

Abraham Vs. Mahtabo and anr.

Abraham Vs. Mahtabo and anr.

SooperKanoon Citation : sooperkanoon.com/854891

Court : Kolkata

Decided On : Mar-28-1889

Reported in : (1889)ILR16Cal488

Judge : Mitter and ;Macpherson, JJ.

Appellant : Abraham

Respondent : Mahtabo and anr.

Judgement :

Mitter and Macpherson, JJ.

1. Section 551 of the Criminal Procedure Code empowers a District Magistrate, upon complaint made on oath of the abduction or unlawful detention of a woman or of a female child under the age of 14 years, for any unlawful purpose, to 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 to compel obedience with such order, using such force as may be necessary.

2. In pursuance of an order made under that section, the girl Luchminia was taken from the petitioner, who is the Superintendent of the Patna Zenana Mission, and made over to her mother Mahtabo.

3. The case comes before us in the exercise of our revisional powers on a rule to show cause why that order should not be set aside, and why the girl should not be restored to the charge of the petitioner, or such other order made as the facts of the case may warrant and justify.

4. The rule was granted mainly on the ground that the order was made without jurisdiction, as the facts found did not disclose 'an unlawful detention for an unlawful purpose.'

5. The complainants are Mahtabo, the mother, and Radhakissen, the alleged husband, of the girl. They made separate complaints, but they are really acting together. Their case is that the girl is under 14 years of age; that she was legally married to Radhakissen, with whom she lived; and that she was taken away by the petitioner and others and detained in the Mission House.

6. The facts are undisputed to this extent that the girl had lived with Radhakissen for a period of 9 or 10 months, and that on the 18th October she left his house and went to the Mission House, where she remained.

7. It also appears that while she was living with Radhakissen she was visited by and received instruction from the petitioner and a native teacher attached to the Mission-On the part of the petitioner, it was denied that the girl was under 14 years of age, and that she was legally married to Radhakissen, and it was alleged that she was practically being brought up, with the connivance of the mother, to a life of prostitution.

8. The Magistrate took evidence and found that the girl was under 14; that she was legally married; and that, although she went to and remained in the Mission House of her own will, there was, under the circumstances, an unlawful detention for an unlawful purpose. He further found that no facts were established which would disentitle the husband or the mother to the charge of the girl. An order for restoration was accordingly made, and, with the consent of Radhakissen, the girl was made over to her mother. There is no reason to suppose that the facts have been wrongly determined by the Magistrate. There is ample evidence to support his conclusions, and the only question which we have to consider in connection

with the order is whether, on the facts found, there was an unlawful detention for an unlawful purpose. Obviously the Magistrate is only empowered to act when the detention and the purpose are both unlawful.

9. 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.

10. The question whether the purpose was unlawful is, however, more difficult to determine. Admittedly the only purpose was that the girl should become a Christian, and the Magistrate, finding that this involved destruction of her caste and severance from her proper home, held that detention for such a purpose against the will of her guardian was a detention for an unlawful purpose. It is not easy to say what is the meaning of the words 'unlawful detention for an unlawful purpose' as used in this section, but their effect clearly is to limit the Magistrate's power of interference to particular cases. It might seem at first sight that the detention of a child, against the will of her parent or guardian with a view that she should be brought up in a religion which such parent or guardian disapproved of, and the adoption of which would not only involve a total change in the child's mode of life, but would also deprive the parent or guardian of any control in the education or bringing up of the child, would come within the meaning of the words as well as within the mischief which they were intended to provide against.

11. But we think it is not so; and that the purpose, whether entertained towards a woman or towards a female child, must be in itself unlawful.

12. 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.

13. The section 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 the 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, empowered the Magistrate to act when a woman or female child was detained for specified purposes; viz., adultery, concubinage, prostitution, deflowering or disposing of her in marriage. The words 'any unlawful purpose' were first substituted in Bengal Act IV of 1866 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.

14. It follows that the Magistrate had no power to make the order which he did. The question remains whether, in setting it aside, we should undo what was done in giving effect to it and replace the girl in the charge of the person from whom she was taken. We have no hesitation in saying that if the Magistrate had the power which he supposed he had, he in our judgment exercised it very properly on the facts before him. It does not, therefore, follow that, because we now find he had not the power, we should, as a matter of course, restore the state of things which existed when the order was made.

15. We are in fact asked to take this child from the charge of her mother or husband in the custody of one or other of whom she is, and either of whom the law

regards 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 is, we think, very questionable whether we have the power to do this; but, assuming that we have the power, we could only with propriety exercise it if the, proper guardian is shown to be in some way disqualified, or if, at the least, the guardian's character is so bad and mode of life so immoral that it would not be proper to leave the child in his or her charge. Nothing of the sort is established. It is not even alleged that the mother has led or is now leading an immoral life. All that is charged is that, by giving her daughter to a man to whom she was not married, she abandoned her and left her to lead a life of prostitution. The truth of this charge depends upon the fact whether there was or was not a marriage. The Magistrate has found, on ample evidence, that there was a marriage, which would be valid if the parties were not incapable of contracting, and that there is no ground for holding that they were incapable. The marriage is said to be illegal because, according to caste custom, widows are not allowed to marry, and because one of the parties is of higher social status than the other. It is only necessary to point out that widow marriages are now legalised, and that, although a marriage may be improper according to caste custom, it is not on that account illegal.

16. But the whole charge of immorality against the mother falls to the ground when it is found, as the Magistrate has found, that even if there was any legal defect in the marriage, this was unknown to the mother and Radha-kissen, both of whom believed that a valid marriage had taken place.

17. With the religious aspect of the case we have, of course, nothing whatever to do. It matters not whether the case is one of a Hindu child leaving her parents and being received and detained against their will in a Christian institution in order that she may become Christian, or of a Christian child leaving her parents and being received and detained against their will in a Mahomedan institution in order that she may become a Mahomedan.

18. There are no circumstances which would justify us in ordering that the child should be made over to the petitioner, and the rule must, so far as it relates to this,

be discharged.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com