*Privy Council Appeal No.* 20 *of* 1941
*Patna Appeal No.* 17 *of* 1940

**Raja Braja Sunder Deb and others** – – – – *Appellants*

*v.*

**Bamdeb Das *alias* Pattanaik (since deceased) and others** – – – – – – – – – – *Respondents*

FROM

## THE HIGH COURT OF JUDICATURE AT PATNA

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH AUGUST, 1943

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*Present at the Hearing:*

LORD ATKIN
LORD THANKERTON
LORD PORTER
LORD CLAUSON
SIR GEORGE RANKIN

[*Delivered by* LORD PORTER]

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This appeal by special leave from the High Court of Patna dated the 25th January, 1938, raises the question whether the appellants who were plaintiffs in the original suit are entitled to succeed in an action against the defendants for malicious prosecution.

The first plaintiff is the Raja of Aul, once an independent tributary State in Orissa, but now an ordinary Zemindari subject to the laws of British India. He is a Khetriya by caste. The second appellant is the son of the original second plaintiff, Krishna Chandra Jagati, deceased, and has been duly substituted for him in the proceedings. Both the original second and third plaintiffs were servants of the first plaintiff. The first and second respondents are the sons and legal personal representatives of the original first defendant, Bamdeb Das, alias Patnaik, who was the father of one Jugal Kishori Das and was related to one Harikrishna Mahanty, now deceased. The second defendant is a nephew of the third defendant, who was a cousin of Harikrishna Mahanty. These two defendants formed a joint Hindu family. The defendants and Harikrishna Mahanty were Karans by caste, a caste regarded as of inferior status to that of the first plaintiff.

The original defendants are said to have prosecuted the original plaintiffs maliciously in the following circumstances.

On the 18th September, 1926, Kanaka, the elder daughter of Harikrishna, was with the consent of her father taken to the household of the first appellant, it was said, by the respondents, in order to become his concubine, but, by the appellants, in order to make a subordinate form of marriage which would give her the status of what is called a Chauki Bai, a position which may perhaps be described as that of a secondary wife. There is no doubt that the other two original plantiffs were implicated in the removal and no argument to the contrary has been addressed to their Lordships.

That some such status as Chauki Bai may exist appears from a publication called Pachis Sawal, which contains 25 questions addressed to the Rajas and Chiefs of the Regulation and Tributory Mahals by the Superintendent in 1814 and was published under the authority of Government.

Two of these questions may be quoted:—

*Question* 2.—By what titles are the several Ranis distinguished?

*Answer*: First married is entitled the Pat Mahadae and the rest Mahadae. Besides such those of other castes, kept as Phool Bahees, are entitled " Ranee."

*Question* 10.—On the death of the Raja, suppose he leaves no son born of any of his Ranees but leave a brother(s) and sons by his Phool Beebahis and concubines and suppose the Ranees have not become " Sutees," who in such a case would succeed?

*Answer*: The son born of the Phool Beebahi becomes the Raja.

This book has previously been received in evidence by their Lordships. In any case apart from it there is a considerable body of evidence to the effect that the Rajas of Aul were accustomed to take to themselves subordinate wives and without determining the question their Lordships are prepared to decide the present case on the assumption that the Rajas are entitled by custom to take such wives.

On the evening on which his daughter was taken away Harikrishna Mahanty appears to have given a caste feast accompanied by various ceremonies such as might indicate that his daughter was to be taken to the Rajah's palace in order to become a Chauki Bahi, and after the feast was over she was carried to the Palace in a palanquin accompanied by her brother and the village barber. Moreover the feast was attended by a considerable number of the Karan caste including the first and third defendants though these latter explain their presence by saying that they feared the enmity of the Raja if they stayed away.

These circumstances are urged by the appellants as showing that the girl was being given in marriage and not in concubinage, since it is said that if the latter had been intended it would have been an occasion for sorrow and not for feasting and in any case members of her caste would not have attended.

When they reached the palace the barber and the palanquin bearers remained outside, whilst the girl was taken within, and next morning they returned to their own village. Shamsunder Mahanty, the girl's brother, also remained outside and stayed after the barber had left but he was not called as witness and it does not appear that he ever saw his sister again.

