

Smt. Basanti Bai Vs. Mohanlal

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Court : Rajasthan

Decided On : Jun-07-1957

Reported in : AIR1958Raj267; 1958CriLJ1245

Judge : K.L. Bapna, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 100 and 552; [Hindu Minority and Guardianship Act, 1956](#) - Sections 13

Appeal No. : Criminal Ref. No. 34 of 1957

Appellant : Smt. Basanti Bai

Respondent : Mohanlal

Advocate for Def. : N.C. Sharma, Adv.

Judgement :

ORDER

K.L. Bapna, J.

1. This is a reference by the learned Additional Sessions Judge, Jhalawar, and is a typical instance where the powers granted to a Magistrate can be abused in the grossest form.

2. One Mohan Lal made an application to the S. D. M., Jhalawar, on 8-11-1956, that he was married to one Sunder Bai about 2 1/2 years ago. She was the daughter of Basanti Bai. It was alleged that Sunder lived with him after the marriage, but she was being prevented by Basanti Bai from coming to the petitioner. It was stated that Basanti Bai also did not allow the petitioner Mohan Lal or his relations to meet Sunder Bai.

It was mentioned that the above facts showed that Sunder was being kept in wrongful confinement. Her age was stated to be 14 years. It was mentioned that under the Hindu Law the petitioner was her guardian. It was prayed that a warrant of search of Sunder Bai be issued, and she may be handed over to the petitioner or set at liberty.

3. Section 100 of the Code of Criminal Procedure runs as follows:

'If any Presidency Magistrate, Magistrate of the first class, or Sub-Divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.'

4. This petition should obviously have been thrown out, because the allegations were only that Sunder Bai was not being allowed to go to her husband, and that the husband or his relations were not being permitted to meet her. These allegations were quite insufficient for even the remotest conclusion that the girl was being wrongfully confined. At best certain persons were being not allowed to meet her, and she was not allowed to go to a particular person, but otherwise her movements were not said to be restrained.

The learned Magistrate, Mr. Jamnalal Laddha, however, proceeded further to examine Mohan Lal. In that statement Mohanlal for the first time added that the girl Sunder Bai was being detained by the mother against her will. A search warrant was issued, and the girl was produced in court on 9-11-1956. The Magistrate did

not record the statement of the girl nor of Basanti Bai who came to court to accompany the girl. There is an order recorded on that date which purports to incorporate what happened before the Magistrate. It says:

'Enquiry was made from the girl whereupon Basanti Bai coaxed the girl to speak out, and the girl Sunder said that she did not want to live with her husband because he was impotent,' The Magistrate proceeded to say in the order that 'the girl was minor calling herself to be about 15 years of age. She was not mature enough to think what was good or bad, and, therefore, she should, according to the Hindu Minority and Guardianship Act, 1956, remain with her guardian, & the guardian of the wife was her husband, and, therefore, the girl is ordered to be given in custody to her husband. Her husband is however, directed not to use coercion on her'.

Sunder Bai made an application to the court immediately that she wanted to file an appeal, and the order of her being given in custody to her husband should not be executed, but this application was refused, and she was handed over to her husband immediately. Basanti Bai, mother of the girl, filed a revision, and the learned Additional Sessions Judge has made a reference that the order of the Magistrate directing the girl to be handed over to the husband should be set aside.

5. The reference is opposed by Mohan Lal, and learned counsel on his behalf contended that the order of the Magistrate was correct, and relied on the following authorities: *Shrinivas v. Badrilal*, (S) AIR 1955 Madh-B 142 (A); *Venkataramaniah Chetty v. Pappamah*, AIR 1948 Mad 103 (B); *Rajendra Nath Mondal v. Anukul Chandra*, AIR 1957 Gal J.39 (C); *Tulsidas Janglyadas v. Chetan-das Domadas*, AIR 1933 Nag 374 (D); *Mt. Bhuri v. Chothia*, 1949 Jaipur LR 19 (E).

One more case relied by the learned Magistrate in his explanation is *Abraham v. Mahtabo*, ILR 1C Cal 487 (F).

