(1937) 02 CAL CK 0001

Calcutta High Court

Case No: None

Kshitish Chandra Chakraburty and Another		APPELLANT
	Vs	
Emperor		RESPONDENT

Date of Decision: Feb. 4, 1937

Acts Referred:

- Penal Code, 1860 (IPC) - Section 109, 34, 419, 496

Citation: AIR 1937 Cal 214

Hon'ble Judges: Guha, J; Bartley, J; B.K. Mukherji, J

Bench: Full Bench

Judgement

Guha, J.

The appellants Kshitish Chandra Chakraburty and Haripada Bhattacharyya have been convicted by the learned Assistant Sessions Judge, Pabna, under Sections 109/496, 419/34, and 496, I.P. C, on the unanimous verdict of the jury before whom the trial of the appellants was held and have been sentenced as follows: The appellant Kshitish Chandra Chakraburty to five years'' rigorous imprisonment under Sections 109/ 496, I.P.C., and two years'' rigorous imprisonment under Sections 419/34, the sentences to run concurrently; the appellant Haripada Bhattacharyya to rigorous imprisonment for four years, u/s 496, I.P.C., and rigorous imprisonment for one year under the Sections 419/34 I.P.C., sentences running concurrently. The case against the appellants was started by a written ijahar of the complainant Surabala Debi 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 Barendra Brahmin widow coming from a kulin and respectable family; that her daughter Jogmaya Debi was aged fifteen years; that the accused persons Kshitish Chandra Chakraburty and Haripada Bhattacharyya, 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 flow class Barna Brahmins and priests of Kaibartas, and there existed no social connexion between the accused and the Barendra 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 cognizance of the offence complained of, Surabala Debi said that:

She heard from some, persons that accused Haripada was a jele Brahmin and that had she known that the accused Haripada was a jele Brahmin, she would not have given her daughter in marriage with him.

2. The charge framed against Kshitish Chandra Chakraburty was that he abetted the commission of the offence of a marriage ceremony fraudulently gone through without lawful marriage by Haripada Bhattacharyya, which was committed in consequence of his abetment (Ss. 109/496, I.P. C). Haripada Bhattacharyya was charged with having committed the offence of fraudulently going through the ceremony of being married to Jogmaya Debi, knowing that he was not lawfully being married (Section 496,1. P.C.). The accused persons were further charged under Sections 419/34, I.P.C., inasmuch as they had cheated Surabala Dabi by representing that they were Barendra Brahmins and intentionally induced her to give her daughter Jogmaya Debi in marriage, which caused harm to Surabala Debi 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 Barendra Brahmins could not have intermarriage, that Haripada''s father was the priest of Jelia Kaibartas. Evidence was also given that Surabala was deceived by the representation of the accused persons which induced her to marry her daughter Jogmaya to Haripada, which marriage would not have been celebrated but for the false representation. It was also in evidence that Surabala Debi suffered harm in mind and reputation and was excommunicated after the marriage of her daughter Jogmaya with Haripada. The evidence of Surabala and other witnesses on the side of the prosecution was that she was excommunicated from society. On the charge u/s 496, I.P. C, after the material portion of the evidence was summarised, the jurors were directed by the Judge as follows:
As regards Section 496 the first ingredient is whether accused (Haripada) went through the ceremony of marriage; there should not be difficulty. The prosecution case is that happened. Evidence has also been led to show that all the ceremonies were performed. The mother''s mind and wife''s mind have been noticed and explained. Haripada claims Jogmaya as his wife. Jury to form opinion. As regards the second element whether Haripada 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 Haripada was altogether of different caste

from Jogmaya. If he was so, then he was not lawfully married.... 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.

3. 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 Shastras 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 v. Mst. Jaggo . 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 be 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 Haripada and Jogmaya 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 Jogmaya Debi and Haripada Bhattacharyya under the Hindu law was concerned.

4. 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 u/s 496, I.P. C, or abetment of the same, was not maintainable and the conviction and sentence under Sections 109/496,1. P.C., in the case of Kshitish Chandra Chakraburty, and under 8. 496, I.P. C, in the case of Haripada Bhattacharyya, must be sat aside.

5. The appellants, as mentioned already, have also been convicted of the offence under Sections 419/34, I.P.C. They were charged with the false representation that they were Barendra Brahmins and of having cheated Surabala Debi by inducing her to give her daughter Jogmaya Debi in marriage, which caused harm to Surabala Debi in mind and reputation. There was evidence led by 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 a representation that they were Barendra Brahmins; that they were not Barendra Brahmins at all; that they were Barna Brahmins; that had they said so, Surabala would not have given Jogmaya in marriage to Haripada; and that damage has been caused to Surabala''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 Sections 419/34, I.P. C, 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 (1871) 16 WR 42; Queen v. Komul Dasa (1865) 2 WR 7; Queen v. Puddomonie Boistobee (1866) 5 WR 98 and Queen v. Debee Singh (1867) 7 WR 55), the offence u/s 419, I.P. C, cheating by false personation, as charged against the appellants, was established. In the case before us the accused represented to Surabala that they were Barendra Brahmins although they were not so. They belonged to the sub-caste of Barna Brahmins and Surabala Debi would not have given her daughter Jogmaya Debi in marriage to Haripada Bhattacharyya but for that representation. The marriage resulted in the excommunication of Burabala Debi from her own caste, as believed by the jury in the case before us, thus causing harm to her in mind and reputation.

6. The conviction of the appellants under Sections 419/34,1. P.C., based on the unanimous verdict of the jury, must be upheld. The sentence 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 Sections 109/496 and Section 496 are set aside, while their conviction and sentences under Sections 419/34, I.P.C. are affirmed. The appeal is disposed of accordingly.

Bartley, J.

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

B.K. Mukherji, J.

8. I agree with my learned brother Guha, J. 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. Bhattacharyya in his reply. Mr. Bhattacharyya, who appears for the Crown, has contended that, even assuming that a marriage between a Barendra Brahmin girl and a man who is a Barna Brahmin, is not invalid in law, yet, if in this case the conviction u/s 419, I.P.C. 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. Bhattacharyya argues therefore that there should be conviction u/s 496,1. P.C. also if we uphold the conviction u/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 dearly stated that the accused could be convicted u/s 496, I.P. C, if Haripada was not lawfully married to Jogmaya 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 a marriage in connection with the charge u/s 496 I.P.C.

9. But apart from that the question that Mr. Bhattacharyya has raised is not strictly relevant to the present inquiry 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: Brindabun Chandra v. Chundra Kurmoka (1886) 12 Cal 140. 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 (1871) 6 Beng LR 243 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 a suit to declare the marriage void if procured by fraud or force and celebrated without the consent of the necessary parties or without the necessary formalities. In Venkata Charyulu v. Ranga Charyulu (1891) 14 Mad 316 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.

10. 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 u/s 496, I.P.C., 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 Sections 496/109, I.P. C, in the case of the first appellant and that u/s 496, I.P. C, as regards the Second appellant, must be set aside.