

(1992) 07 KAR CK 0019
In the Karnataka High Court
Case No : Criminal Petition No. 852 of 1992

Capt. Vipin Menon

APPELLANT

Vs

The State of Karnataka and another

RESPONDENT

Date of Decision : 10-07-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 155, 482
Penal Code, 1860 (IPC) — Section 361

Citation : (1992) CriLJ 3737 : (1992) 2 DMC 288 : (1992) ILR (Kar) 2622 :
(1992) 3 KarLJ 19

Hon'ble Judges : B. Jagannatha Hegde, J

Bench : Single Bench

Advocate : B.V. Acharya and C.V. Nagesh, for the Appellant; U.L. Narayana Rao and T.V. Vijayaraghavan and M. Marigowda, H.C.G.P., for the Respondent

Judgement

1. One Vipin Menon has filed this petition u/s 482, Cr.P.C. to set aside the order dated 15-5-1992 passed by the Chief Metropolitan Magistrate, Bangalore City, in Criminal Misc. No. 198/1992. Though the petition was filed only against the State, subsequently as directed by the Court, Sri V. P. R. Nambiar, father-in-law of the petitioner, has been impleaded as the second respondent.

2. The facts that are not in dispute may be set out briefly as follows :

The petitioner is the father of a minor female child, named Soumya. She is aged about seven years. Respondent 2 is the maternal grand-father of the minor child. Soumya was residing with V. P. R. Nambiar for some time prior to 29-4-1992. On 29-4-1992, Nambiar gave a complaint to J.C. Nagar Police Station alleging that the petitioner and his sisters had kidnapped Soumya at about 10.30 a.m. on that day. The police did not register a case either u/s 154, Cr.P.C. or u/s 155, Cr.P.C. on the basis of that complaint as no offence was disclosed, No F.I.R. was sent to the Magistrate. But, the petition was numbered as Criminal Misc. No. 198/1992 and the P.S.I. attached to the J.C. Nagar Police Station took custody of the child from the petitioner on 6-5-1992 and on the same day produced the child before

the Chief Metropolitan Magistrate, Bangalore, with a report. In the report, it is clearly mentioned that no offence u/s 361, I.P.C. has been made out.

3. The learned Magistrate passed an order on that day itself, handing over the custody of the child to the petitioner for the time being. He also directed issuance of notice to R-2 Sri Nambiar. On 12-5-1992, the petitioner and R-2 appeared before the Magistrate and the case was adjourned to 15-5-1992. The petitioner was directed to produce the child before the Magistrate on 15-5-1992. On 15-5-1992, the petitioner did not appear before the Court with the child. The learned Magistrate adjourned the case to 3.00 p.m. The request made by the advocate for the petitioner in the morning session had been refused by the Magistrate. In the meanwhile, before the Court reassembled after lunch-break, the Magistrate received a telegram from the petitioner saying that he was unavoidably held up in Bombay and seeking adjournment of the case. The Magistrate, however, did not grant adjournment. But proceeded to pass the impugned order on that day itself. The order shows that the Magistrate came to the conclusion on the basis of the order passed by the Family Court, Bangalore, that Sri Nambiar was entitled to the custody of the child. He, therefore, directed the petitioner to handover the custody of the child to the police so that the police in turn may handover the custody of the child to Sri Nambiar, R-2 herein. He further directed that if the petitioner failed to produce the child before the police, the register case against the petitioner and also for taking steps for treating the petitioner as a pro-claimed offender. He terminated the proceedings for the time being, reserving liberty to R-2 to move for contempt against the petitioner.

4. Sri B. V. Acharya, learned Senior Counsel appearing for the petitioner, contends that the proceedings before the Magistrate was wholly without jurisdiction and not warranted by any provision of the Code of Criminal Procedure or any other provision of law. It is also his contention that the police had exceeded their limits in taking the custody of the minor child from her father and producing her before the Magistrate especially when no case has been registered against the petitioner. Sri Narayana Rao, learned Senior Counsel for R-2, contends that the petitioner is guilty of kidnapping as he had been divested of his right of guardianship as on 29-4-1992 and a person who has been guilty of a serious offence like kidnapping cannot be given any relief u/s 482, Cr.P.C.

5. It may be useful to refer to a pending proceeding between the petitioner and R-2 in the Family Court as the impugned order of the Magistrate indicates that he had relied upon the order passed by the Family Court on 23-4-1992. It may be stated that there is no dispute as to what had happened before the Family Court between the petitioner and R-2.

6. The petitioner had filed a case in G & WC No. 42/1992 under the provisions of the Guardians and Wards Act and also the Hindu Minority and Guardianship Act before the Family Court, Bangalore, for a direction to R-2 and his wife for returning the custody of Soumya to him. He also filed an application which is numbered as I.A. No. II to grant him interim custody of the child. On 23-4-1992,

the petitioner, R-2 and his wife were present before the family Court with their Counsel and the order sheet of the Family Court dated 23-4-1992 reads thus :

"23-4-92 R-1 Both Counsel present R-2 Call on 24-4-92 Sd/- 23-4-92 Respondents 1 & 2 Petitioner and Counsel have no objection for present. Respondents the visiting rights to 1 & 2 are present along their flat along with a with child. Respondent's responsible person during Counsel present. Child's week ends and during opinion is taken. Objection holidays to build up to I.A. II by 2-6-92. rapport between 3.30 p.m. to 5 p.m. Sd/- 23-4-92 Sd/- 23-4-92"

So, as on 29-4-1992, the main petition filed by the petitioner for custody of the child was pending before the Family Court and even his application for interim custody was posted for filing objections.

