

THE HONOURABLE SRI JUSTICE K. SREENIVASA REDDY

CRIMINAL PETITION NO.8501 of 2022

ORDER:-

This Criminal Petition, under Section 482 of the Code of Criminal Procedure 1973, is filed by A1 and A2, to quash the proceedings in F.I.R.No.305 of 2022 of Gooty Police Station, Ananthapuramu District, registered for the offence punishable under Section 363 r/w 34 IPC.

2. Brief facts of the case are as follows;

On 23.9.2022 at 12.30 P.M., at Jangala Colony Arch, Tadipatri Road, Gooty Town, the petitioners along with four others came in a car and kidnapped the children by name 1. Md.Atheek Ahammad, aged 10 years, 2. Md. Arshad Ahmmad, aged 8 years, of the *de facto* complainant/2nd respondent herein, by pushing away the father of the *de facto* complainant/2nd respondent who was bringing the children from school. On that the *de facto* complainant/2nd respondent gave a report to the police and based on the said report a case in crime No.305 of 2022 was registered by police against the petitioners and others.

3. Learned counsel for the petitioners submits that even accepting the entire allegations to be true, still the offence under Section 363 r/w 34 IPC would not be made out for the reason that the petitioners herein are Sunni Muslims, who are governed by the Suni School of Mohammedan law. It is contended that the mother is entitled to custody of her male child until that child completed the age of 7 years under the Sunni School of Mohammedan law and 2 years under the Shia School of Mohammedan law. Under the said provisions, it is the father who is the primary and natural guardian of minor children. Right of custody of the children by the mother and the female relations are subject to the supervision and control of the father who is entitled by virtue of his natural guardianship of the child. According to the prosecution, the petitioner No.1 who is the father and Petitioner No.2 who is paternal uncle of the kids, have taken away the children who are aged about 8 years and 10 years from their maternal grandparents. The natural guardian of the kids is petitioner No.1, the father. Hence, taking away of the children by their father would not in any

way come within the meaning of kidnap so to attract the offence punishable under Section 363 IPC.

4. On the other hand, learned counsel for the respondent No.2 contends that the children are in the custody of the mother. Thus, even if father takes away the minor children from the custody of their mother, he is liable to be punished under Section 363 IPC. The accusations that are made in the complaint, certainly attract the offence under Section 363 IPC. He also submits that since the investigation is at the nascent stage, truth or otherwise of the said accusations has to be investigated by the police.

5. Heard both sides and perused the record.

6. On 24.9.2022 at 4.00 P.M., a report was given in the police station stating that on 23.9.2022 at 12.30 P.M., the petitioners herein and four others came in a car and kidnapped 1. Md Atheek Ahmmad, 10 years, 2. Md. Arshad Ahmmad, 8 years old children who are in the custody of the the *de facto* complainant, by pushing away the father of the *defacto* complainant. Based on the said report, a case in Crime No.305 of 2022 has been registered for the offence punishable under Section 363 r/w 34 IPC.

7. So as to attract the offence under Section 363 IPC, it is essential to consider Section 361 IPC.

Section 361 IPC reads as follows.

361. Kidnapping from lawful guardianship.—
Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation to the said provision contemplates that the words “lawful guardian” in the aforesaid section includes any person lawfully entrusted with the care or custody of such minor or other person.

It is clear from the above said provision that whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind without the consent of such guardian is said to have committed the offence of kidnapping from lawful guardianship.

8. Admittedly, in the case on hand, both the children are minors. As per the explanation to that Section, a lawful guardian includes a person who is lawfully entrusted with the care or custody of such minor. It naturally includes a natural guardian. Since the parties are Muslims they are governed by Mohammedan law. The mother is entitled to the custody of male child until the child reaches the age of 7 years under the Sunni School of Mohammedan Law, and 2 years under the Shia School. (See 'Principles of Mohammedan Law' by D.K Mulla, 15th Edn page 297).