In October, 1926, about a month after the girl reached the palace she became ill and died. It is alleged that the doctor who attended her diagnosed her illness as dropsy possibly caused by an attack of malarial fever, but he was not called to give evidence to this effect at the trial, though he was called at the criminal prosecution. During this period she appears to have remained in the harem, but no marriage ceremony took place.

In these circumstances, her taking away, illness and death not unnaturally caused considerable commotion amongst those of her own caste, commotion which was accentuated when it was rumoured that Harikrishna was about to send her younger sister to the palace. At any rate it is not surprising that in March, 1927, a meeting was held amongst the Karans, the summons to which was sent out under the signatures of the second defendant and Jugal Kishore, son of the first defendant. The subject for discussion was " ascertainment of social degeneration of the Karans of this part and the remedy therefor."

At this meeting, it appears from the programme which was produced in evidence that one subject raised was " reform of the hateful practice prevailing at this place ", and it was given in evidence that it was proposed to ostracise Harikrishna for sending his daughter to the Raja. He was not in

fact ostracised, 25 voting in his favour and 23 against. He says that the reason for this result was that the custom of secondary marriage was recognised, the respondents that he asked pardon and was excused. The fact is undeniable but the exact cause of the result is not directly material.

The next step which led up to the present action was taken by Jugal Kishore Das.

In April, 1927, a police inspector went to the neighbourhood in connection with a petition case in which Jugal Kishore Das was concerned. In the course of his examination by the inspector he made a statement implicating the three appellants and Harikrishna, and of his own accord lodged a First Information Report on the 20th of April accusing them of selling and buying minor girls for the purpose of illicit intercourse.

Jugal Kishore Das is dead, but it is alleged that Bamdeb Das and the second and third defendants instigated the prosecution and instructed the police and therefore were the real prosecutors. There is evidence to support this allegation though the testimony of the defendants and the general effect of that of the police is against this contention, but the Judge of first instance found it established and their Lordships propose to deal with the case on the assumption that his finding is right.

As a result of the allegations contained in the First Information Report a charge sheet was prepared dated the 20th May, 1927.

In it the first appellant was noted as an accused person not sent up for trial and in fact he never was so sent up. The second and third appellants and Harikrishna were sent for trial, the latter under section 372 I.P.C. (selling or letting to hire of any person under eighteen years of age with intent that such person shall be employed or used for prostitution or illicit intercourse or any unlawful or immoral purpose) and the other two under Section 373 I.P.C. read with Section 114 I.P.C. (buying, hiring or obtaining any person under eighteen years of age with the like intent). For the purpose of these sections, illicit intercourse is defined to mean " sexual intercourse between persons not united by marriage or by any union or tie which though not amounting to a marriage is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities as constituting between them a *quasi*-marital relation."

As a result of this information the second and third Appellants were criminally prosecuted. The hearing of this case took place before Mr. B. Misra and was protracted over the space of about a year. Some fourteen witnesses were called on behalf of the prosecution, and after hearing the evidence the learned magistrate dismissed the case without calling upon the accused persons, and found:

(1) That the age of the girl was between 13 or 14.

(2) That a sum of Rs.500 was paid for the girl.

(3) That the girl was given to the first appellant.

(4) That she was given as a Chauki Bai and that upon the evidence contained in the Pachis Sawal and elicited from the witnesses such a union is at least a recognised tie.

The witnesses were examined and cross-examined at length and inasmuch as the depositions were put in evidence in the present case their Lordships will refer to them in considering the findings at which the Subordinate Judge and the High Court have arrived.

After this decision Harikrishna took no further step but on the 10th June, 1929, the appellants instituted the present suit in the Court of the Subordinate Judge of Cuttack alleging that the original defendants in collusion with one another lodged a criminal information through Jugal Kishore falsely and maliciously implicating the appellants and were the real

prosecutors. The learned Subordinate Judge found these charges proved and gave Rs.6,000 as damages divisible as to the first appellant into a sum of Rs.2,000 for pain and suffering and Rs.1,000 for costs and as to each of the other two into Rs.500 for pain and suffering and Rs.1,000 for costs.

