

Turning to the issues in the case, I must hold on the first issue that the adoption set out in the plaint is not true and, even if true, would not be valid ; on the second issue that there is no joint family properly speaking and that the plaintiff has no claim to partition ; on the third issue that there is no proof that any of the properties in which the plaintiff claims a share were acquired out of her earnings ; and on the fourth issue, even if it were proved that the plaintiff's immoral earnings contributed to the acquisition of the properties claimed, that a suit based on such an immoral association would not lie. No decision seems necessary on the fifth issue. On issues 6, 7 and 8 I find that the plaintiff cannot question the alienation in favour of defendants 4 and 5. In the result, the suit is dismissed with costs, one set for defendants 1 and 2 and one set for defendants 4 and 5. The plaintiff will pay the court-fee due to Government.

GANGAMMA
v.
KUPPAMMAL.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Burn.

IN RE KANNEGANTI CHOWDARAYYA
(ACCUSED), APPELLANT.*

1938,
February 22.

*Indian Penal Code (XLV of 1860), sec. 361—Hindu boy—
Mother's custody from birth—Acquiescence by father—
Later, father enticing away the child—If an offence.*

A boy born of Hindu parents had been brought up by his mother and was in her keeping from the date of his birth. The

* Criminal Appeals Nos. 456 and 465 of 1937.

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father who was living separately did not object to the mother having the custody of the child. Some time later, the father, by deceitful means, took the child away from the mother and kept the boy with him. He was convicted of an offence under section 363, Indian Penal Code.

Held that the conviction of the father under section 363, Indian Penal Code, was wrong.

The parties being Hindus, the father was *the* lawful guardian whose rights of guardianship, until they were taken away by a decree of a competent Court or surrendered by himself, were paramount to those of any other person. The father having acquiesced in the retention by the mother of the custody of the child from the date of his birth for over three years and three months, the mother was a lawful guardian within the meaning of the explanation to section 361, Indian Penal Code, and the child was taken or enticed away out of her keeping. But the father being entitled to the lawful custody of the child, his act in taking the child from the keeping of his mother could not amount to an offence of kidnapping from lawful guardianship by virtue of the exception to that section.

APPEALS against the sentences of the Court of Session of the Guntur Division in Case No. 22 of the Calendar for 1937.

S. Vepa, N. V. B. Sankara Rao and T. Krishna-murti for appellants.

Public Prosecutor (V. L. Ethiraj) for the Crown.
Cur. adv. vult.

JUDGMENT.

This is a case of an unusual kind. In fact I am informed that it is the first case of its kind. The appellant in Criminal Appeal No. 456 of 1937 was the first accused, and the appellant in Criminal Appeal No. 465 of 1937 was the second accused, in Sessions Case No. 22 of 1937 on the file of the learned Sessions Judge of Guntur. Along with them two Muhammadans were tried and the charges upon which they were put up for

trial were that the first accused kidnapped a minor boy from lawful guardianship with intent that he should be murdered (section 364, Indian Penal Code). The second, third and fourth accused were charged with abetment of this offence. The learned Sessions Judge found the first accused guilty of an offence under section 363, Indian Penal Code, holding it not proved that the kidnapping was in order that the little boy might be murdered. The first accused has been sentenced to seven years' rigorous imprisonment. The second accused was convicted of abetment of the offence under section 363, Indian Penal Code, and sentenced to five years' rigorous imprisonment. The third and fourth accused were acquitted.

The remarkable feature of this case is that the first accused is the father of the boy, whom he is said to have kidnapped from the keeping of the boy's mother (P. W. 1). P.W. 1 and the first accused were married several years ago and according to P.W. 1 her husband deserted her. She filed a suit for maintenance and this was compromised on terms by which the first accused gave her some land to defray her costs and some additional land for her maintenance. This compromise took place on 19th July 1933, and in 1936 P.W. 1 put the decree in execution and got delivery of the lands. In the meanwhile in 1935 the first accused had filed a suit in the Court of the District Munsif, Guntur, to set aside the compromise entered into in July 1933, on the ground that it had been obtained by fraud. A copy of the plaint has been filed as Exhibit L and it shows that the first accused alleged that his marriage with P.W. 1 had never been consummated, that her child was

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illegitimate, and that she was actually pregnant as the result of adulterous intercourse at the time the compromise took place. The plaint was dated 22nd November 1935. In that it is alleged that P.W. 1's son was born on 2nd January 1934.

