

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16. In *S. Hanumantha Rao v. S. Ramani*, AIR 1999 SC 1318, this Court considered the meaning of *cruelty* in the context of the provisions under Section 13 of the Hindu Marriage Act, 1955 and observed that :

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"mental cruelty broadly means, when either party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and husband and as a result of which it becomes impossible for the party who has suffered to live with the other party. In other words, the party who has committed wrong is not expected to live with the other party."

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17. In *V. Bhagat v. Mrs. D. Bhagat*, AIR 1994 SC 710, this court, while dealing with the issue of cruelty in the context of Section 13 of the Hindu Marriage Act, observed as under :

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"17.It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must

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- A be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively.
- B What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.....
- C The context and the set up in which the word 'cruelty' has been used in the section seems to us, that intention is not necessary element in cruelty. That word has to be understood in the ordinary sense of the term in matrimonial affairs. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty."
- E 18. In *Mohd. Hoshan v. State of A.P.*; (2002) 7 SCC 414, this Court while dealing with the similar issue held that mental or physical torture should be "continuously" practiced by the accused on the wife. The Court further observed as under :
- F "Whether one spouse has been guilty of cruelty to the other is essentially a question of fact. The impart of complaints, accusations or taunts on a person amounting to cruelty depends on various factors like the sensitivity of the individual victim concerned, the social background, the environment, education etc. Further, mental cruelty varies from person to person depending on the intensity of sensitivity and the degree of courage or endurance to withstand such mental cruelty. In other words, each case has to be decided on its own facts to decide whether the mental cruelty was established or not."
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19. In *Smt. Raj Rani v. State (Delhi Administration)*; AIR 2000 SC 3559, this Court held that while considering the case of cruelty in the context to the provisions of Section 498A I.P.C., the court must examine that allegations/accusations must be of a very grave nature and should be proved beyond reasonable doubt.

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20. In *Sushil Kumar Sharma vs. Union of India*, AIR 2005 SC 3100, this Court explained the distinction of cruelty as provided under Section 306 and 498A IPC observing that under Section 498A cruelty committed by the husband or his relation drive woman to commit suicide etc. while under Section 306 IPC, suicide is abated and intended. Therefore, there is a basic difference of the intention in application of the said provisions.

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21. In *Girdhar Shankar Tawade v. State of Maharashtra*, AIR 2002 SC 2078; this Court held that "cruelty" has to be understood having a specific statutory meaning provided in Section 498A I.P.C. and there should be a case of *continuous* state of affairs of torture by one to another.

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22. "Cruelty" for the purpose of Section 498-A I.P.C. is to be established in the context of S. 498-A IPC as it may be a different from other statutory provisions. It is to be determined/ inferred by considering the conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide etc. It is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as 'cruelty' to attract the provisions of Section 498-A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty.

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23. The instant case required to be examined taking into consideration the aforesaid settled legal provisions. Undoubtedly, there had been complaint by the wife of physical

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- A and mental torture upto 1993 when she left the matrimonial home and started living with her father. The complaint of cruelty was lodged by filing an FIR on 23.5.1997 i.e. after four years of leaving the matrimonial home. More so, the mental or physical torture was not continuous on the part of the appellant
- B as there is no complaint against him between 1993 to 1997 i.e. leaving the matrimonial home by the wife and performing the second marriage by the husband.

- C 24. The complainant Smt. Minati Das (Kalita) P.W.3 deposed that she had been tortured physically and mentally but there was no allegation that she was subjected to physical or mental torture after the birth of the child in 1993. Similarly, Shri Lakhi Kt. Das (P.W.1), the father of the complainant has not mentioned any incident of physical or mental torture after 1993.
- D None of the witnesses examined in this respect deposed that there was a continuous physical or mental torture and some untoward incident occurred between the husband and wife after 1993.

- E 25. The Trial Court, after considering the depositions, came to the conclusion that the appellant being husband of the complainant subjected her to cruelty both mental and physical. But it further held as under :

- F *"No doubt there is no evidence on the record to show that the accused committed harassment on P.W.3 with a view to force her to commit suicide or to fulfil illegal demands of him. The continuous harassment, both physical and mental by the accused made her life miserable and forced her to live separately from her husband."* (Emphasis added)

- G 26. The Appellate Court dealt with the issue as under :

- H "Her specific evidence is that the cruelty both physical and mental was meted to her by her husband after the marriage and this has been well supported by the evidence of the

witnesses as discussed above. Her mental torture had reached to such an extent that she had *to leave her matrimonial home* along with the baby in the womb and this has been well testified in the evidence on record." (emphasis added) A

27. The High Court considered the issue and reached the conclusion: B

"The offence u/s 498 A IPC is punishable with imprisonment upto three years only and as such the prosecution is barred u/S468, Cr.P.C. In view of the catena of decisions of the Apex Court, the law is well settled that offence of cruelty to wife is a continuing offence. Hence the fact that the wife was not living with the husband since 1993 is immaterial and mental and other cruelty may be committed even after the parties living separately." C D

The High Court further held that during the subsistence of the marriage, the appellant contracted second marriage and started living with the another woman that itself was a cruelty and therefore he was liable for the punishment under Section 498 A. E

28. Thus, from the above, it is evident that the Trial Court itself had been of the view that there was no evidence of cruelty on the part of the appellant with a view to drive the complainant to commit suicide. The appellate Forum reached the conclusion that mental torture was of the magnitude that the complainant had to leave her matrimonial home during her pregnancy. The Revisional court did not find that the complainant had been subjected to cruelty continuously. F G

29. Thus, in our opinion, all the three courts below erred in not considering the case in correct perspective. The findings so recorded by the Courts below may be relevant for granting the relief in a matrimonial dispute i.e. divorce etc. but could not H

A bring home the charge under Section 498-A IPC.

30. Thus, in view of the aforesaid, conviction of the appellant under Section 498-A IPC and punishment for the said offence awarded by the courts below are set aside. However, B conviction and sentence under Section 494 IPC are maintained.

31. Appeal succeeds to the said extent and disposed of accordingly.

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Appeal partly allowed.