VEERA KORAVAN *In re.*

ANANTA-KRISHNA AYYAR, J.

In the present case, it is clear from the evidence of the other prosecution witnesses that Muhammad Sultan was present at the scene of offence and when the offence was being committed. If so, he should have been asked to swear to facts known to him in the ordinary way, and not merely "tendered for cross-examination."

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Horace Owen Compton Beasley, Chief Justice, and Mr. Justice Anantakrishna Ayyar.

IN THE MATTER OF THANGATHAYEE AMMAL, A MINOR.

1929, July 20.

SUBBUSWAMI GOUNDAN (PETITIONER),

v.

KAMAKSHI AMMAL AND ANOTHER (RESPONDENTS).*

Code of Criminal Procedure (V of 1898), sec. 491—Minor wife illegally detained—Husband seeking to recover custody—If entitled to proceed under section—Plurality of remedies provided by law—If husband bound to resort to less expensive and less threatening remedy—Minor with her consent in custody of a person—Another better entitled in law desires custody—If minor "illegally detained" within meaning of section.

A husband seeking to recover custody of his minor wife illegally detained by others is entitled to proceed under section 491 of the Code of Criminal Procedure, and the opposite party cannot be heard to say that, where there are more than one remedy provided for under the law, the less expensive and less threatening remedy should be resorted to by the petitioner. *Bryant* v. *Bull*, (1879) 10 Ch.D., 155, followed.

If a minor, even though with her own consent, remains in the custody of a person, he must be held to have illegally detained

* Criminal Miscellaneous Petition No. 468 of 1929.

her within the meaning of section 491, if another person, who is better entitled in law to have the custody of the minor, desires to have that custody. *Abraham* v. *Mahtabo*, (1889) I.L.R., 16 Calc., 487, referred to.

PETITION praying that the High Court may be pleased to issue a writ of *habeas corpus* directing the respondents to produce Thangathayee Ammal, the minor wife of the petitioner herein, before the Court to be dealt with according to law, and to hand over the custody of the said minor to the petitioner herein.

K. S. Jayarama Ayyar for petitioner.

Md. Askar Ali for respondents.

JUDGMENT.

This is a petition praying for an order directing the bringing up to the Court of a minor married girl, and also for an order directing that she be handed over to her husband, who is the petitioner. The young girl is the wife of the petitioner, and the first respondent is the mother of the minor girl, and the second her step-brother. The petition is founded on the allegation that, after the marriage, the wife having got into the custody of the two respondents, they have illegally detained her. If these facts are proved, then it is quite sufficient for us to make the order prayed for, if we are satisfied that it is in the interests of the wife that she should be handed over to the care of the person who should naturally have her in his charge, namely, her husband. The petitioner married this young girl on the 9th March 1927. She is said to have been about 10 or 11 years of age then, the evidence as to the exact age of these children is usually rather indefinite and vague, but, assuming her age to have been 11 years, she is now just over 13 years. She is of the Gounda class, and according to the petitioner, it is the custom of that caste for

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wives even before they have attained puberty to reside under the husband's roof. In this case, it is asserted by the petitioner that she resided under his roof and under the roof of his mother for some seven, eight, or nine months. That assertion is denied by the respondents, who say that except for two periods, each of them of about 8 days, she has all along since the marriage resided with the respondents. The petitioner's case is that, after the marriage, she was living with him at Sindupatti, where he was then Sub-Registrar, and that afterwards she was living with his mother at his family house at Pannaipuram. Whilst there, there was, according to him, an outbreak of plague, and having the health and safety of his wife to consider, she was then sent home to the respondents, where she has been living since. As I have stated, the respondents' case is that this is untrue, and that, except for these two periods of 7 or 8 days at a time, she has never resided under the roof of her husband. Last year, the petitioner met with a very serious motor accident which necessitated his having to take leave for a year, and during that time he was not nursed by his wife. On his return from leave, his wife attained puberty—this was some six months ago according to him—and he wished to consummate the marriage and sent word to the respondents stating his willingness to do so, but the respondents refused to send the girl, and there is no question that the puberty ceremonies did not take place until two or three months after the girl attained puberty. The petitioner's case is that, during this time, the respondents were attempting to extort from him a large sum of money and some lands, as a condition for allowing the girl to return to him; and evidence upon this point has been called, and it is abundantly clear to us that, whatever may be the real facts with regard to that, the petitioner had to pay