In these circumstances, it was alleged that on 11th April 1937 the first accused with the help of the other three kidnapped his own son from the guardianship of the little boy's mother. Learned Counsel for the appellants has argued that the evidence of P.Ws. 1 to 5, who speak to the kidnapping, ought not to be accepted. P.W. 1 is the mother of the child: P.W. 2 is a woman with whom P.W. 1 was lodging while she was in Guntur for the purposes of her litigation: P.W. 3 is another woman who was lodging in the same house: and P.Ws. 4 and 5 are boys, aged 13 and 11 respectively, who were employed in sweet-meat shops in Guntur. The boys described how the second accused picked up the child in front of their shops, took him down a side lane and handed him over to the first accused. These two boys picked out the first and second accused at an identification parade which was held on 12th April, and there is really no reason for rejecting their evidence. In addition to this there was a confession (Exhibit C) made by the second accused to the Taluk Magistrate, Guntur, on 17th April. The learned Sessions Judge discarded this confession on the ground that the Taluk Magistrate had not in spirit observed the proper precautions to ensure that the confession should be voluntary. Mr. Vepa who appears for the appellants contends that the learned Sessions Judge was right. The learned Public Prosecutor

on the other hand contends that the learned Sessions Judge was wrong, and that there are no proper reasons for supposing the second accused's confession to have been anything but voluntary. I do not see any necessity to discuss this question at length, because I am satisfied, as the learned Sessions Judge was, that the other evidence in the case is sufficient to establish the fact.

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The facts proved therefore are that the little boy (the son of the first accused and P.W. 1), who had been brought up by his mother from the date of his birth and who was in her keeping on 11th April 1937, was taken from her keeping by the second accused who handed him over to the first accused, and who must of course have been acting under instructions from the first accused. The first accused does not now deny the paternity of the child. He alleges that he was ill-advised when he filed his suit against his wife. He says that the plaint was not drafted on his own instructions but on the advice of his pleader's clerk. This is not of course true. The pleader was examined as P.W. 12 and he testified that the plaint (Exhibit L) was prepared in accordance with the instructions of the first accused. His evidence is no doubt true. The interesting question which arises is whether in these circumstances the first accused can be held guilty of an offence under section 363, Indian Penal Code. I am told that there is as yet no record of any case in which a father has been convicted of kidnapping his own child from the guardianship of the child's mother. I have therefore to decide the matter as well as I can without the assistance of any reported cases.

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There is no doubt of course that P.W. 1, the mother of the child, was on 11th April 1937 the lawful guardian of the child for the purposes of section 361, Indian Penal Code. The parties being Hindus, the father is *the* lawful guardian, whose rights of guardianship, until they are taken away by a decree of a competent Court or surrendered by himself, are paramount to those of any other person. The father having acquiesced in the retention by the mother of the custody of this child from the date of his birth for over three years and three months, the mother clearly comes within the meaning of the explanation to section 361, Indian Penal Code. It was observed by RANKIN C.J. in *Saharali Mahammad v. Kamizuddin Mahammad*(1) :

“ I do not doubt at all that the explanation to section 361 was intended to extend the meaning of the words ‘lawful guardian’ beyond their ordinary scope. It is extended to include any person lawfully entrusted with the care or custody of such minor or other person. I do not doubt either that, where, by consent of the relatives, a minor has been allowed to be in the custody of a particular relative, the definition given by the section will be satisfied. In such a case, there may be no definite transaction of entrustment, but the consent of the relatives would be quite sufficient to make the guardianship lawful guardianship.”

Therefore what we have proved in this case is that the child was in the keeping of his mother who was a lawful guardian within the meaning of section 361, Indian Penal Code, and that the child was taken or enticed away out of her keeping. Section 361 says that “whoever takes or entices . . . is said to kidnap” and there can be no doubt that the word “whoever” will include

(1) (1930) I.L.R. 58 Cal. 897.

