

APPELLATE CRIMINAL.

Before Guha, Bartley and Mukherjea JJ.

KSHITEESH CHANDRA CHAKRABARTI

1937

Feb. 1, 4.

v.

EMPEROR.*

False personation—Misrepresentation as to caste, if amounts to false personation—Marriage by misrepresentation, if void—Indian Penal Code (XLV of 1860), ss. 419, 496.

In a case where the accused falsely represented to the mother of a girl that he was a *Bārendra* Brahmin, whereas in fact he really belonged to another sub-caste, namely, *Barna* Brahmin, and thereby procured his marriage with the girl to which the mother would not have agreed but for such false representation and as a result of which marriage the mother was excommunicated,

Held that the accused was guilty of cheating by false personation under s. 419 of the Indian Penal Code.

Queen v. Mohim Chunder Sil (1); *Queen v. Puddomonie Boistobce* (2) and *Queen v. Dabee Sing* (3) referred to.

There is no rule of Hindu law which prevents, in the absence of a custom, a man and woman belonging to two sub-castes of a twice-born class from entering into a lawful marriage.

Gopi Krishna Kasaudhan v. Jagger (4) followed.

Per MUKHERJEA J. *Querae*. Whether the obtaining of the guardians' consent to a marriage by misrepresentation would render a marriage otherwise duly performed null and void.

Brindaban Chandra Kurnokar v. Chundra Kurnokar (5); *Aunjona Dasi v. Prahlad Chandra Ghose* (6) and *Venkatacharyulu v. Ranga-charyulu* (7) discussed.

CRIMINAL APPEAL.

The material facts of the case and arguments in the appeal appear from the judgment.

Deenesh Chandra Ray for the appellant.

Debendra Narayan Bhattacharjya and *Surajit Chandra Lahiri* for the Crown.

*Criminal Appeal, No. 793 of 1936, against the order of Sreesh Chandra Chakrabarti, Assistant Sessions Judge of Pabna, dated Aug. 11, 1936.

(1) (1871) 16 W. R. (Cr.) 42.

(5) (1885) I. L. R. 12 Cal. 140.

(2) (1866) 5 W. R. (Cr.) 98.

(6) (1870) 6 B. L. R. 243.

(3) (1867) 7 W. R. (Cr.) 55.

(7) (1890) I. L. R. 14 Mad. 316.

(4) (1936) I. L. R. 58 All. 397;

L. R. 63 I. A. 295.

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GUHA J. The appellants Kshiteesh Chandra Chakrabarti and Hari Pada Bhattacharjya have been convicted by the learned Assistant Sessions Judge, Pabna, under ss. 109/496, 419/34 and 496 of the Indian Penal Code, on the unanimous verdict of the jury before whom the trial of the appellants was held and have been sentenced as follows :—

The appellant Kshiteesh Chandra Chakrabarti to five years' rigorous imprisonment, under s. 109/496 of the Indian Penal Code, and two years' rigorous imprisonment under s. 419/34, sentences to run concurrently.

The appellant Hari Pada Bhattacharjya to rigorous imprisonment for four years' under s. 496 of the Indian Penal Code and rigorous imprisonment for one year under s. 419/34 of the Indian Penal Code, sentences running concurrently.

The case against the appellants was started by a written *ijâhâr* of the complainant Sura Bala Debee received from the Sub-Divisional Officer of Pabna through the Assistant Sub-Inspector of Pabna by post, treated as the First Information. It was stated in the aforesaid First Information that the complainant was a *Bârendra* Brahmin widow coming from a *kulin* and respectable family; that her daughter Jog Maya Debee was aged fifteen years; that the accused persons Kshiteesh Chandra Chakrabarti and Hari Pada Bhattacharjya, in collusion with one another, represented to the informant that they were high class Brahmins and arranged for the daughter's marriage; that after the marriage was celebrated the informant came to learn that the accused persons belonged to a class of Brahmins with whom they had no social intercourse; the accused persons were low class *Barna* Brahmins and priests of *kaibartas*, and there existed no social connection between the accused and the *Bârendra* Brahmins; that the high class Brahmins do not use the water touched by them.

In her statement on solemn affirmation before the Magistrate who took cognisance of the offence complained of Sura Bala Debee said that "she heard from some persons that accused Hari Pada was a *jete* Brahmin and that had she known that the accused Hari Pada was a *jete* Brahmin, she would not have given her daughter in marriage with him."

The charge framed against Kshiteesh Chandra Chakrabarti was that he abetted the commission of the offence of marriage ceremony fraudulently gone through without lawful marriage by Hari Pada Bhattacharjya, which was committed in consequence of his abetment (s. 109/496 of the Indian Penal Code). Hari Pada Bhattacharjya was charged with having committed offence of fraudulently going through the ceremony of being married to Jog Maya Debee, knowing that he was not lawfully married (s. 496 of the Indian Penal Code). The accused persons were further charged under s. 419/34 of the Indian Penal Code inasmuch, as they had cheated Sura Bala Debee by representing that they were *Bârendra* Brahmins and intentionally induced her to give her daughter Jog Maya Debee in marriage, which caused harm to Sura Bala Debee in mind and reputation.