This finding was reversed by the High Court in a judgment obviously influenced by a strong dislike of the quasi-marriage spoken to, and animadverting in very strong terms upon the honesty and capability of the learned magistrate and the learned Subordinate Judge.

Whilst their Lordships agree with the conclusion reached by the High Court they must not be thought to agree with these observations. The learned magistrate appears to them to have given a careful and dispassionate consideration to the matter and to have arrived at a reasonable and they think a justifiable solution. Furthermore whilst they differ sharply in many respects from the conclusions of the learned Subordinate Judge, they see no reason to cast aspersions upon his efforts. Their Lordships will consider his more detailed findings at a later stage, but before they do so there is one problem which requires immediate solution, viz.:—Has the Rajah of Aul any cause of action for malicious prosecution?

In their Lordships' view clearly he has not: the simple answer is that he was never prosecuted. Their Lordships find themselves in entire agreement with the observations of Harries C.J. spoken when rejecting the appellant's petition for leave to appeal to His Majesty in Council:

> "In my view it is clear that the Raja of Aul had no cause of action for malicious prosecution. He was never in fact prosecuted though the information originally laid did suggest he was to a large extent responsible for the purchase of this girl. Be that as it may, it is clear that no criminal proceedings were ever taken against him, and that being so he could never maintain an action for damages for malicious prosecution."

As regards the other two appellants the learned Subordinate Judge made certain findings which must now be considered.

(1) It was alleged by the prosecution that when she was sent to Aul the girl was between 12 and 13 years of age. The learned Subordinate Judge found that there was no satisfactory and reliable evidence of this allegation. The exact age however is immaterial provided she was under 18 years of age. As to this there is ample evidence. Even the appellants' witnesses do not put her age more definitely than 17 or 18, whilst the doctor and the defendants' witnesses, some of whom were her contemporaries or nearly her contemporaries, put her age at not more than 13 or 14. This evidence commended itself to the learned magistrate and their Lordships agree with his finding. They would add that there is evidence that one of the respondents' witnesses at the criminal trial obtained a copy of this girl's horoscope and handed it to the police, but that the original was with Harikrishna. The production of the original document would have set the matter at rest but in any case it has to be remembered that the question is not whether the girl was over 18 but whether the respondents reasonably thought she was younger. If the father had, and did not produce, so vital a document, they might well believe the girl was much under the prescribed age. Even if it were incumbent upon the respondents to prove that she was in fact under 18, their Lordships think sufficient proof was given, especially when it is remembered that, if she was not, the whole case breaks down, and yet in an application by the respondents in the criminal proceedings for transfer of the case to another magistrate it is said only "that the defence of the petitioners is that the girl in question was taken for marriage in Ful Bebahi form . . ."

(ii) The learned Subordinate Judge further finds no money was ever paid. As in the case of the previous finding, such a contention, if established, would be fatal to the prosecution. Yet it was never mentioned in the petition referred to above. Nor, indeed, was it seriously contested in the criminal proceedings. It is true that the appellants were not called upon to give evidence, but they cross-examined the prosecution's witnesses at length and as the learned magistrate says, the fact was not categorically denied.

From an examination of the record in the criminal proceedings the witnesses never seem to have been specifically challenged on the matter. It was not until the civil proceedings were heard that it was asserted that no money passed. There is plenty of evidence on behalf of the respondents that it did, and their Lordships again find themselves in agreement with the learned magistrate. Even if they did not it would be enough if in this matter, as in point (i), the respondents honestly believed the girl was bought.

Finally there is the substantial question whether the respondents had reasonable and probable cause for believing that the girl was given in order to become a concubine and not for some quasi-marital relationship, and whether they were malicious.

In order to succeed in an action for malicious prosecution the plaintiff must in the first instance prove two things: (i) that defendant was malicious and (ii) that he acted without reasonable and probable cause.

Malice has been said to mean any wrong or indirect motive, but a prosecution is not malicious merely because it is inspired by anger. However wrongheaded a prosecutor may be, if he honestly thinks that the accused has been guilty of a criminal offence he cannot be the initiator of a malicious prosecution. But malice alone is not enough: there must also be shown to be absence of reasonable and probable cause. If, in the present case, the respondents honestly believed a criminal offence to have been committed and had reasonable cause for so doing, they are not liable in this action, and even though they were malicious they still would not be liable if they had reasonable and probable cause for believing in the appellants' guilt.

