

**Umabai Vs. Limbaji**

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**Court :** Andhra Pradesh

**Decided On :** Jun-14-1954

**Reported in :** 1955CriLJ957

**Judge :** Qamar Hasan and; Mohd. Ahmed Ansari, JJ.

**Appellant :** Umabai

**Respondent :** Limbaji

**Judgement :**

ORDER

1. This revision petition by the mother of a minor girl is against two orders of the District Magistrate, Hyderabad District, dated May 19 and 24, 1954, whereby the daughter has been directed by a search warrant to be brought into the court and then handed over to the respondent.

2. The proceedings in the court below had started on an application by one Limbaji, who is the opposite party to this revision petition, alleging that Uma Bai, the mother, was the applicant's paternal aunt; Nagoba, her husband, had died leaving by her a daughter Chotoo Bai who is now eleven years old.

In paragraph 2 of the application, it is alleged that Nagoba was a member of the joint family when he died, and Uma Bai as well as Chotoo Bai both continued to live in the family; that Chotoo Bai, the daughter, is still a member of the joint family, but Uma Bai had remarried.

The petition then contains the allegations that Uma Bai a month back had taken away the minor girl to Bidar, she and her husband were asked to send back the girl, had refused to return the girl, and the mother had said that her husband was determined to get the girl married to someone in his own family, necessary arrangements had been made by Uma Bai and her husband to marry the girl within 8 or 10 days without the knowledge and consent of her lawful guardian, the members of her father's family, therefore, the custody of Uma Bai and her husband of the minor girl is unlawful, amounts to an abduction and illegal detention or an unlawful purpose, and the court should Under Section 552, Criminal P. C. order the restoration of Chotoo Bai to the petitioner, who has claimed to be working 'karta' of the family because of the old age of his father.

3. The Magistrate thereupon took down the<sup>1</sup> deposition of the applicant before him and it pears from the order-sheet of 19-5-1954, that on being satisfied from the statement about the case being a proper one Under Section 552, Criminal P. C, he issued a search warrant for the recovery of the girl, die search warrant was executed and the girl was brought in the Court. From the order-sheet of 24-5-1954, it appears that the girl was handed over to the applicant before the Magistrate, and a receipt obtained from the applicant, and therefore the case was closed.

4. On 24-5-1954, die mother appears to have filed an application before the Magistrate claiming that after the death of her husband she and her minor daughter were driven from the house; that Limbaji was not a member of the deceased husband's joint family; that after the death of her former husband and according to the custom and usage of the community she had remarried; that for the last six years she with her minor daughter had been living at Bidar and Limbaji has nothing to do with her nor with her daughter. She therefore prayed that the ex parte order against her be cancelled, the case be heard before the parties and the order issued for handing over the minor girl to the petitioner Limbaji be cancelled.

The Magistrate fixed May 26 for the hearing, but till 12-15 p. m. nobody appeared to support the application and, therefore, this petition was dismissed.

5. On the same day, a revision petition was filed in this Court which was admitted by one of us on the 31st. On 7-6-1954, we directed the main revision petition to be heard on a near date and also the girl to be in attendance so that we may question the girl.

On June 11, the girl was brought and at first she replied to our inquiries that she was well fed and would stay with the uncle. But when we had asked her to come nearer she burst into tears & said that she would like to go with the mother. Till the rising of the court we kept the girl near us, and she never said that she would go to Limbaji's place from where she was brought in court. These are the broad facts of the case, and we would now assign our reasons for directing the restoration of the girl to her mother which we ordered before we rose on Friday 11-6-1954.

6. Section 552, Criminal P. C, lays down that upon complaint made to a 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 the Magistrate may make an order for the immediate restoration of such woman to liberty or such female child to her husband, parent, guardian or other persons having the lawful charge of such child, and the Magistrate may compel compliance with such order using such force as may be necessary.

7. Regarding the section, it is clear and there are authorities in support of our view, which we shall presently cite that before the Magistrate exercises the powers under the section he must be satisfied that there is detention against the will of those who are lawfully entitled to the custody of the minor girl, and the purpose of the detention is also unlawful. Both unlawful detention and purpose must be proved, and if either is not established, the Magistrate has not the jurisdiction to pass orders under the aforesaid section.

In - 'Abraham v. Mahtabo', 16 Cal 487 (A), where a Hindu girl had gone of her own accord to a Christian Mission House in Patna and was directed to be restored to the applicants who were her second husband and mother, it was held at p. 501 that obviously the Magistrate is only empowered to act when the detention and the purpose are both unlawful.

Again in - 'State v. Billi' AIR 1953 Nag 128 (B), where there was an application by the husband against the father-in-law for the recovery of his minor wife on the allegation that the father-in-law was going to remarry the girl, it was reiterated that the powers Under Section 552 can be exercised only when the detention and the purpose are both unlawful.

8. We need not cite other authorities, for, in no case, it has been decided that if the custody is proper and the purpose is unlawful (sic.) the Magistrate can exercise powers Under Section 552, Criminal P, C. Therefore, the first thing which the Magistrate in this case should have done was to satisfy himself whether the custody of a minor Hindu girl by her mother amounted to unlawful detention especially when there was no allegation that the mother had forfeited her right on remarriage, It is not denied that the Hindu mother is entitled to the guardianship of the person of minor children in preference to her husband's male relations, and remarriage where custom of the community allows such remarriage, does not deprive the mother of this right. Therefore, the custody of the mother, applicant before us, on the date of the application was made to the Magistrate, was not made out as unlawful.