Rs. 100 to the respondents towards the expenses of the puberty ceremonies

Counter-affidavits have been filed by the first and second respondents. The first respondent has not signed her own affidavit but it is signed on her behalf by the second. Both the affidavits contain largely matters which are entirely irrelevant and which, if true, would merely be reasons for not allowing the young girl to have married the petitioner at all. They do not set forth any valid reasons for detaining the girl after her marriage and refusing to allow her to return to her husband. However, it is asserted that, on the occasion of her first visit to her husband after the marriage, which, it is alleged by the respondents, was only for some eight days, and on this occasion she was accompanied by her mother, the wife was subjected to ill-treatment, the story being that she was sent by the petitioner to fetch water, and as there was some delay in getting it, he abused her, kicked her, and beat her, and later on sent her away. That is the story put forward by the respondents and is the one reason which is largely relied upon by them here as a justification for the girl being with them, as it is alleged that the girl is unwilling to return to her husband. We may say also that it is the case of the respondents that they have not detained her against her will; on the contrary it is their case that they are and have been all along most anxious that she should return to her husband and have endeavoured to get her to do so. But they say that this young girl is extremely self-willed, and under no circumstances would she ever think of or be willing to return to her husband, the reason for this being that she fears a further outbreak of ill-treatment. So that, the respondents' case is that they have not detained her and have always been willing that she should return to her husband, but that she,

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of her own free will, remained with them, and no persuasions or inducements would get her to rejoin her husband.

We ordered the girl to be brought here and also ordered the attendance of both the respondents and the petitioner. We questioned the wife in chambers, and the conclusion we have come to with regard to her—and it is a very definite and clear conclusion—is that she has been tutored by the respondents. That appears to us to be beyond all question. With regard to certain questions put to her touching important matters in the case, she pretended that she knew nothing of them at all, and she is obviously an untruthful person, because it is said that she was taken to Madura and stayed there for some time for the purpose of undergoing treatment to her eyes, which she herself denied, but even her mother the first respondent admitted, although reluctantly, that this was the case. When asked whether she was willing to return to the petitioner, she, definitely and with a great show of resolution, said that nothing could ever induce her to return, and that she would rather die than return to him. We are satisfied that, in so saying, she was not expressing her own opinion at all, but that she was told to say this by her mother and the second respondent. That being so, much of the argument which has been addressed to us on behalf of the respondents as to the duty of the Court to consider the wishes of the wife disappears. If, however, this declaration of the wife that she was not willing to return to her husband were true, then we would have to consider what the duty of the Court is. Whilst it is quite unnecessary, in our view of the circumstances, to consider that position, we must state that we consider that, in the case of of a girl of only 13 years of age, her consent or otherwise is quite immaterial. What we would have to consider

would be the welfare of the minor wife, and in doing so, the fact that she prefers to reside elsewhere than with her husband, although, had she been old enough to form a good opinion, this would have been a very important circumstance for consideration, would not in our view be entitled to very much or any weight at all. We have also come to the conclusion that the assertion that she was ill-treated when she was residing under her husband's roof is a pure invention. The only evidence with regard to this is the statement of the young wife herself which, for the reasons we have already stated, we decline to attach any weight to, and that of her mother, the first respondent, who professes to have been an eye-witness of it. But there is this important fact to be considered. In the affidavit which was sworn to on the first respondent's behalf by the second respondent, no allegation whatever is made that the young girl was beaten or kicked by her husband. The only reference to this occurs in the affidavit of the second respondent, and he does not profess to have been an eye-witness of it, and it is therefore entirely hearsay. We do not think that, had this young girl been subjected to ill-treatment, she would have been allowed, even accepting the respondents' case, to have gone back again to her husband, nor do we think it in the least likely that either of the respondents would have been anxious that she should return to him, as they say they are. The whole case appears to us to be a pure concoction, and we shall dismiss the charge of cruelty as being entirely untrue. We have to consider the welfare of the minor, and in this connection we are bound to say that we think that it is to the advantage of this young girl that she should return at the earliest possible moment to her husband, who is a well-to-do man, a Bachelor of Arts, a Sub-Registrar, and so far as we can see, perfectly

