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Court : Mumbai

Decided On : Sep-21-1951

Reported in : 1953CriLJ743

Judge : Mangalmurti, J.

Appellant : The State

Respondent : Billi and anr.

Judgement :

ORDER

Mangalmurti, J.

1. One Dhanau made an application under Section 552, Criminal P.C.R the Additional District Magistrate, Bilaspur, praying that the latter should make an order for the immediate restoration to him of his minor wife Mst. Para-buli who is at present living with her father Billi.

2. The allegations in the application were that Billi was a greedy fellow, that he had already carried on negotiations for getting Parabuli married in 'churi' form to some other person and that if she remained with Billi he (Billi) would take money and get her married in 'churi' form to some other person. Billi denied these allegations and stated that he was not sending Parabuli to her husband's place because the customary 'gauna' ceremony had not taken place.

3. The learned Additional District Magistrate disbelieved the witnesses examined by both the parties as they were highly interested and their evidence did not give any clear idea about the matter; and yet the learned Magistrate passed the following order:

According to the non-applicant himself the girl is minor and in my opinion the legal guardian of the girl after marriage is the husband. The mere fact that 'Gauna' ceremony has not been performed, in my opinion, should not justify retention of the girl by the father-in-law. This is marriage season now and if really the non-applicant wants to perform the 2nd marriage, he can do so within 2 months from the date of this order and in case if he fails, then the girl will be returned to the husband immediately. In no circumstances the non-applicant will negotiate this girl's marriage by 'churi' with anybody else during this period.

4. The learned Additional Sessions Judge, Bilaspur, has reported the case under Section 438, Criminal P.C. to this Court on the ground that the order of the learned Additional District Magistrate, Bilaspur is without jurisdiction.

5. Section 552, Criminal P.C. runs thus:

Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of sixteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

Thus both the detention and the purpose must be unlawful. The law on the point has been very lucidly discussed in - *Abraham v. Mahtabo* 16 Cal 487 . The age of the girl in that case was under 14 years and the age of the girl in the present case is also 13 years. In - *Abraham v. Mahtabo* supra their Lordships of the Calcutta High Court observed at pages 501-503:

Undoubtedly there was an unlawful detention. It was immaterial whether the girl did or did not consent; she was kept against the will of those who were lawfully entitled to have charge of her, and this keeping and the refusal to give her up amounted to detention which was unlawful. The question whether the purpose was unlawful is, however, more difficult to determine. x x x and that the purpose, whether entertained towards a woman or towards a female child, must be in itself unlawful.

The purpose of forcing a woman to sexual intercourse would certainly be unlawful; the purpose of having sexual intercourse with a girl under 14, even with her consent, would I take it, be equally unlawful within the meaning of this section, because the girl's consent would be immaterial. But it cannot be said that the purpose of enabling or persuading an adult woman to become a Christian would be in itself unlawful. If it is not unlawful in the case of an adult woman, it could only be unlawful in the case of a child by reason of its being done without the guardian's consent. But we think it is impossible to construe the section so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian.

The section was not enacted for the protection of (sic female?) children only or of children generally. It applies to women & to female children only: and this combination and exclusion of male children, goes to show not only that some definite purpose unlawful in itself, was contemplated, but that the purpose had some special reference to the sex of the person against whom it was entertained. This view is supported by the earlier legislation on the subject. The sections of the earlier Acts, corresponding to Section 551 of the Procedure Code (Act 10 of 1882), empowered the Magistrate to act when a woman or female child was obtained for specified purposes; viz., adultery, concubine, prostitution, deflowering or disposing of her in marriage. The words 'any unlawful purpose' were first substituted in Bengal Act 4 of 1860 for the specified purposes mentioned in the previous Acts, and those words have been used in all the subsequent Acts, but the Magistrate's power has always been restricted to the case of women and female children. It may be that the effect of the alteration was to extend the scope of the section and

to include some purposes other than those which were before distinctly specified, but it is unnecessary to consider whether this is the case; it is enough to say that the purpose which is here found to have been entertained is not an unlawful purpose within the meaning of the section.

It follows that the Magistrate had no power to make the order which he did.'

That case was followed in - *Thakordas v. Bhagwandas* 4 Bom LR 609, wherein it was observed at page 610: It has been held that the purpose contemplated by that section must be in itself unlawful and must not be construed so as to make it include purposes which although not unlawful in themselves might only become so when entertained towards a child in opposition to the wishes of its guardian; - *Abraham v. Mahatabo*.

6. The learned Counsel who appeared in this Court for Dhanau, party No. 2, relied upon - *Emperor v. Tulsidas* 30 Nag LR 76 at p. 82, which followed - *Abraham v. Mahtabo* 16 Cal 487, so far as the discussion regarding unlawful detention was concerned. So far as the expression 'unlawful purpose' is concerned, in - *Emperor v. Tulsidas* supra the detention by the father of a minor married girl against the wishes of her husband, her legal guardian under the Hindu Law, was with the object of remarrying her. That would clearly be an unlawful purpose because bigamy is an offence under Section 494, Penal Code. In that case - *Emperor v. Tulsidas* it was observed at page 83:

Tested in this light the detention by a father of his minor married daughter contrary to the wish of her husband with the object to remarry her would clearly constitute 'unlawful detention for an unlawful purpose' because bigamy is declared an offence by Section 494, Penal Code.

The learned Counsel for party No. 2, however, relies on the following observations in that case:

Lastly, since the unlawful detention of his minor wife by his father-in-law 'prima facie' affords a cause of action to the husband to recover possession of his wife by a civil action, the purpose of such detention would likewise be 'unlawful' within the

meaning of Section 552 Criminal P.C.

As in that case the girl was detained for the purpose of getting remarried, those observations were 'obiter dicta'. With the greatest respect I would say that the learned Additional Judicial Commissioner did not take into consideration the discussion in - Abraham v. Mahtabo which has been quoted above. I am in respectful agreement with the reasons-given by their Lordships of the Calcutta High Court in that case, viz. - Abraham v. Mahtabo supra and hold that the purpose contemplated by Section 552, Criminal P.C. must be in itself unlawful and must not be construed so as to make it include purposes which, although not unlawful in themselves might only become so when entertained towards a child in opposition to the wishes of its guardian.

7. As the purpose was not unlawful, the provisions of Section 552, Criminal P.C. do not apply to the present case, and the Court ought to have dismissed the petition.

8. The order of the learned Additional District Magistrate, Bilaspur, dated 19.5.1950 is hereby set aside and the application under Section 552, Criminal P.C. dated 28.11.1949 filed by party No. 2 Dhanau is hereby dismissed.

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