P.W. 1's husband. But this is not quite sufficient. The exception to section 361 states as follows :

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“This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.”

Now, if a person who in good faith believes himself to be entitled to the lawful custody of a child cannot commit an offence under section 361, Indian Penal Code, it seems to follow *a fortiori* that a person, who is in fact the father of the child and therefore in law entitled to the lawful custody of the child, cannot come within the scope of section 361, Indian Penal Code. In this case it can be said on behalf of the first accused that he did not merely in good faith believe himself to be entitled to the lawful custody of his child, but he was beyond the possibility of any challenge entitled to the lawful custody of the child, and that therefore his act in taking the child from the keeping of his mother could not amount to an offence of kidnapping from lawful guardianship.

I think this contention is correct. The learned Public Prosecutor has drawn my attention to the final words of the exception to section 361, Indian Penal Code,

“unless such act is committed for an immoral or unlawful purpose”.

He points out that, according to the finding of the learned Sessions Judge, the first accused had a strong motive to get the child away from his mother in order to stifle any suit for partition on behalf of the child. The learned Public Prosecutor suggests that this is an immoral or unlawful purpose and invites my attention to the case

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reported as *Mahendranath Chakrabarti v. Emperor*(1). That was a case in which the father of an illegitimate child was said to have taken the child away from its mother at the age of ten days in order to hush up a scandal. It was held that in such circumstances the father of the illegitimate child might not be protected by the exception to section 361, Indian Penal Code. There was however no decision in the case, the appeal being remanded for re-hearing, but I notice that in the judgment of HENDERSON J. it is observed that it is for the prosecution to show that the act was committed for an immoral or unlawful purpose. By section 105 of the Evidence Act it is of course the duty of the accused to show that his offence falls within any of the exceptions in the Indian Penal Code; but where it appears from the prosecution evidence itself that the act falls within the exception, the accused will clearly be relieved of that burden. In this case, the exception itself states that section 361 does not extend to the act of a person who in good faith believes himself to be entitled to the lawful custody of the child, unless such act is committed for an immoral or unlawful purpose; and that, as HENDERSON J. observes, lays upon the prosecution the burden of proving that the act was committed for an immoral or unlawful purpose. In the present case, it cannot be said that the prosecution has established that the act of the first accused was committed for an immoral or unlawful purpose. The charge against the first accused was that he had caused this child to be kidnapped in order that he might be murdered

(1) (1934) I.L.R. 62 Cal. 629.

but the learned Sessions Judge has expressly found that that charge was not established. No other object was attributed to the first accused and it is not in my opinion justifiable to say that even though he has not been proved to have intended to murder the child, yet he must have had some other unlawful or immoral purpose.

In the absence of proof of the purpose for which the accused caused the child to be taken away from the keeping of his mother, all that we have proved is that the father of the child by deceitful means got the child from the keeping of his mother to his own. This in my judgment is not an offence under section 361, Indian Penal Code, and I am fortified in this opinion by the reasoning of RANKIN C.J. in the case of *Saharali Mahammad v. Kamizuddin Mahammad*(1). The learned Chief Justice quoted with approval the decision in *Emperor v. Sital Prasad*(2) as authority for the proposition that

“ the explanation (to section 361) cannot be used to mean that, as against a person who, in fact, is the civil guardian of the minor, mere *de facto* guardianship can be set up so as to convict the real civil guardian of an offence under section 361 ”.

I therefore find that the appellant in Criminal Appeal No. 456 of 1937 has been wrongly convicted of an offence under section 363, Indian Penal Code. I set aside the conviction and acquit him. The conviction of the appellant in Criminal Appeal No. 465 of 1937 for abetment also must be set aside for the same reason. He also is acquitted. The appellants have been released on bail and I direct that their bail bonds be cancelled.

V.V.C.

(1) (1930) I.L.R. 58 Cal. 897.

(2) (1919) I.L.R. 42 All. 146.