

(1991) 11 MAD CK 0032

In the Madras High Court

Case No : Criminal M.P. No. 7082 of 1989

A.V.M. Rahamathullah and Another

APPELLANT

Vs

H. Laila Banu

RESPONDENT

Date of Decision : 12-11-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (1991) 11 MAD CK 0032

Hon'ble Judges : Pratap Singh, J

Bench : Single Bench

Advocate : M.S. Pandian, for the Appellant; K.A. Panchapagesan, for the Respondent

Final Decision : Dismissed

Judgement

Pratap Singh, J.—The accused 1 and 2 in C.C.No. 1023 of 1989 on the file of Judicial Magistrate No. VII, Trichy have filed this petition under S.482 Criminal Procedure Code, praying to call for the records in the aforesaid case and quash the same.

2. The respondent has filed a private complaint against the petitioner and another, arraying them as accused 1 to 3. The allegations in it are briefly as follows:

Accused No. 1 is the former husband of the complainant, and accused 2 and 3 are closely related to accused No.1. During the subsistence of marriage between the complainant and accused No. 1, three children were born. He illtreated the complainant and in 1987 she became separated. The marriage between them became dissolved by divorce on 16.4.88. The children A1 Aman alias Hasina Begum and Salha were with the complainant. On 2.3.89, at about 8.30 A.M., when A1 Aman alias Hasina Begum was going to school, accused 1 to 3 forcibly kidnapped the girl from the lawful custody of the complainant. They are liable to be punished for offence under S.361 Indian Penal Code. Since her complaint to

the police did not prove fruitful, she has filed the private complaint.

3. Mr. M.S. Pandian, the learned counsel appearing for the petitioners, would contend that parties are Muslims that as per Mahomedan Law, the father is the natural and legal guardian of the children and as such his alleged taking away of A1 Aman from the custody of the complainant does not amount to an offence under S.361 I.P.C. Per contra, Mr. K.A. Panchapagesan, the learned counsel appearing for the respondent, would contend that legal guardianship is different from that of lawful guardianship, that offence is complete if a minor is kidnapped from the custody of a lawful guardians that mother is entitled to custody of female child up to the age of puberty and that kidnapping such a female child from the custody of the mother is an offence under S.361 I.P.C. For a better appreciation of the contentions put forth by the rival counsels, S.361 I.P.C. needs extraction. It reads as follows:

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 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 the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

According to the Explanation lawful guardian in the section, includes any person lawfully entrusted with the care and custody of such minor. Admittedly, the parties are Muslims. As per Mahomedan Law, the mother is entitled to custody of the children up to a certain age, depending upon the sex of the child. In case of female child, the mother is entitled to custody of the female child up to the age of puberty and normally it is taken as 15 years. In this case, at the time of kidnapping, A1 Aman was about 12 years old. So, as per Mahomedan Law, the complainant is entitled to the custody of the female child A1 Aman. When she is entitled to custody of the child, as per the mandate of Mahomedan Law, in my opinion, she would be the "lawful guardian" as per the expansive meaning given in the explanation to S.361

4. In State Vs. Harbansing Kisansing, (as he then was) has considered the provisions of S.361 and has observed as follows:

In considering the provisions of S.361 and the other cognate sections of the Indian Penal Code, it is necessary to bear in mind that these provisions are intended more for the protection of the minors and persons of unsound mind themselves than for the rights of the guardians of such persons. It may be that

the mischief intended to be punished partly consists in the violation or the infringement of the guardians' right to keep their wards under their care and custody, but the more important object of these provisions undoubtedly is to afford security and protection to the wards themselves. The guardian is described in this section as a "Lawful guardian" and not as a "legal guardian", and the significance of the adjective "lawful" is emphasised by the Explanation which shows that it includes any person who is lawfully entrusted with the care or custody of the ward concerned.