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respectable. It must always be to the advantage of a wife to return to her husband, and it is very difficult to believe that Hindu parents of a young wife would ever consider that it was better for her to remain with them than to go to her husband, after she had attained puberty. It is not necessary for us to consider why it is that the respondents have kept this girl from her husband. But there is evidence which we think we are entitled to rely on, that the respondents attempted to make terms upon which this young girl would be allowed to return to her husband. There is the evidence of Chinnaswami Goundan, who is a relation of the respondents and also a connection by marriage of the petitioner, and who lives next door to the respondents, that the respondents were demanding Rs. 5,000 and some lands, as a condition for allowing the girl to return to her husband. We think that it is most probable that that correctly represents the facts. It was pressed upon us on behalf of the respondents that this was most unlikely, because at the time of the marriage the respondents could have insisted, as a condition for giving their permission to the petitioner to marry this young girl, on the payment of a very substantial sum of money. Although, in some cases, this no doubt would be a very cogent argument, we think that in this case no such terms were exacted, because the respondents were anxious that this girl should marry the petitioner, and therefore did not want to risk the marriage going off by insisting upon onerous terms.

Another argument addressed to us, which seems to us to have no force at all, was that the proceedings under section 491 of the Criminal Procedure Code were not the appropriate ones. On the facts of this case, it was argued that the relief should have been sought under the Guardian and Wards Act, which would not have put upon the respondents the expense that these proceedings

have done, because the enquiry could have been had locally and therefore been less expensive than this. It is said that, by adopting these proceedings, the petitioner has given evidence of his vindictiveness and that he has really used this Court as a means of extortion, that is to say, by bringing these proceedings, he has as it were exercised an unfair pressure on the respondents. This is an argument which we cannot accede to. We are very far from saying that in a case such as this the remedy of the husband could be under the provisions of the Guardian and Wards Act, but it is not necessary for us to express an opinion beyond saying that we think it is very doubtful. Even assuming that that remedy were open to the petitioner, it is clear that the remedy under section 491 of the Criminal Procedure Code is one which is open to the petitioner, and the respondents cannot be heard to say that, where there is a remedy provided by law, that remedy should not be resorted to, because there is another remedy less expensive and less threatening. BACON V.C. in *Bryant* v. *Bull*(1), when he had to deal with a similar argument, said that it did not matter how many remedies were open to a person—there might be 5,000—he was entitled to avail himself of any one of them, and that what had to be shown was that the remedy that he did avail himself of was not open to him. It is quite clear that the petitioner is entitled to come here under section 491 of the Criminal Procedure Code. We are satisfied that there is no force in the argument addressed to us.

Another argument put forward was that the wife had not been illegally detained. This of course was founded on the assertion that she consented to live with the respondents and is unwilling to return to her

(1) (1879) 10 Ch.D., 155.

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husband. As we have already expressed the view that she is not unwilling to return to her husband, much of the force of this argument is lost. But it is quite clear from *Abraham* v. *Mahtabo*(1) that, even if a minor does consent and remains in the custody of those who are charged with illegally detaining her, that does not matter, but the persons who keep her even with her consent are to be held to have illegally detained her, if a person who is better entitled in law to have the custody of that person desires to have that custody. That was a case under section 552 of the Criminal Procedure Code, but we think that the reasons given for deciding the case in that way are equally applicable to the facts of this case.

Under these circumstances, we find that the petitioner is entitled to have the order he asks for. We direct the respondents to hand over the minor wife to his custody. The wife will be handed over now in Court to her husband.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Horace Owen Compton Beasley, Chief Justice, and Mr. Justice Cornish.

1929, August 1.

SAMI KARUPPA TEVAN (2ND ACCUSED), APPELLANT.*

Criminal Tribes Act (VI of 1924), sec. 23 (1) (b)—Long interval of time between accused coming out of prison after serving last sentence and commission of offence—If a "special reason" to the contrary" with in meaning of section.

Under the Criminal Tribes Act (VI of 1924), the fact that there has been a long interval of time, between the accused person coming out of prison after serving his last sentence and

(1) (1889) I.L.R., 16 Calc., 487.

* Criminal Appeal No. 107 of 1927.