

I am in respectful agreement with the aforesaid observations also.

(11) Thus viewed from any angle, we find no merit in this appeal and consequently, dismiss the same but without any order as to costs.

J. M. Tandon, J.—I agree.

H.S.B.

Before M. M. Punchhi, J.

COURT ON ITS OWN MOTION,—*Petitioner.*

versus

RAM LUBHAYA AND ANOTHER,—*Respondents*

Criminal Revision No. 1488 of 1984.

October 30, 1984.

Indian Penal Code (XLV of 1860)—Sections 361 and 363—Prohibition of Offenders Act (XX of 1958)—Section 4—Natural father attempting to kidnap minor daughter from lawful custody of adoptive father—Such attempt—Whether makes the natural father culpable under Section 361—Appellate Court releasing accused on probation under section 4 but maintaining imposition of fine—Maintenance of fine—Whether legal—Note appended to the judgment after its finalisation and signing that the conviction shall not effect the service of accused—Such direction—Whether permissible.

Held, that Section 361 of the Indian Penal Code, 1860 envisages the taking or enticing away of any minor out of the keeping of the lawful guardian of such minor without the consent of such guardian. The explanation added thereto expands the words 'lawful guardian' to include any person lawfully entrusted with the care or custody of such minor or other person. The explanation to Section 361 of the Penal Code envisages more than one lawful guardian of a minor at one and the same time. In this view of the matter, the natural father of the minor child was also lawful guardian along with the adoptive father. As such the natural father of the minor cannot be said to have committed the offence under Section 361 so as to be punishable under Section 363 of the Code.

(Paras 3 and 4)

Court of its own motion *v.* Ram Lubhaya and others,
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Held, that while releasing the accused on probation under section 4 of the Probation of Offenders Act, 1958, the imposition of fine could not be maintained.

(Para 5)

Held, that it must be commented that the Judge after concluding and signing the judgment could not append any note thereto. That course will not be permissible under the law and such Judge could not order the conviction of the accused to be not affecting his service. That was outside the domain of the Judge as a criminal Court.

(Para 5)

This revision petition was taken by this Court on its own Motion,—vide order dated 28th September, 1984, passed by Hon'ble Mr. Justice M. M. Punchhi, from the judgment dated 3rd May, 1984 passed by Shri O. P. Gupta, Additional Session Judge, Chandigarh,—vide which he maintained the conviction of Ram Lubhaya as recorded by the trial Court u/s 363/511 IPC but released him on probation.

Nemo for the Petitioner.

H. S. Brar, Standing Counsel, Chandigarh Administration and P. S. Teji, Advocate with him for respondent No. 2.

K. L. Arora, Advocate, for respondent No. 1.

JUDGMENT

M. M. Punchhi, J. (Oral):

(1) Ram Lubhaya, respondent was convicted by a Judicial Magistrate, 1st Class, Chandigarh under section 363/511, Indian Penal Code, and sentenced to rigorous imprisonment for six months as also to pay a fine of Rs. 300. Shri O. P. Gupta, Additional Sessions Judge, Chandigarh in appeal confirmed the conviction but released the respondent under section 4 of the Probation of Offenders Act, 1958,—*vide* his order dated 3rd May, 1964. After signing the judgment, the learned Judge appended a note thereto by ordering that the conviction shall not affect the service of the appellant. The judgment and order came to my notice while reading some judgments of the learned Judge. The records were called for. In exercise of *suo motu* powers of revision the respondent and the Chandigarh Administration have been heard.

(2) The established allegation against the respondent is that he attempted to kidnap his own natural daughter Kamini aged 9 years from the lawful guardianship of Dr. Madan Mohan Rattan who was

in custody of the child allegedly right from the date of her birth. It is further established that Dr. Madan Mohan Rattan is the maternal uncle of Kamini. It is also established on the record that there was no regular adoption deed executed by the respondent in favour of Dr. Madan Mohan Rattan with regard to the minor but, for all practical purposes, Dr. Madan Mohan Rattan had treated the said minor as his adopted daughter. As has been observed by the Courts below, the tussle between the two about the guardianship of the minor was decided by the Guardian Court in favour of Dr. Madan Mohan Rattan. The judgment, Exhibit P. S., dated 12th November, 1983. The offence was said to have been committed much earlier on 26th October, 1978 by two instances of the attempt.

