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Court and not of any other court. It may be that this works some hardship. We cannot help this; and after all if the applicant went to the wrong court in the first instance, and then appealed, he has to some extent at least only himself to blame in the matter. We reject the application with costs.

Application rejected.

APPELLATE CRIMINAL.

Before Mr. Justice Alston.

KING EMPEROR v. GANESH.*

*Act No. XLV of 1860 (Indian Penal Code), sections 361, 363—Kidnapping—
 Motive—Punishment.*

For a conviction under section 363, Indian Penal Code, it was sufficient to prove that the minor was taken away from the custody of a lawful guardian without his consent. Motive had nothing to say to the offence of kidnapping though it might have much to say to the punishment. Consent given by the guardian after the commission of the offence would not cure it.

Mr. G. W. Hornsby, for the appellant as *amicus curiæ*.

Mr. R. Malcomson, Officiating Assistant Government Advocate for the Crown.

ALSTON, J.—This is a jail appeal from a conviction under section 366 of the Indian Penal Code. I took time to consider this case, because I was not satisfied* that the findings of fact at which the learned Sessions Judge arrived were correct. On those findings it seemed to me that the appellant, however improperly he may have acted, had committed no criminal offence; but having listened to the learned Government Advocate, who put the case for the Crown before me with great pains, I am convinced that the appellant did commit an offence, but not one under section 366 of the Indian Penal Code.

I find as a fact that there was no abduction. I believe, however, that the appellant took the girl, who was undoubtedly a minor, to his village without having previously obtained the consent of either her father or of her uncle Sunder in whose charge she was for the time. I can see nothing that justifies the finding of the learned Sessions Judge that Sunder consented to

* Criminal Appeal No. 231 of 1909 against the order of Muhammad Rafique, Sessions Judge of Azamgarh, dated the 17th of March 1909.

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the girl's going in the first instance. He was not at home when the appellant and his wife took the girl away ; he had gone on a pilgrimage to Bindhachal. When, on his return from his pilgrimage, he traced the girl to the appellant's village, it is possible that he did, as is alleged, agree to her staying there for a few days longer. This would not, however, cure the offence which the appellant had already committed when he took away the girl in the first instance without the consent of her lawful guardian, which I think Sunder was not. The offence of kidnapping is defined in section 361 of the Indian Penal Code and it will be observed by any one who reads that definition that motive has nothing to say to the offence, though it may of course have much to say to the punishment. In *Dhanonidhar Ghose* (1) it was held that even a girl's father with "no criminal intention in taking away his own daughter" from her husband, her lawful guardian, might be guilty of kidnapping. As I read the section, even if the appellant thought that neither the girl's father nor Sunder would, had they known of it, have had any objection to his taking the girl with him, yet if in fact there was no consent to the going the offence would be committed. The case of *Jagannadha Rao* (2) was cited in argument. With the reasoning of BENSON, J., as to the correct interpretation to be put on section 361 of the Indian Penal Code, I entirely agree. Where the temporary guardian is proved to have been in collusion with the other party, as in that case, and the taking away was accomplished in consequence of such collusion, there could be no such consent of the lawful guardian as the section requires. The view taken by the English Courts that by the fraud of the temporary guardian the right to possession of the child reverted to the natural guardian seems to me to be correct. To hold otherwise would be disastrous to the rights of parents. In the present case I find that Sunder did not consent to the taking away. I cannot, however, upon the evidence hold that the appellant took the girl away "with intent" that she might be compelled or "knowing it to be likely" that she would be compelled to marry. I believe that the idea of marriage was an after-thought, the result of the visit subsequently paid to Sital's house, a visit not in

(1) (1889) I. L. R. 17 Calc., 298. . (2) (1900) I. L. R. 24 Mad., 284.

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contemplation when the girl was taken away from Sunder's house. According to the girl, whose evidence I believe on this point, she lived with the appellant and his wife for 14 days during which period there was no question of getting her married to any one. I think that when Sital saw the girl he wished to marry her and persuaded the appellant, who was his brother-in-law, to allow the marriage to take place. This the appellant had no right whatever to consent to. What happened in this case after the girl had been taken away from lawful guardianship illustrates the wisdom of the legislature in excluding motive from the definition in section 361. One never can tell what wrong may not result from taking a young girl away from lawful guardianship. The view which I have taken of the facts was the view taken by the police who investigated the case, for they sent it up under section 363. The assessors convicted, but there is nothing to show that they understood the law on the subject, their reasons for convicting not having been recorded. I accordingly alter the conviction from one under section 366 to one under section 363 of the Indian Penal Code and reduce the sentence to one of eighteen months' rigorous imprisonment. The appeal is otherwise dismissed.

Appeal dismissed.

APPELLATE CIVIL.

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Before Mr. Justice Banerji and Mr. Justice Tudball.

SHIB LAL AND OTHERS (PLAINTIFFS) v. CHATARBHUIJ AND OTHERS (DEFENDANTS).*

Code of Civil Procedure (Act No. XIV of 1882), section 522.—Arbitration—Invalid reference and award—Appeal from decree passed in accordance with such award.

Where there is no valid reference to arbitration and no valid award the decree passed in accordance therewith cannot be maintained, and an appeal lies against such decree. *Negi Puran v. Hera Singh* (1), referred to.

THE facts of the case are as follows :—Shiv Lal and Badri Das brought a suit for recovery of money against two brothers,

* Second Appeal No. 439 of 1908 from a decree of B. J. Dalal, District Judge of Agra, dated the 31st of March 1908 confirming a decree of Chhajju Mal, Subordinate Judge of Agra, dated the 17th of July 1906.