9. It was urged before us that the paternal relations of a Hindu minor girl have a right to give her in marriage. But if such a right is threatened, provisions of the Guardians and Wards Act can be invoked to restrain a Hindu mother from giving the child into marriage.

In the matter of the petition of - 'Brohomayee v. Kashi Chander Sen', 8 Cal 266 (C), the paternal uncle of a minor Hindu girl, whose father was dead, applied to the District Judge under Act No. V of 1861 for the custody of the minor and for an injunction to prevent the mother of the minor for carrying out a projected marriage. The Judge issued an interim injunction, and on appeal to the High Court it was contended that the District Judge had no jurisdiction to determine the right of a party to give an infant in marriage or to grant an injunction. The Division Bench held that the District Judge has the jurisdiction.

It is obvious that this civil right of the applicant before the Magistrate assuming that he has such a right, to give the girl in marriage does not entitle him to order Under

Section 552, Criminal P. C. for proceedings of civil nature cannot be converted into those of criminal.

We are supported in this view by the case of - 'Om Radhe v. Emperor' AIR 1939 Sind 152 (D), where a minor girl was put in an institution by the consent of her mother, but later an application was made Under Section 552 on ground that she would be spoiled. Though it was held in the case that the unlawful purpose was not proved, it was also observed that for such matters the legislature has made provisions in the Guardians and Wards Act, and the powers given to the District Magistrate under S, 552 of the Code ought to be used with caution and only when the conditions of the section are satisfied.

There are other authorities to the same effect. In - 'Nathu Mistry v. Narilal Mistry' AIR 1915 Cal 686 (E), a husband complained to the District Magistrate that his father-in-law was wrongfully detaining his wife and refused to send her to his house without alleging that she was being so detained contrary to her wish, and an order was made by the Magistrate for restoration Under Section 552. It was held there that on the facts the case was not one to which the provisions of Section 552, Criminal P. C. should apply, and if the husband had any grievance he should seek remedy in a civil Court.

We have also the case of - 'Parambath Kanaran v. Vasudevan' AIR 1941 Mad 625 (F), where it was held that the order of the Magistrate directing production of the girl without being satisfied that the marriage had taken place was wrong, and that the proceedings should be quashed as the dispute could be decided more satisfactorily by a civil court than by a summary order of a Magistrate.

10. In light of the aforesaid not think there is much force - 'Tulsidas v. Chitandas' AIR In this case, it was held in an husband against the father on lawful detention of the minor of committing bigamy, that a constitute an unlawful purpose authorities, we do in the authority of 1933 Nag 374 (G).application by the husband against the father on the ground of un-wife for purposes civil wrong would Under Section 552.

In the recent authority of the Court reported in AIR 1953 Nag 128 (B), the observation that civil wrong constitutes an unlawful purpose Under Section 552, it

has been pointed out at p. 130 that these observations were 'obiter dicta' in view of the allegations of the bigamy in the case. Therefore, the mere infringement of a civil wrong does not constitute an unlawful purpose, and at any rate the mother being the guardian of the person of her minor children under the Hindu Law, the daughter before us having expressly said that she would like to remain with the mother, there being no allegation of immorality of the mother, we do not think that this is a fit case in which the Magistrate could have passed orders Under Section 552, as no unlawful detention has been proved.

11. We also feel that before issuing a search warrant for the production of the girl, the Magistrate could have with advantage studied case-law on the subject, which does not approve initial issuing of search warrant.

In the case of AIR 1939 Sind 152 (D), it was held that although an order for restoration Under Section 552 can be enforced by a warrant, if necessary, an order is ordinarily sufficient to meet the purpose of the section, and the Magistrate should not make an order for the ex parte issue of a warrant.

Again in - 'Khuda Bux v. State' : AIR1951 All637 , it was held that although a woman unlawfully detained can Under Section 552 be set at liberty, to issue under that section, a warrant for her arrest will be illegal. Such a warrant can be issued Under Section 100.

12. In view of the aforesaid authorities, it is obvious that the order of the Magistrate of 19-5-1954, directing the search and production of the girl is not such as is approved of by the authorities, and the Magistrate could have issued an order directing the applicant, before us to produce the girl and to show cause why an order against her' should not be made Under Section 552. Such a procedure is also recommended by the authority of AIR 1933 Nag 374 (G), which was strongly relied by the Advocate of the opposite party.

We would have remanded the case had we not been satisfied that the right claimed by the applicant before the Magistrate is to give the minor into marriage on the ground of his being a member of the father's joint family, which assuming that he had such a right, is of a civil nature, adequately provided for and

safeguarded by the provisions of the Guardians and Wards Act, and is not such that can be gone into by the Magistrate in die summary procedure provided for by Section 552. We therefore allow the revision application, set aside the order of the Magistrate giving the custody of the girl to Limbaji and dismiss the application of the opposite party to the Magistrate.

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