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IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 4TH DAY OF JULY, 2024

BEFORE

THE HON'BLE MR JUSTICE VENKATESH NAIK T

CRIMINAL PETITION NO.102394 OF 2023 (482)

BETWEEN:

KUSHAGRA S/O. SUDHIR SINHA
AGE: 40 YEARS, OCC. EMPLOYEE IN PVT. FIRM,
R/O. 119 OLD AG COLONY, KADRU, RANCHI
JHARKHAND-834002, NOW AT T-35
MANGESH KRUPA APARTMENT
YASHWANT VIHAR ROAD, NANAWADI,
BELGAUM, KARNATAKA-590 009.

...PETITIONER

(BY SRI. ROHIT KUMAR SINGH, ADVOCATE FOR
SRI. SAJID AHMED GOODWALA, ADVOCATE)

AND:

1. THE STATE OF KARNATAKA,
THROUGH KHADEBAZAR P.S, BELAGAVI, NOW
REPRESENTED BY THE STATE PUBLIC PROSECUTOR,
HIGH COURT OF KARNATAKA,
DHARWAD BENCH, AT DHARWAD-580001.
2. MEENAKSHI VIJAY MENSE
AGE: 37 YEARS, OCC. EMPLOYEE IN PVT. FIRM
R/O. FLAT NO.3, 2ND FLOOR, TRIDAL COMPLEX
MARUTI GALLI, DISTRICT: BELAGAVI-590 001.

...RESPONDENTS

(BY SRI. JAIRAM SIDDI, HCGP FOR R1;
SRI. SHARAD M. PATIL, ADV. FOR R2)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.PC., PRAYING TO ALLOW THE PETITION AND QUASH THE FIR IN CRIME NO.53/2023 DATED 23.08.2023 REGISTERED BY RESPONDENT NO.1 POLICE STATION BELAGAVI PENDING ON THE FILE OF JMFC III COURT BELGAUM FOR THE ALLEGED OFFENCE PUNISHABLE UNDER SECTION 363 OF IPC WITH RESPECT TO THE PETITIONER/ACCUSED AND ETC.

THIS CRIMINAL PETITION IS COMING ON FOR ADMISSION, THIS DAY, THE COURT MADE THE FOLLOWING:



ORDER

Heard learned counsel for the petitioner, learned H.C.G.P for respondent No.1 State and learned counsel for respondent No.2-defacto complainant.

Though the matter is listed for admission, with the consent of learned counsel appearing for the parties, the matter is taken up for final hearing.

This is a petition seeking to quash the first information report in Cr.No.53/2023 registered by Khadebazar police station, Belagavi for the offence punishable under Section 363 IPC.

2. At the instance of first information lodged by respondent No.2/biological mother, a crime has been registered against the petitioner/ biological father. First informant mother has alleged that on 20.08.2023 at 7.00 p.m., the petitioner-father forcibly took away their minor son aged about two years, from the house of defacto – complainant and thus committed offence of kidnapping.



3. A short issue that falls for consideration is "whether a father can be booked for the offence of kidnapping for taking away his own minor child from the custody of the mother?' and 'whether it would attract the offence under Section 363 IPC?

4. Learned counsel for the petitioner would submit that by no stretch of imagination, the act of the petitioner/accused attracts the offence of kidnap as defined under Section 361 IPC punishable under Section 363 IPC. The petitioner being a father and natural guardian of a minor, he cannot be booked for the aforesaid offence.

5. Admittedly, there is no dispute that the parties are governed by Hindu Law. It is not in dispute that the petitioner-accused is the biological father and first informant is the biological mother of a minor son, aged about two years.

6. Under such circumstances, it is just and necessary to analyse Section 361 IPC. Section 361 IPC reads as under:-



"361. Kidnapping from lawful guardianship.—

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 kidnap such minor or person from lawful guardianship.

Explanation.— The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

(Exception)— 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 lawful custody of such child, unless such act is committed for an immoral or unlawful purpose. "

The Explanation added thereto includes the words "lawful guardian" to include any person lawfully entrusted with the care or custody of such minor or other person. However, to complete the offence, the person who takes away the minor, must fall within proposition of term 'lawful guardian'.

7. The parties are governed under Hindu Law. Hence, it is just and necessary to analyse the term 'guardian' as defined under Section 4(2) of The Guardians and Wards Act, 1890, which reads as under:-



" 4. Definitions

In this Act, unless there is something repugnant in the subject or context,

(1) xxxxxxxx

(2) "guardian" mean's a person having the care of the person of a minor or of his property, or of both is person and property:"

The term 'guardian' means a person having the care of the person of a minor or of his property, or of both is person and property.

8. From the perusal of Section 6 of The Hindu Minority and Guardianship Act, 1956, it contemplates that for Hindu minor, the father is a natural guardian and after him, the mother.

9. Sub-clause (a) of the said Act speaks about the custody of a minor upto the age of five years. Therefore, it is clear that the petitioner-father is a natural guardian of a minor, in the absence of the order otherwise passed by the Court by competent jurisdiction. Section 361 IPC speaks about lawful guardian as explained in the Section itself. If



the minor of the age specified in the section, is taken out of the custody of the lawful guardian of such a minor, then the offence would be complete. It is not a case that the mother was lawfully entrusted within the care or custody of the minor by the order of competent Court. Therefore, the petitioner-accused is natural guardian to the child. In the absence of any prohibition of the order of the competent Court, the petitioner-father cannot be booked for taking away his own minor child from the custody of her mother.

10. The father of a child will not come within the scope of Section 361 IPC, even if he takes away the child from the custody of the mother. She may be lawful guardian as against any other except the father or any other person who has been appointed as a legal guardian by virtue of an order of the competent Court. So long as there is no divestment of rights of guardianship of the father, he cannot be held guilty of the offence under Section 361 IPC.

11. Whereas in the instant case, the petitioner-father attended second birthday of child. On 20.08.2023, he took child away from the house, and informed his wife that, he



took child to his house, where he arranged birthday programme of his child, and also seeks grace from his parents and his relatives. Hence, the defacto complainant being mother of child booked her husband for kidnap punishable under Section 363 of IPC.

12. In similar circumstances, the coordinate Bench of this Court in the case of **Capt. Vipin Menon v. The State Of Karnataka and Another** reported in **ILR 1992 KAR 2622** and the Hon'ble Apex Court in the case of **Chandrakala Menon (Mrs) And Anr. v Vipin Menon (Capt.) and Anr** reported in **(1993) 2 SCC 6** held that the father cannot be charged for taking away his minor child from the custody of his wife, because, he is the natural guardian and therefore, the offence under Section 363 IPC cannot be directed against him.

13. Under such circumstances, on acceptance of the prosecution case, in its totality, a prima-facie case is not made out for the offence under Section 363 IPC by specifying the ingredient of offence of kidnap. Therefore, the



continuation of such prosecution amounts to abuse of process of Court. Hence, I proceed to pass the following

ORDER

1. The petition is ***allowed.***
2. FIR registered in Cr.No.53/2023 of Khadebazar police station, Belagavi, registered for the offence under Section 363 IPC is hereby ***quashed.***
3. Pending IAs, if any, stand disposed of.

Sd/-
JUDGE

MN
List No.: 1 SI No.: 42.