(3) On these admitted facts, it had to be seen by the Courts below whether the act of the respondent fell squarely within the ambit of section 361, Indian Penal Code, so as to be punishable under section 363, Indian Penal Code. But, as said before, it was an attempt in that direction and not the actual commission. Section 361, Indian Penal Code, envisages the taking or enticing away of any minor out of the keeping of the lawful guardian of such minor without the consent of such guardian. The explanation added thereto expands the words 'lawful guardian' to include any person lawfully entrusted with the care or custody of such minor, or other person. On the established facts, Dr. Madan Mohan Rattan was such a lawful guardian as envisaged under the explanation. But equally the respondent as the natural father of the minor was also her lawful guardian. As a caution it may be mentioned that the tussle between these two lawful guardians was settled by the Guardian Judge as late as 12th November, 1983, but on the date of the commission of the offence, the tussle had surfaced. The paramount consideration before the Guardian Judge obviously was the interest of the minor. The conduct of Dr. Madan Mohan Rattan towards the minor led him to pass the judgment Exhibit P. S. All the same on the date of the commission of the offence it could not be said that the respondent was not the lawful guardian of his natural daughter, though her custody stood entrusted factually and lawfully to the minor's maternal uncle. The explanation to section 361, Indian Penal Code, envisages more than one lawful guardian of a minor at one and the same time. The respondent was one such person and so was Dr. Madan Mohan Rattan. Thus the Courts below should have acquitted the respondent of the charge at least extending to him the benefit of doubt. On their failure to do so, the respondent is ordered to be acquitted of the charge by this Court.

Dharam Vir v. Dr. Vinod Mahajan and others, J. V. Gupta, J.

(4) Without burdening the Judgment, it would be appropriate to refer here that on the death of Dr. Madan Mohan Rattan on 9th June, 1984, the question of the custody of the minor and her guardianship came to be settled by me in the *parens patriae* jurisdiction in (**Udham Devi v. Tripa Devi**) (1). I had appointed Smt. Kamlesh, the natural mother of the minor, to be her *de jure* guardian and the present *de facto* guardian to be Mrs. S. Roy, Principal, M.C.M. D.A.V. College for Women, Chandigarh. The respondent was not considered to be appointed the guardian of the minor on account of the present conviction and the stigma attached despite the mollifying factor of section 12 of the Probation of Offenders Act. The acquittal of the respondent is likely to breathe air of peace between him and his minor daughter, who rather is his only offspring.

(5) Lastly, it must be commented that the learned Additional Sessions Judge after concluding and signing the judgment could not append any note thereto. That course was not permissible to him under the law. He could not order the conviction of the respondent to be not affecting his service. That was outside the domain of the Additional Sessions Judge as an appellate criminal Court. Further, while releasing the respondent under section 4 of the Probation of Offenders Act, he could not leave the sentence of fine maintained. The fine in that event had to be remitted to the respondent. Since now he is being acquitted, the fine, if paid by him, would be remitted to him.

(6) For what has been said above, the order of the Additional Sessions Judge is reversed and the accused respondent is acquitted of the charge.

H.S.B.

Before J. V. Gupta, J.

DHARAM VIR,--*Petitioner.*

versus

Dr. VINOD MAHAJAN AND OTHERS,--*Respondents*

Civil Revision No. 1448 of 1984

November 19, 1984.

East Punjab Urban Rent Restriction Act (III of 1949)—Section 13(3)(a)(ii)—Landlord doctor by profession—Such landlord seeking

(1) *Cr. W. 264/84* decided on 10th August, 1984.