At the trial evidence was led on the side of the prosecution that the accused persons were *Barna* Brahmins with whom *Bârendra* Brahmins could not have inter-marriage, that Hari Pada's father was the priest of *jeliâ kaibartas*. Evidence was also given that Sura Bala was deceived by the representation of the accused persons which induced her to marry her daughter Jog Maya to Hari Pada, which marriage would not have been celebrated but for the false representation. It was also in evidence that Sura Bala Debee suffered harm in mind and reputation, and was excommunicated after the marriage of her daughter Jog Maya with Hari Pada. The evidence of Sura Bala and other witnesses on the side of the

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prosecution was that she was excommunicated from society.

On the charge under s. 496 of the Indian Penal Code after the material portion of the evidence was summarised the jurors were directed by the Judge as follows :—

As regards s. 496 the first ingredient is whether accused (Hari Pada) went through the ceremony of marriage, there should not be difficulty. The prosecution case is that that happened. Evidence has also been led to show that all the ceremonies were performed. The mother's mind and the wife's mind have been noticed and explained. Hari Pada claims Jog Maya as his wife. Jury to form opinion.

As regards the second element whether Hari Pada knew then that he was lawfully married, by merely going through the ceremony, the jury must be careful. Marriage between sub-castes or sub-sects is lawful. But marriage between different castes is not valid and lawful. Point therefore is whether Hari Pada was altogether of different caste from Jog Maya. If he was not so, then he was lawfully married.

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The jury must consider it with a view to find out if *barna* was altogether a different caste, if there was lawful marriage, if *barna* was a mere sub-caste, and if he was lawfully married.

On this part of the case before the Court, it must be taken to be established that there is no rule of Hindu law which prevents a man and woman belonging to two sub-castes of a twice-born class from entering into a lawful marriage. The *shâstras* dealing with the Hindu law of marriage do not contain any injunction forbidding marriages between persons belonging to different divisions of the same *barna*. *Gopi Krishna Kasaudhan v. Jaggo* (1). The Judge's direction to the jury in general terms as mentioned above, on the question of law arising for consideration in the case, may be taken to in consonance with the pronouncement of their Lordships of the Judicial Committee of the Privy Council referred to above; but it appears to us that, on the evidence as led by the prosecution, the Judge should have directed the jury that as the marriage in question was between persons of two different sub-castes, and there being no evidence to indicate that Hari Pada and Jog Maya

belonged to different castes, that as a marriage between two different divisions of the same caste, the marriage which was admitted, was not invalid in law. The Judge should further have held, on the evidence before him, that there was no case to go to the jury so far as the question of validity of the marriage of Jog Maya Debee and Hari Pada Bhattacharjya under the Hindu law was concerned.

It may be observed in line with the pronouncement of the Judicial Committee in the case referred to above, what is it upon which the invalidity of the marriage is sought to be sustained. The evidence in the case before us at the most goes only to indicate that marriages between members of different sub-castes of the same caste do not ordinarily take place, but this does not imply that such a marriage is interdicted and would, if performed, be declared to be invalid. There may be a disinclination to marry outside a sub-caste inspired probably by a social prejudice; but it cannot be seriously maintained that there is any custom which has acquired the force of law. On the evidence before us no such custom was set up or proved as would render the marriage invalid.

On the above view of the case before us the charge against the appellants in regard to offences under s. 496 of the Indian Penal Code, or abetment of the same, was not maintainable, and the conviction and sentence under s. 109/496 of the Indian Penal Code in the case of Kshiteesh Chandra Chakrabarti, and under s. 496 of the Indian Penal Code in the case of Hari Pada Bhattacharjya must be set aside.

The appellants, as mentioned already, have also been convicted of the offence under s. 419/34 of the Indian Penal Code. They were charged with the false representation that they were *Bârendra* Brahmins and of having cheated Sura Bala Debee by inducing her to give her daughter Jog Maya Debee in marriage, which caused harm to Sura Bala Debee in mind and reputation. There was evidence led by

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the prosecution bearing upon this part of the case; and the Judge after placing that evidence directed the jury that the accused persons could be convicted of cheating only if the prosecution has been able to prove beyond reasonable doubt that they committed deception by making representation that they were *Bârendra* Brahmins; that they were not *Bârendra* Brahmins at all; that they were *Barna* Brahmins; that had they said so, Sura Bala would not have given Jog Maya in marriage to Hari Pada; and that damage has been caused to Sura Bala's reputation or mind by their acts. The jurors on the above direction gave their verdict of guilty. It cannot be said that there was any misdirection or non-direction involved in the charge to the jury so far as the case under s. 419/34 of the Indian Penal Code was concerned, as sought to be established against the appellants; and the conviction based on the unanimous verdict of the jury must be upheld. It may be mentioned in this connection that in view of the decisions of this Court [see *Queen v. Mohim Chunder Sil* (1); *Queen v. Komul Dass* (2); *Queen v. Puddomonie Boistobee* (3) and *Queen v. Dabee Sing* (4)], the offence under s. 419 of the Indian Penal Code, cheating by false personation as charged against the appellants was established. In the case before us the accused represented to Sura Bala that they were *Bârendra* Brahmins although they were not so. They belonged to the sub-caste of *Barna* Brahmins and Sura Bala Debee would not have given her daughter Jog Maya Debee in marriage to Hari Pada Bhattacharjya but for that representation. The marriage resulted in the excommunication of Sura Bala Debee from her own caste, as believed by the jury in the case before us, thus causing harm to her in mind and reputation.