6. In (S) AIR 1955 Madh-B. 143 (A), an application had been made by the husband to the District Magistrate that his minor wife had been taken away from his home without his consent by the father, and that she was being detained with a view to her being married for the second time somewhere else. The learned

Magistrate rejected the application after examining the husband and certain witnesses, as in his opinion it had not been proved that the detention of the minor wife of the petitioner was against her will or that she was so detained for unlawful purpose.

The revision was dismissed by the High Court on the ground that the place where the woman was alleged to have been confined was not within the jurisdiction of the Magistrate. But there is an observation that--

'This evidence was 'prima facie' sufficient to issue process to the opponent and call upon him to produce the girl before the court for further inquiry into the matter.'

It may only be stated that in that case there was an allegation of Kidnapping and detention against the will of the woman, and for the unlawful purpose of marrying her second time. In the present case, as stated above, there was no allegation in the complaint that the girl had been wrongfully confined against her will.

The subsequent statement is also of little value because he did not disclose the source of his information which led him to allege that the girl was being kept by the mother against her will. Of course there is no allegation that she was being kept for any unlawful or immoral purpose.

7. In AIR 1948 Mad 103 (B), an application was made under Section 491, Criminal P. C., and the allegations of the husband were that his wife had been living with him, but was taken away by the mother of the girl promising to send her back in a few days. It was alleged that the respondent was intending to take her away to Rangoon. The respondent's reply was that the girl was only 13 years of age, and was not in a fit condition for consummation, and it was prayed that immediate custody of her daughter should not be given to the petitioner.

The learned Judge directed the respondent to surrender the minor to the petitioner on condition that the petitioner should arrange to have the minor girl kept in the custody of some public institution for the period of one year and incur the necessary expenses for the purpose. In paragraph 4 of the judgment it is mentioned that after the marriage the petitioner would be the lawful guardian of his

minor wife, and, therefore, entitled to custody, and even if the girl desired to stay with her mother, the respondent, that would not confer a right on the respondent to detain her.

It is difficult to follow the principle of law behind this judgment. Section 491 (b) could only be relevant and it says that any High Court may, whenever it thinks fit, direct that a person illegally or improperly detained in public or private custody within such limits be set at liberty. If the learned Judge was of opinion that the girl had been illegally or improperly detained, the only order that could be passed would have been that she should be set at liberty. It is not mentioned in that case what the girl herself had to say. There was no finding that the girl had been illegally or improperly detained.

8. In AIR 1957 Cal 139 (C), a warrant was directed to be issued by the Sub-Divisional Magistrate, Chinsurah, for search of a minor woman on the allegations of her husband that she had been taken away by her father and was being detained by him against her wishes at Nadia. On revision the learned Sessions Judge was of opinion that the grounds made out for the issue of the warrant were not good.

Their Lordships of the Calcutta High Court were of opinion that the Magistrate was the best judge about the bona fides of an application under Section 100, Criminal P. C., and that the allegations need not reach that precision and particularity so as to establish definitely that the confinement was in fact an offence. What the learned Judges seem to have held is that there must only be a prima facie case, and not proof that an offence of wrongful confinement has been committed. It is observed in paragraph 4 of that judgment--

'If there are materials upon which a Magistrate can reasonably come to the conclusion that the conditions necessary to be fulfilled for the issue of a warrant for discovery of a person wrongfully confined exist, then it is for the Magistrate before whom the application is made to make up his mind whether a warrant should at all issue.'

9. In AIR 1933 Nag 374 (D), the allegations of the husband were that the girl was being unlawfully detained by her father and brother contrary to her wishes, and they intended to perform her second marriage. The observations in the case were that--

'If the father of a minor married girl keeps her with him against the wishes of her legal guardian, he detains her unlawfully, and if the unlawful detention is for a purpose which is an offence or is legally prohibited or which is a civil wrong it would constitute an unlawful purpose under Section 552, Criminal P. C.'

The case was under Section 552, Criminal P. C., and the allegations made were held to be sufficient for a notice to the non-applicants to produce the girl and to show cause against the complaint.