9. It is thus clear that under the Mohammedan law, the mother is entitled to the custody of her minor child only up to a certain age, and it is according to the sex of the child. It is an admitted fact that she is not the natural guardian. On the other hand, the father alone is the natural guardian. In case if the father is dead, his executor is the legal guardian according to the Sunni law.

10. Learned counsel for the petitioners relied upon the judgment in ***Ismail Aboobaker, Puthuparambil,***

Thodupuzha and others Vs. State Of Kerala on 28 March, 1967¹ , wherein it is held,

In 'Muslim Law as Administered in British India' by K.P.Saxena, 2nd Edn., page 385, after quoting the above observation of the Privy Council it is said:

"Thus it is quite evident from this passage that the father is the primary and natural guardian of his minor children, and that the right of custody of the mother and the female relations mentioned above are subject to the supervision and control of the father to which he is entitled by virtue of his natural guardianship of the infant. If that be so, the right of hizanal does not confer upon the mother all the powers of a guardian of the person of a minor under the Guardians and [Wards Act](#). 1890."

In 'Macnaghlen's Principles 'I Mohammedan Law' 3rd Edn., page 62, it is stated:

"Guardians, are either natural or testa-mentary Of the former description are fathers and paternal grand-fathers and their executors and the executors of such executors."

In 'Outlines of Muhammadan Law' by A. A. Fyzee, 3rd Edn. Page 189, it is observed:

"The custody of an infant child belongs to the mother: this right is known as hldens (loosely spelt in India Hizanat) The mother is entitled in Hanafl law to the custody of her male child till the age of 7 years, and of her female child till puberty ... The mother is, of all persons, the best entitled to the custody of her infant child during marriage

¹ AIR 1968 Ker 21

and after separation from her husband, unless she be an apostate, or wicked, or un worthy to be trusted. Although the mother has the custody of a child of tender years, this does not imply that the father has no rights whatever."

11. It may be noted that Section 361 IPC speaks of 'lawful guardianship' and taking of a minor out of the keeping of the lawful guardian. The mother has the right to the custody of the minor only until a particular age. That will not make the father criminally liable if he takes the child from the custody of the mother, the reason being that when the father takes the child from the custody of the mother, he is only taking the child to the custody of the lawful guardianship. The father, according to the Privy Council, is the natural and legal guardian of the minor. A legal guardian is certainly a lawful guardian, and if he takes a minor child from the custody of the mother who is certainly not the legal or natural guardian, though entitled to the custody of the child until it reaches a particular age, he cannot be said to commit the offence of kidnapping. In this case, the parties are governed by Mohammedan Law. Thus, it is the father that is lawful guardian of his

male children during their minority and mother can claim custody of such child till 7 years of his age of the child.

12. In the case on hand, admittedly even according to the report given to police, the children are living with the parents of the *de facto* complainant, whereas, the *de facto* complainant is working at Hyderabad. On a plain reading of the recitals in the report, they go to show that admittedly the children are under the care of the *de facto* complainant who happens to be the mother of the children. She is residing elsewhere because of her job. In such circumstances, father who happens to be the lawful guardian of the children, takes away the children from the grandparents would not in any way come within the purview of kidnapping. The right of the mother to the custody of the children is not absolute right and that right is not superior to the right of lawful guardian. It is clear to the extent that it is the father alone that had taken away the children from the custody of the *de facto* complainant's parents.

13. In view of the above discussion, it is clear that the offence under Section 363 IPC is not attracted against the petitioner/A1, since he is the father and is lawful guardian of the children.

14. As far as petitioner No.2/ A2 is concerned, he is said to have accompanied A1 only. *Prima facie* basing on the accusations even accepting to be true, no offence was made out. Hence subjecting the petitioners herein to undergo the rigmarole of criminal trial would be totally unjustified leading to abuse of process of law.

15. Therefore, the Criminal Petition is allowed and the proceedings against the petitioners in F.I.R.No.305 of 2022 of Gooty Police Station, Ananthapuramu District, are hereby quashed.

Miscellaneous petitions pending, if any, in the Criminal Petition shall stand closed.

JUSTICE K. SREENIVASA REDDY

Date: 17.04.2023
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