The conviction of the appellants under s. 419/34 of the Indian Penal Code based on the unanimous verdict of the jury must be upheld. The sentence

(1) (1871) 16 W. R. (Cr.) 42.

(2) (1865) 2 W. R. (Cr.) 7.

(3) (1866) 5 W. R. (Cr.) 98.

(4) (1867) 7 W. R. (Cr.) 55.

passed on the appellants under the above provision of the law cannot be considered to be severe in any way, regard being had to the facts and the circumstances of the case before us.

The result of our decision is that the conviction of and the sentences passed on the appellants under s. 109/496 and s. 496 are set aside, while their conviction and sentences under s. 419/34 of the Indian Penal Code are affirmed.

The appeal is disposed of accordingly.

BARTLEY J. I have had the advantage of seeing the judgment which has now been delivered by Mr. Justice Guha and I entirely agree.

MUKHERJEA J. I agree with my learned brother Mr. Justice Guha in the view expressed by him in his judgment and in the order that has been passed in this appeal. I would only add a few words as regards the new point which was raised by Mr. Bhattacharjya in his reply. Mr. Bhattacharjya who appears for the Crown has contended that even assuming that a marriage between a *Bârendra* Brahmin girl and a man who is *Barna* Brahmin is not invalid in law, yet if in this case the conviction under s. 419 of the Indian Penal Code stands and the accused are held guilty of practising deception upon the complainant which induced her to give away her daughter in marriage which otherwise she would not have done, the fraud practised by the accused is quite sufficient to invalidate the marriage even if it is otherwise valid. Mr. Bhattacharjya argues, therefore, that there should be conviction under s. 496 of the Indian Penal Code also if we uphold the conviction under s. 419.

It may be said in the first place that this aspect of the case was not presented to the jury at all. In his charge to the jury the Judge clearly stated that the accused could be convicted under s. 496 of the

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Indian Penal Code if Hari Pada was not lawfully married to Jog Maya by reason of his belonging to a different caste and if he knew that he was not lawfully married by reason of this difference in caste. No direction was given to the jury to consider the question of fraud as an element to establish the invalidity of marriage in connection with the charge under s. 496 of the Indian Penal Code.

But apart from that, the question that Mr. Bhattacharjya has raised is not strictly relevant to the present enquiry and could be properly decided only if a civil suit was brought to set aside the marriage. It is well settled that a Hindu marriage is a sacrament and not a contract and the presence of a consenting mind is not indispensable. If the marriage rites are duly performed and there is no impediment to the marriage in the shape of identity of *gotra* or prohibited degrees of relationship, the doctrine of *factum valet* applies and makes the marriage indissoluble in the absence of proof of any force or fraud: *Brindaban Chandra Kurmokar v. Chundra Kurmokar* (1). The reason for the exception seems to be that where the girl is abducted by force or fraud and married, there is neither any gift by the lawful guardian nor the performance of any religious ceremony in the proper sense and there is consequently an absence of the essential ingredients necessary to constitute a valid marriage. In *Aunjona Dasi v. Prahlad Chandra Ghose* (2) a minor girl was forcibly removed by the defendant from the custody of the mother and taken to the house of a stranger where the defendant went through a marriage ceremony with her and the only thing decided in that case was that a suit would lie in a civil Court for a declaration that the marriage was invalid and the Court would have jurisdiction in such suit to declare the marriage void if procured by fraud or force and celebrated without the consent of the necessary parties.

(1) (1885) I. L. R. 12 Cal. 140.

(2) (1890) 6 B. L. R. 243.

or without the necessary formalities. In *Venkatacharyulu v Rangacharyulu* (1) the marriage was held to be valid although the father who was the legal guardian had not given his consent and the mother falsely represented to the officiating priest that such consent was given.

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In the present case the mother who was the legal guardian had given away the daughter in marriage and there was due observance of the religious ceremonies. Whether the fact that the mother's consent was procured by misrepresentation would be sufficient to render the marriage null and void is a question which is not altogether beyond controversy. It is not, however, necessary to express any opinion on this point either one way or the other. To establish a charge under s. 496 of the Indian Penal Code it is not enough to show that the marriage may be set aside on the ground of fraud or declared a nullity : it is incumbent upon the prosecution to go further and to prove that the accused knew that there was no valid marriage and he has gone through a show of marriage with a fraudulent or ulterior object in view. There is no such evidence adduced by the prosecution in this case and I agree therefore that the conviction under s. 496/109 of the Indian Penal Code in the case of the first appellant and that under s. 496 of the Indian Penal Code as regards the second appellant must be set aside.

Appeal allowed in part

A. C. R. C.

(1) (1890) I. L. R. 14 Mad. 316.