Then again, the learned judge has expressed as follows:

We must, therefore, hold that under S.361 the expression "lawfully guardian" includes the legal guardian as well as a person who has become the guardian of the minor or the lunatic in a lawful manner.

The allegations made in the complaint would state that the complainant was living separately along with the female child A1 Aman. She was in custody of the female child in a lawful manner in as much as she is entitled to her custody as per Mahomedan Law. As per the allegations in the complaint, accused No.1 ill-treated the complainant in 1987. She has separated herself with the two children viz. A1 Aman and Salha. A1 Aman was with the complainant at the time of occurrence. She being entitled to lawful custody of the same, as per law. In the above circumstances she is a "lawful guardian" as per the Explanation to S.361 Criminal Procedure Code.

5. In *Zara Bibi v. Abdul Razak* 1910 Cri.L.J. 687 the children who were in the custody of the mother were taken away by the father. The mother filed an application under S.491 of Criminal Procedure Code, corresponding in effect with a writ of Habeas Corpus, against the father. The learned Judge has observed as follows:

However, on the question of law, namely who is entitled to the custody of these minor children, I think only one answer is possible. All the authorities to which my attention has been drawn, appear to me unanimous on this point. During the subsistence of marriage the mother is by common consent entitled to the guardianship or custody of male children up to the age of seven and that right survives even after separation by divorce.

In *Imambandi v. Haji Mutsaddi* AIR 1918 P.C. 11, it was held that under Mahomedan Law, the mother is entitled only to the custody of the minor up to certain age, according to the sex of the child but she is not the natural guardian. Thus, here again, regarding custody of the person of her minor child, the entitlement of the mother is clearly laid. But regarding her minor's properties, only natural guardian can validly deal with it. Regarding that aspect, we are not concerned in this case.

In *Korben v. King Emperor* ILR (1904) 32 Cal 444 it is held:

Under the Mahomedan law the mother is entitled to the custody of her daughter

in preference to the husband, until the girl attains the age of puberty.

The removal of an immature Mohammadan girl of eleven or twelve from the house of her mother-in-law in whose charge her husband had left her, by a third person acting at the instance, and under the instigation of her mother is not a taking from "lawful guardianship" and does not amount to kidnapping.

This ruling shows that until a girl attains the age of puberty, her instead of her father is entitled to her custody and taking the girl from the custody of the husband by the mother would not amount to an offence under S.361 I.P.C.

The pronouncement of various courts would lay that under Mahomedan law, the mother is entitled to the custody of the child up to a certain age depending upon the sex of the child. This right cannot be a shallow or empty one. It cannot be infringed with impunity. Though the father may be the legal guardian, S.361 I.P.C. lays stress on the custody of the minor under a "lawful guardian" and violation thereon. Though the mother may not be a legal guardian, being a person lawfully entrusted and entitled to the custody of the child under the mandate of Mohamaddan Law, she is the lawful guardian in cases where the child is under her custody. Whoever takes such a child from the custody of the lawful guardian viz., the mother is liable to be punished under S.361 I.P.C. unless one comes within the exception.

6. Ismail Aboobaker, Puthuparambil, Thodupuzha and Others Vs. State of Kerala, . In that case, the minor children were taken away by the father from the custody of the mother. The trial court convicted the father and others for offence under S.363 and other offences of Indian Penal Code. On revision, the Kerala High Court has held that the father is natural and legal guardian of the minor and the legal guardian is certainly a lawful guardian and if he takes a minor child from the custody of the mother, he has not committed an offence under S.361 Indian Penal Code. I am in respectful disagreement with this ruling, in view of what I have stated earlier. The allegations in the complaint, do make out the offence, provided the same is substantiated by evidence. Hence, at the threshold, it cannot be quashed. The trial Magistrate shall proceed with the trial and dispose of the case expeditiously, uninfluenced by the observations made in the course of this order.

7. In view of the above, this petition which does not have any merit shall stand dismissed.