

(1993) 07 BOM CK 0016

In the Bombay High Court

Case No : Criminal Rev. Application No. 22 of 1993 and Criminal Miscellaneous Application No. 99 of 1993

Meharunnissa Khan

APPELLANT

Vs

Kamlesh Naik and Another

RESPONDENT

Date of Decision : 16-07-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 98
Penal Code, 1860 (IPC) — Section 361

Citation : (1995) 1 DMC 302

Hon'ble Judges : E.S. Da Silva, J

Bench : Single Bench

Advocate : F. Rebello, for the Appellant; S.D. Lotlikar and G.U. Bhobe, Public Prosecutor, for the Respondent

Judgement

E.S. Da Silva, J.—This Criminal Revision is directed against the order of the learned J.M.F.C., Panjim, dated 15th May, 1993 in Criminal Misc. Application No. 158/93/C whereby the learned Magistrate has rejected an application moved by the petitioner u/s 98 of Criminal Procedure Code and declined to give to her the custody of her minor daughter Wahida Bi Khan. Along with this application an interim relief was also sought for to the effect that pending the disposal of the application the Court should hand over back to the petitioner the custody of her said daughter.

2. The case of the petitioner is that the respondent No. 1 (hereinafter called the respondent) kidnapped the petitioner's minor daughter on 2.4.1993 against the wishes of the petitioner and her husband, got married to her at Sawantwadi by furnishing a false School Leaving Certificate so as to represent to the concerned authorities that the petitioner's daughter was a major. Thereupon consequent upon a complaint lodged by the petitioner against the respondent about the kidnapping of her daughter the police arrested the said respondent who was, however, released on bail by the learned J.M.F.C. pending investigation of the offence. The material taken into consideration by the learned Magistrate while

enlarging the respondent on bail was the School Leaving Certificate showing the date of birth of Wahida as 9.3.1975 as well as her marriage certificate,

3. Shri Rebello, learned Counsel for the petitioner, has made a strong grievance against the impugned order inasmuch as according to him it appears that the learned Magistrate has grossly overlooked that the law prescribing the minimum of 18 years for marriage of a girl was an invariable rule and as such a marriage with a minor is not to be recognised by law being thus a nullity. It was further contended by the learned Counsel that admittedly the respondent has forged the School Leaving Certificate of the petitioner's daughter so as to mislead the Court and the concerned authorities and led them to believe that Wahida was a major. The learned Magistrate also seems to have ignored that a minor could not give a valid consent and he clearly erred when it was wrongly held by him that Wahida had not been illegally detained by the respondent and that her detention was not unlawful. The learned Magistrate was again not right when he arrived at this conclusion by relying on the statement made by a minor which in all probabilities could not have been believed by him once it is the case of the petitioner that her minor daughter had been induced by the respondent to leave the parental house and accompany him for an unlawful purpose. It was further urged by the learned Counsel that the birth certificate regarding the age of the minor as being 9.3.1976 as well as School Leaving Certificate confirming that her birth occurred on 9.3.1976 had been produced by the petitioner, while the respondent before the Magistrate tendered another birth certificate apparently forged which shows the minor's birth as being 9.3.1975. It was also submitted by the learned Counsel that if by confronting both the birth certificates the one produced by the respondent being not an original document but simply a mere xerox copy it could be found that Wahida was a minor there was therefore no question of her voluntarily having left the parental house so as to enable the respondent to claim that Wahida accompanied him of her own free will. It was further urged by the learned Counsel that the allegation of the respondent that Wahida was presently married to him and that the marriage was celebrated at Sawantwadi becomes also irrelevant. Being a minor, the learned Counsel contended, Wahida could not validly and legally marry without her parents' consent. Hence the marriage was on its face null and inoperative and could not create any rights either to the minor or to the respondent. It was also submitted by the learned Counsel that the learned Magistrate appears to have questioned the minor before releasing her so as to permit Wahida to join the respondent thus totally ignoring the requirements of Section 98 of Criminal Procedure Code. The learned Counsel reminded that the petitioner having filed a criminal case for an offence of kidnapping against the respondent u/s 361 of Indian Penal Code the circumstance of Wahida having married the said respondent should not have weighed in the learned Magistrate's mind considering that Wahida being a minor could not marry without the express permission of the petitioner and/or her husband.