7. Now the main point for my consideration would be whether the petitioner has committed an offence u/s 361, I.P.C. by kidnapping the child from the lawful guardianship of R-2 and his wife.

8. Section 361, I.P.C. reads thus :

"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 - xxx xxx xxx"

The explanation is not intended to limit the protection which the Section gives to a guardian viz., the father or the mother. It is intended to extend that protection by including the term "lawful guardian" to any person who has been lawfully entrusted with the care or custody of a minor. The contention of Sri Narayana Rao is that as on 29-4-1992, R-2 was the "lawful guardian" who has been entrusted with the custody of the child lawfully. Sri Acharya, on the other hand, contends that there has not been divestment of the right of the petitioner of his right of guardianship though R-2 might have been entrusted with the child. In other words, the father taking away his own child from the custody of a "lawful guardian", coming within the mischief of the explanation, would not be committing an offence of kidnapping as defined u/s 361, I.P.C. The answer to this question depends on whether the father who is a guardian according to law has been divested of his right as on 29-4-1992 or not.

9. Sri Narayana Rao, learned Senior Counsel for R-2, relying on a decision in the case of State Vs. Ramji Vithal Chaudhari and Another, contends that the words "lawful guardian" as is apparent from the language of Section 361 are of wider connotation than the words "legal guardian". The word "lawful" in that Section

has been deliberately used in its wider connotation, and that word would mean that whenever the relationship of a guardian and a ward is established by means which are lawful and legitimate, that relationship is intended to be included within the meaning of the words "lawful guardian" as used in this section. None can dispute that R-2 would be lawful guardian. But, the point for consideration is whether the father, who is a natural guardian, could be accused of kidnapping his own child from the custody of a "lawful guardian." In the case relied upon by Sri Narayana Rao, there was a decree directing that the minor girl was to remain in the custody of the mother till the father gets himself appointed as the guardian of the minor under law. In that situation, it was held that the father who takes away a minor girl forcibly from the keeping of his own wife would be committing an offence of kidnapping. Sri Narayana Rao contends that the order of the Family Court dated 23-4-1992 had the effect of divesting of the right of the petitioner. It is also his contention that the said order had the effect of entrustment of lawful guardianship of the minor to the custody of R-2 and his wife. I find it difficult to accept this proposition. In the first place, the Family Court has not passed any order on I.A. No. II. In the margin of the order sheet dated 23-4-1992, it has been stated that R-1 and R-2 had no objection for the petitioner visiting their flat along with a responsible person during week-ends and during holidays to build up rapport between 3.30 p.m. and 5.00 p.m. The Family Court has only noted whatever that has been conceded by R-2 and his wife before it. That order does not in any way limit the right of the petitioner, that he has under law. A father of the child is a person who is entitled to the lawful custody of the child and he will not come within the scope of Section 361, I.P.C. even if he takes away the child from the keeping of the mother. She may be a lawful guardian as against any others except the father or any other person who has been appointed as the legal guardian by virtue of an order of a competent Court. So long as there is no divestment of the right of the guardianship of a father, a father cannot be guilty of an offence u/s 361, I.P.C. (Please see *In Re: Kanneganti Chowdarayya and Another*, *In Re Kannegati Chowdarayya*). The same view has been expressed in the case *Dhuma Manjhi and Others Vs. Emperor*, In that case, the husband of a minor girl sought assistance of a civil court for obtaining the custody of his wife. The Civil Court had declined to give him the custody. But, a Division Bench of the Patna High Court came to the conclusion that if such a husband seizes an opportunity that presents itself to him of taking his wife into his own custody, he does not commit the offence of kidnapping, as he is the lawful guardian of his minor wife as soon as the marriage ceremony takes place. In the instant case, I do not find any material to hold that the guardianship right of the petitioner has been determined by any competent Court.

10. The learned Government Pleader is not able to point out any provision of law which authorises the police to take the minor child to their custody on 6-5-1992 from her father nor he is able to point out any provision of law by virtue of which the Magistrate could have passed the impugned order dated 15-5-1992. According to him, the police intended only to restore the custody of the child to

her grandfather with whom she was living. It may be that the police officer and the Magistrate had acted with the righteous indignation. But, no officer can be permitted to go beyond the limits of his powers and all are expected to follow the law of land.

11. Sri Narayana Rao also refers to a decision in the case of Elizabeth Dinshaw v. Arvand M. Dinshaw : [1987]1SCR175 , to contend that the Magistrate after taking into interest and welfare of the minor could have given suitable direction. It is observed in that case that whenever a question arises before Court pertaining to the custody of a minor child, the matter has to be decided not on consideration of the legal rights of the parties, but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. None can dispute this proposition of law. But, these guidelines will have to be borne in mind by a competent Court when the matter is presented before it in accordance with law. In the instant case, neither the police nor the Magistrate had jurisdiction to entertain the matter as the allegations made against the petitioner do not make out an offence of kidnapping. This Court, therefore, has no other option but to exercise the inherent power conferred u/s 482, Cr.P.C.

12. The petition is, therefore, allowed and the impugned order dated 15-5-1992 passed by the learned Magistrate is quashed.

13. Petition allowed.