In the present case, as in most cases, the two questions are interwoven, but for the sake of simplification their Lordships are prepared to assume without determining that the respondents were prepared to take the opportunity afforded them of making a general attack upon the type of subordinate marriage, which was said to have been intended and to have taken advantage of Harikrishna's action in order to do so. But they may nevertheless have then honestly believed that a criminal offence had been committed and have undertaken the prosecution in that belief. Let it be assumed that at the time when the girl was given away the respondents knew of the claim of the Rajas of Aul that they were entitled by custom to unite themselves with Karans by the method of Ful Bebahi marriage and thereby to give the girl so united to them the status of a Chauki Bai. Still the question arises, had they at the time of the institution of the prosecution good reasons for believing that Kanaka was taken as a concubine and not under this custom. If the question was whether on the occasion of the feast when the girl was actually removed, the respondents had reasonable cause for his belief the matter might be one of doubt. But those are not the circumstances. The girl was taken away and lived in the Raja's harem for a month, but no ceremony was performed. She died in unusual circumstances and if the respondents really were prosecutors they must have known of the statement given by the Raja to the police before the prosecution took place: a statement which was given in evidence and contained the following assertions. He (i.e., the Raja) said that this girl was brought by her father and left in his palace to be used as a Palati. He denied having any personal knowledge of her importation. He continued to say that many people bring in their girls when they are too poor to maintain them and such people are usually allowed to be left in his harem to be used as Palatis or disposed of in marriage to their caste people. He further stated that he heard that the girl was 17 or 18, but he had no occasion to see her. He also denied having issued any order to the other two appellants to bring in the girl, nor did he say that there was any negotiation about the girl with him. He admitted that the girl remained in his harem since she was taken in and she used to be looked after by his maidservants. He gave out that according to his household custom no girl is taken as Chauki Bai, etc., until she is kept under observation for some time. So there was no certainty in this connection.

The policeman ends the extract from his case diary from which these remarks are taken by saying: " I further examined the proprietor's manager and office superintendent and they also made the same statement as the proprietor and disclaimed all personal knowledge about the girl or of the occurrence."

In the circumstances such a statement was bound to give rise to the gravest suspicions. So much so, indeed, that the learned Subordinate Judge, taking the view he did, felt himself constrained to disbelieve this statement and to find that the Raja had made false answers to the policeman's questions for fear of criminal proceedings.

In considering whether this inference is true or not, it is noteworthy that the Raja, though he was a plaintiff, was not called on the trial of the action. Even if his statement was untrue their Lordships think it must have established a very reasonable belief in the minds of the respondents that there never was any question of making the girl a Chauki Bai. Indeed, their Lordships do not think it established that the Raja did intend to do so, much less that the respondents had no reasonable or probable cause for thinking that no marriage of any kind was contemplated.

It is true that the learned Subordinate Judge has found that Harikrishna intended to give his daughter to be a Chauki Bai, but this finding, even if accepted, has no bearing upon the ultimate decision.

In the first place Harikrishna is not a party to the present proceedings, and in the second even if he were, the question would not be what he intended but what the respondents reasonably thought his intentions were.

As it is, what the respondents thought of Harikrishna's action is not directly material. The material question is what was the respondents' reasonable belief as to the circumstances in which and the object with which the second and third appellants took away the girl.

In their Lordships' opinion the respondents might well believe that the appellants' intention was to take her as a concubine, and it certainly has not been proved that there was no reasonable or probable cause for this view. As it was incumbent upon the appellants, if they were to succeed, to prove that no reasonable and probable cause for the prosecution existed, it follows that the appellants have not made out their case, and the suit fails in respect of all three.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal to His Majesty in Council.

(28380) Wt. 8226—23 150 8/43 D.L. G. 338

**In the Privy Council**

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RAJA BRAJA SUNDER DEB AND OTHERS

*v.*

BAMDEB DAS *alias* PATTANAIK (since deceased) AND OTHERS

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DELIVERED BY LORD PORTER

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