10. In 1949 Jaipur LR 19 (E), there was a complaint under Section 498, I. P. C., by the husband that his wife Parbhathi was being unlawfully detained by certain accused persons. The Magistrate issued a search warrant under Section 552, Criminal P. C., and the girl was produced from the custody of her father. The Magistrate directed that she should be handed over to the husband. The mother of the girl filed a revision whereupon the Sessions Judge was of opinion that the District Magistrate had no jurisdiction to pass the order which he did.

The High Court agreed with the view of the Sessions Judge and set aside the order, but did not pass an order that the girl be restored to her mother, because she had already been with the husband for some time, and the Magistrate was directed to make further enquiry and to pass an order as may be proper in the circumstances of the case.

11. In ILR 16 Cal 487 (F), a girl Luchminia went to the Mission House, and Radhakissen claiming to be entitled to the custody of the girl made an application along with Mahtabo, the mother of the girl that she should be made over to them. The Magistrate passed an order that the girl should be restored to her mother. It was observed that the detention at the Mission House even with the consent of the girl was not lawful, because she was being kept there against the wishes of those who were lawfully entitled to have charge of her, but the purpose of detention

stated to be that the girl should become a Christian was not held to be unlawful. It was observed that--

'The section (552 of the Code of Criminal Procedure -- Act V of 1898) was not enacted for the protection of children only or of children generally. It applies to women and 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.'

It was held that the Magistrate had no power to make an order which he did. Their Lordships however declined to take the child from the charge of her mother or husband, in the custody of one or other of whom she was, and either of whom the law regarded as her natural and proper guardian, and make her over to a stranger whose detention of the child, against the will of her husband or mother, would, be prima facie unlawful. It was observed that the proper guardian was not shown to be in some way disqualified, nor was it shown that the guardian's character was so bad and mode of life so immoral that it would not be proper to leave the child in his or her charge.

12. None of the cases above cited can support the order of the Magistrate in the present case. In order that action under Section 552 of the Code of Criminal Procedure can be taken, there must be an allegation of abduction or unlawful detention of the woman or female child under the age of 18 years for any unlawful purpose. The allegation in the present case may be considered to have been unlawful detention, but there is no allegation that it was for an unlawful purpose. S, 552, was, therefore, not applicable.

13. Section 100, Criminal P. C., has already been quoted above, and is only applicable when there is reason to believe that any person is confined in such circumstances that the confinement amounts to an offence.

14. Learned counsel for the husband tried to support the order on a contention that the husband was a proper guardian under the [Hindu Minority and Guardianship Act, 1956](#), and, therefore, the Magistrate had jurisdiction to restore the girl to the

husband. The Magistrate was not acting as judge of a civil court. The District Court is empowered under Section 25 of the Guardians and Wards Act to arrest a ward and deliver it to the custody of the guardian, if the ward leaves or is removed from the custody of a guardian of his person, if the Court is of opinion that it will be for the welfare of the ward to return to the custody of the guardian.

A Criminal Court has only jurisdiction under Section 100 of the Code of Criminal Procedure, in case the confinement is stated to be in circumstances which amount to an offence. Apart from those circumstances, the Magistrate's plain duty is to refer the husband to a civil court. Section 13 of the [Hindu Minority and Guardianship Act, 1956](#), lays down that in the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration. Therefore, the right of the guardian of a minor wife is not unrestricted, but is limited by considerations of welfare of the minor herself. The Magistrate in the present case, therefore, had no jurisdiction to issue a warrant, and further to hand her over to her husband contrary to her wishes and the wishes of her mother.

15. It was next contended on behalf of the husband that whatever illegality may have been committed, this Court should not order the girl to be restored to her mother, because she has now completely reconciled with her husband. There is no support for the contention that the girl had since reconciled herself to reside with her husband. The girl has not been produced in this Court, nor her affidavit has been secured and produced in this Court. It is, therefore, not clear what would now be in the best interests of the girl. The order of the Magistrate dated 9-11-1956, is set aside, and the case will go back to the District Magistrate, who will send for the girl by issuing a notice or warrant as may be necessary, ascertain her wishes and wishes of her mother, and thereafter pass an order for the custody of the girl as may be most suitable in the interests of the minor.

16. A copy of this judgment will be sent to the Government for such action as may be deemed proper.