4. In his turn Shri Lotlikar, learned Counsel for the respondent, has invited my

attention to the provision of Section 98 of Criminal Procedure Code which refers to the power to compel restoration of an abducted female. The aforesaid Section provides that upon a complaint made on oath of abduction or unlawful detention of a female child under the age of eighteen years for any lawful purpose a Magistrate may make an order for the immediate restoration of such female child to her parent guardian or other person having lawful charge of such child and may compel compliance with such order, using such force as may be necessary. The learned Counsel has laid stress on the discretion conferred to the Magistrate by the use of the word "may" and at the same time contended that the application of the petitioner before the Trial Court did not allege any abduction or illegal detention of the minor by the respondent and not even reference was made therein to any unlawful purpose which was the requirement of Section 98. It was thus urged that the only ground sought to be made out by the petitioner against the respondent was that the petitioner was entitled to her daughter's custody because she was a minor. The learned Counsel further submitted that the learned J.M.F.C., Panaji, after the girl having been released, interviewed Wahida and allowed her to go wherever she wanted. Thereupon Wahida has chosen to go to the place of her own choice and decided to live with the respondent who is her husband Shri Lotlikar has thrown open some questions for this Court to consider namely as to whether a minor girl under the law was bound to stay with her parents or had a right to choose her own place of residence, whether the parents would impose or demand that their minor children had to stay with their parents and nowhere else and also whether in case the minor did not want to stay along with their parents the parents could maintain an application u/s 98 for the custody of the minor child. It was then submitted by the learned Counsel that the respondent at no time either induced Wahida or detained her against her wishes. Wahida was given full freedom. However she has chosen to reside with the respondent. Being so, it was obvious that in such circumstances the petitioner's application to obtain the custody of her daughter on the ground that she was a minor should not be granted. The learned Counsel further argued that Section 98 is not meant to determine the rights of the parents on their children. It was strictly a criminal procedure to secure the custody of a female minor child which has been kidnapped or illegally detained for unlawful purpose. It was also urged by the learned Counsel that if a complicated question of law arising to determine as to who was to hold the custody of the child. Section 98 of Criminal Procedure Code could not be applicable in that case. In this respect Shri Lotlikar contended that Wahida was born in Bombay and there was no statement or evidence on record to show that either the petitioner or her husband who are the parents, of Wahida were born in Goa. Hence the question would arise as to whether the Goan Law as the personal law of Wahida or the Mohammedan Law was to be applied. The learned Counsel then referred to the provision of the Child's Restraint Marriage Act according to which a marriage of the minor could not be held as invalid and it only provides for a person indulging in such marriage to be punished. It was his contention that the validity of Wahida and respondent's marriage was to be determined with

reference to the correct law applicable to the parties.

5. A number of decisions were cited by Shri Lotlikar namely the case of Md. Idris Vs. State of Bihar and Others, , Thakoredas Manchharam v. Bhugwandas Madhavdas, TV BLR 609, Umabai v. Limbaji ATR 1955 Hyderabad 153, Sebastian Vs. Moideen A.P. and Others, and Jainoo Widow v. M.F. Abrams 16 Bom 307 . I am however of the view that it is not necessary to go into the merits of any of these rulings which appear to have been all given on the special facts of each case and in terms of the relevant legal provisions applicable to those cases. It is only suffice to point out that the reliance placed Md. Idris Vs. State of Bihar and Others, is by all means unwarranted and misconceived. I say so because the record shows and the order of the learned Magistrate in para 9 so reveals also that Wahida has stated that she has married the respondent and prior to that she converted to Hinduism. It is thus seen that on her own admission Wahida is now a Hindu. Therefore the aforesaid authority which eventually deals with the case of marriages under the Mohammedan law and has held that a girl who has attained the age of puberty (15 years) can marry without the consent of her parents and as such is a contest between the girl's father and her husband who was alleged to have abducted her, the minor admitted her marriage before the Magistrate, the order releasing the girl in favour of the husband was found to be justified and affirmed by the High Court appears to be not at all applicable to the instant case.

6. There is indeed a lot of substance in all the submissions of Shri Rebello and I am afraid that it is not permissible for Shri Lotlikar to misplace the real issue in this case by raising questions which do not appear to be relevant or material to decide as to whether the petitioner as a mother and natural guardian of her minor daughter has or not a right to Wahida's custody if one is satisfied that she has left the parental house to join the respondent and get married to him allegedly on account of inducement played on her by the said respondent. Therefore and although quite impressive I am unable to accept the entire line of arguments advanced by the respondent's learned Counsel in this regard.

7. At the very outset I am at loss to see any complicated question of law arising in this case and there should be really no problem to assess the correct issue in its true perspective in view of the plain language of Section 98 which is meant to provide for an effective and immediate relief for the parents of a female child under the age of eighteen years when illegally detained for any unlawful purpose.

