REVISIONAL CRIMINAL.

1912
June. 7.

Before Mr. Justice Chamier.

EMPEROR *v.* MADAN GOPAL.*

Act No. XLV of 1860 *(Indian Penal Code), section* 498—*Enticing away a married woman—Marriage—Hindu law—Whether marriage legal between a Banya and the illegitimate daughter of a Brahman and a Banya woman.*

Held that there was no reason why a marriage between a Banya and the illegitimate daughter of a Brahman father and Banya mother should not be valid according to Hindu law, especially when the marriage was recognized by the caste to which the husband belonged.

Padam Kumari v. *Suraj Kumari* (1) and *In the matter of Ram Kumari* (2) referred to.

The facts of this case were as follows:—

One Madan Gopal was convicted by a magistrate of the second class in the Benares district under section 498 of the Indian Penal Code of having enticed away Musammat Kharag Kumari, the wife of Gokul Prasad. Madan Gopal appealed to the District Magistrate, but without success. He then applied to the High Court in revision upon two grounds, first, that it was not satisfactorily proved that he had enticed away Musammat Kharag Kumari, and secondly, that the marriage of Kharag Kumari with Gokul Prasad was according to the Hindu law invalid.

Mr. *R. K. Sorabji*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

CHAMIER, J.—The applicant was convicted by a magistrate of the second class in the Benares district under section 498, Indian Penal Code, of having enticed away Musammat Kharag Kumari, who was the wife of the complainant, Gokul Prasad. The applicant appealed to the District Magistrate without success. He has now applied to this Court to set aside the conviction on two grounds, namely, that there is no evidence that he enticed the woman away and that she is not the lawfully married wife of the complainant. On the first point there are the concurrent findings of the courts below, and having looked into the evidence I see no reason to think that they are erroneous. On the second point it is conceded that the prosecution had to establish that Kharag Kumari was the

* Criminal revision No. 250 of 1912 from an order of C. A. C. Streatfeild, District Magistrate of Benares, dated the 2nd of April, 1912.

(1) (1908) I. L. R., 28 All., 458. (2) (1891) I. L. R., 16 Calc., 264.

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wife of the complainant. The prosecution proved that the complainant married Kharag Kumari eleven or twelve years ago in Nepal, to which country both parties seem to have originally belonged. The prosecution also proved that complainant and Kharag Kumari had lived together as husband and wife ever since the marriage, and that they had been recognized as husband and wife by their caste-fellows. There is also definite evidence that all the usual ceremonies were performed at the marriage. In these circumstances it seems to me that it must be presumed till the contrary is shown that Kharag Kumari is the lawful wife of the complainant. The applicant contended that she could not be the lawful wife of the complainant because she was the daughter of a Brahman by a mistress of the Banya caste, whereas complainant is a Banya of legitimate birth. Counsel for the applicant relied upon the decision of this Court in *Padam Kumari* v. *Suraj Kumari* (1), that whatever may have been the case in ancient times, a marriage between a Brahman and Kshatrya woman is now invalid, and upon the opinions expressed by Mayne and other writers on the Hindu law that marriages between persons of different castes have long since become obsolete. It is not clear how far the prohibition of inter-marriage between castes applies to marriages between persons of hybrid caste or marriages between a person of hybrid caste and a Brahman or a Kshatrya or a Vaisya or a Sudra. According to Manu, Chap. X, verse 8, Kharag Kumari should be called Ambasht'ha or Vaisya. In practice, however, it seems that a child born of parents of different castes, though an outcaste in the strict sense, is regarded for many purposes as belonging to the caste either of its father or of its mother. There is no evidence as to whether Kharag Kumari was regarded as a Brahman or a Banya, but if, as is possible, even probable, she was regarded as belonging to the Banya caste, there would, even according to modern usage, be no obstacle to a marriage between her and the complainant, though the latter would perhaps be lowered in social estimation by such a marriage. Dr. Gurudas Banerjee in his work on the Hindu law of marriage, 2nd Edition, p. 73, says :—" At the present day when caste has become so elastic and loss of caste so rare, the general question whether an outcaste is eligible for marriage at all, and, if so, in what caste is not of much practical importance.

(1) (1908) I. L. R., 28 All., 458.

The only case of some difficulty is that of a person who is born of parents belonging to two different castes. But even in these cases which, however, are by no means common, the child if recognized by relatives and others as belonging to the caste of either parent and is married in that caste.....And it may, perhaps, be laid down as a general rule that so far as prohibition of inter-marriage between different castes is concerned, a marriage would be valid or void according as the parties to it are or are not in point of fact recognized as belonging to the same caste." According to this view of the law the marriage between the complainant and Kharag Kumari has been valid. If the rule against inter-marriage between persons of different castes were applied strictly, it is doubtful whether a person born of an illicit union between two Hindus, could contract a valid marriage at all. In the case of *Ram Kumari* (1) the illegitimate child of Chhattri parents had been married according to Hindu rites to a man who was by caste a Chhattri. The High Court held that as the parties to the marriage had been recognized by their castemen as belonging to the same caste, the marriage was lawful, and they also laid it down that illegitimacy was no absolute disqualification for marriage in the case of Hindus. There is the further consideration in the present case that the parties belonged to Nepal where the Hindu Law of marriage may not be so strictly followed as it is in these Provinces. I have been referred to no authority which requires me to hold that the marriage in the present case was invalid. The applicant has failed to rebut the presumption that there was a valid marriage. In my opinion he was rightly convicted under section 498 of the Indian Penal Code.

I am asked to reduce the sentence on the ground that the applicant may have supposed that he was justified in regarding Kharag Kumari as the mistress, not the wife of the complainant. But there is nothing to show that the complainant or any one else has ever regarded her as a mistress. The application is rejected.

Application rejected.

(1) (1891) I. L. R., 18 Calc., 264.