8. As rightly pointed out by Shri Rebello the question which really arises is as to who on the day the complaint was lodged by the petitioner to the police against the respondent for his alleged kidnapping of her minor daughter was in lawful guardianship of the child was or not the detention by the respondent of the petitioner's minor daughter subsequent to that complaint an unlawful detention and for an unlawful purpose ?

9. Admittedly the petitioner of her husband were the legal guardians of Wahida

on the day of the complaint. It is also not in dispute that a case of unlawful detention and kidnapping u/s 361 of Indian Penal Code was filed by the petitioner against the respondent. Being so it is obvious that even the marriage purportedly contracted by the minor with her kidnapper can be held to be an act with an unlawful purpose. The record shows that while in lawful guardianship of the petitioner the respondent has induced her minor daughter, took her out from the parental house, made her religion and ultimately got married to her. All this shows that the purpose of the respondent while getting Wahida out from her parents house was utterly unlawful.

10. In the case of *State of Haryana Vs. Raja Ram*, , the Supreme Court while dealing with Section 361 interpreted the words "takes or entices any minor...out of the keeping of the lawful guardian of such minor" and held that the object of the Section seems to protect the minor children from being seduced for improper purposes rather than protect the right and privileges of guardians having the lawful charge or custody of their minor wards. Being so on a plain reading of this Section the consent of the minor who was taken or enticed was wholly immaterial. It was only the guardian's consent which could take the case out of its purview nor was it necessary that the taking or enticing to be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the Section. The consent or willingness of the minor to accompany the accused was immaterial and it would be equally so even if the proposal to go with the accused had emanated from her.

11. In another case of *Thakorlal D. Vadgama Vs. The State of Gujarat*, , it was similarly held by the Apex Court that the word "takes" in Section 361 does not necessarily connote taking by force and it was not confined to use of force, actual or constructive. These words merely mean to cause "to go", "to escort" or "to get into possession". No doubt it does mean physical taking, but not necessarily by use of force or fraud. The two words "takes" and "entices" are intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361, Indian Penal Code. But if the guilty party has laid a foundation by inducement, allurement or threat, etc, and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him.

12. It is thus seen that in the facts and circumstances of the case the whole act of the respondent in taking the minor daughter of the petitioner away from the lawful guardianship of her parents or even consenting the minor to accompany him after which he got married to her without the permission of her parents

becomes unlawful and it is therefore enough to attract Section 361 of Indian Penal Code. Mere persuasion and/or enticement would be sufficient. It was not necessary for the petitioner to prove that the taking away of her minor daughter by the respondent was by the use of force or fraud.

13. At this stage I need not also go through the merits of the respondent's contention that Wahida was a major by relying on a mere xerox copy of an apparently fabricated document of her birth which shows that she was born on 9.3.1975 when the real birth certificate produced by the petitioner in original along with the School Leaving Certificate discloses her birth date as being 9.3.1976. Suffice it to say that in the present context of available circumstances the petitioner's daughter appears *ex facie* to be a minor.

14. In this view of the matter the impugned order of the learned Magistrate cannot be sustained and is therefore bound to be unsettled. This is what I exactly propose to do. Accordingly the order dated 15th May, 1993 of the learned J.M.F.C., Panaji is hereby quashed and set aside. This leaves open the question as to what should be done in relation to the minor who is apparently in the unlawful custody of the respondent. In this respect Shri Rebello has fairly conceded that having regard to the whole past story of this unfortunate case the antecedents of the girl who has allegedly attempted to commit suicide by claiming that she has been harassed by her parents on account of her affair with a Hindu boy, the respondent being a Hindu while the petitioner and her daughter are ostensibly Muslims by religion, the fact that even considering that the birth certificate relied by the petitioner is genuine the girl might attain her majority within a few months this Court may be required to play its role and act as a *bonus pater familias* bearing exclusively in mind the ultimate interest of the minor.

15. I have given my anxious thought on the matter and irrespective of the legitimate claim of the minor's parents I am inclined to allow the minor to remain in the company of the respondent in case a satisfactory report about this character and conduct is secured by this Court from the concerned authorities. I therefore, direct that the Probation Officer in charge of the area of the respondent's residence should furnish such a report within a period of 10 days from the receipt of this order, In the meantime the status quo prevailing may continue. On the receipt of the report a final order regarding the custody of the minor will be passed as per the law. For this purpose the respondent should make himself available to the Probation Officer so as to enable him to collect the necessary data and help him to get the required information to prepare his report. With the above direction rule is accordingly made absolute.