

(2024) 07 JH CK 0077
In the Jharkhand High Court
Case No : Writ Petition (Cr.) No. 722 Of 2023

Jawed Nehal

APPELLANT

Vs

State Of Jharkhand & Ors

RESPONDENT

Date of Decision : 10-07-2024

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 41A
Indian Penal Code, 1860 — Section 361, 363

Citation : (2024) 07 JH CK 0077

Hon'ble Judges : Sanjay Kumar Dwivedi, J

Bench : Single Bench

Advocate : Onkar Nath Tewary, Shahid Yunus, Shamid Raza, Shivam Anand Pathak, Amrita Sinha, Madhuri Nikunj Horo

Final Decision : Dismissed

Judgement

Sanjay Kumar Dwivedi, J

1. Heard the learned counsel appearing for the petitioner, learned counsel appearing for the State and learned counsel appearing for the respondent No.5.
2. The prayer in the petition is made for quashing of the entire criminal proceeding including the FIR in connection with Chakardharpur P.S. Case No.126 of 2023 for the offence under Section 363 of IPC pending in the Court of learned SDJM Porahat at West Singhbhum, Chaibasa.
3. The FIR was registered alleging therein that on the basis of the Fardbeyan of informant that her husband has taken away her both daughters without the permission of the informant and further stated that the Jawed Nehal came from Kolkata to meet his daughters namely Mariyam aged about 7 years and Alisha aged about 5 years but he took away along with him without the consent/permission of her and threatened her that do whatever she can do.
4. Mr. Onkar Nath Tewary, learned counsel appearing for the petitioner submits that the petitioner is a government employee in the West Bengal

Secretariat Service and being harassed and humiliated by the in-laws in the false cases. He submits that the informant is the wife of this petitioner and out of the wedlock, they are having two daughters namely Mariyam Jawed aged about 7 years and Alisha Jawed aged about 5 years. He submits that the wife is reluctant to reside along with the petitioner and in view of that the petitioner has instituted the case under the Guardianship and Ward Act before the learned Additional District and Sessions Judge, 14th Court, Alipore, South 24 Parganas, being Ref:Act VIII-21 of 2018 corresponding to CIS 1/2019. He submits that after filing of the said petition under the Guardianship and Ward Act, the visiting right was provided to the petitioner and he was allowed to visit for a period of three hours once in a week on Sunday and to remain with the children in the premises of the wife and with consent of the wife. He submits that subsequently, the petitioner has gone to meet the children on 19.08.2023 and thereafter willingly the children have gone along with the petitioner as such no case under Section 363 of the IPC is made out. He submits that the petitioner is still ready to make an amicable settlement. He relied in the case of Chandrakala Menon (Mrs.) And Another versus Vipin Menon (Capt.) and Another reported in 1993 2 SCC 6. By way of relying on the said judgment, he submits that petitioner being the natural father and Section 363 is not attracted, on this ground, he submits that the entire criminal proceeding may kindly be quashed.

5. Learned counsel appearing for the State submits that during the pendency of this writ petition under Section 41A Cr.P.C. notice was issued upon this petitioner and the petitioner has appeared and accepted that the children are with him.

6. Learned counsel appearing for the respondent No.5 submits that the informant being the wife of the petitioner was brutally tortured and that fact has come into the final order of the learned Additional District and Sessions Judge in the said Guardianship and Ward Act, which was disposed of by the judgment dated 14.07.2023. She submits that the issue was decided against the petitioner and petition was dismissed and the custody of the children with the wife was found to be perfect by the said Court. She further submits that in view of the visiting right, the wife has allowed the petitioner to visit every week on Sunday for three hours with consent of the wife and on 19.08.2023 in absence of the wife, the petitioner has taken away both the children without her consent and after hectic efforts, she has been able to find out that the petitioner has taken away the children. She further submits that in reference to the complaint made by the wife namely Aisha Shaista, the West Bengal Commission for Protection of Child Rights forwarded to enquire into the welfare of the child and in the said report, it was reported that the children's father was very anxious and he was not allowed to capture any documents photos and photo of rooms. It was also found that the two children are attached with their father but not with other family members and they speak English very fluently except their father no one communicate with them for their English Language. It was also reported that their father admitted them in Baitulmal Kelabagan School and they have problem in learning Urdu as they speak English Language. It was further pointed out that there is a

chance of manipulation of children. It was also reported that their father was not willing to disclose his official communication details. It was also reported and suggested that both the children were mentally disturbed and confused and their statements were prepared, so they need mother's love as there is high chance of manipulation. It was further disclosed that there is a need of family counselling, proper care and guidance to those children. The said report has been produced by the learned counsel appearing for the respondent No.5 in the course of argument and the said report is taken on the record. She further submits that the submission of the learned counsel appearing for the petitioner with regard to the definition of kidnapping under Section 361 of IPC is misplaced one. According to her in the facts of the present case the way the father has taken away the children prima facie case under Section 363 IPC is made out. She relied in the case of State versus Ramji Vithal Chaudhari and Another reported in 1957 SCC OnLine Bom 121 and she refers to paragraph No.14 of the said judgment which are quoted as under:

14. In the case of Soni Damodar (A) the facts, as we have already indicated, were similar to the facts before us. There also disputes had arisen between a husband and wife and they were living separately, the wife having the care of children. The husband then made an application to the District Court to be appointed the guardian of the children. The District Court, however, did not formally appoint anyone to be the guardian of the children but simply said that the minors were to continue in the custody of their mother though the father was given the liberty to have free access to the children. The order that was made in connection with that application was that except for the custody of the minor children, the rights of the father as a natural guardian under Hindu Law were not interfered with. Mr. Justice Heaton observes in his judgment that the order passed by the learned District Judge meant that the wife was to have the custody of the children and that it was because of this order that the father when he took away the girl, as he did, had been rightly convicted of the offence of kidnapping. The father in that case also had behaved in the same manner as the 1st respondent in this case before us, for there the father had the minor girl seized as she was going to school early in the morning, placed in a motor car in which he was sitting and had carried her off. The girl had been rescued the same day and returned to her mother. It was held in that case that the action of the father amounted to kidnapping, her legal guardian for the purpose of Section 361 being then her mother and that therefore the girl had been taken out of the keeping of the guardian by the accused. Though, the words "legal guardian" are used in this connection, obviously what was intended to be conveyed was that the mother was the lawful guardian at the material time. The facts in this case being almost identical to the facts before us, even Mr. Vaidya was not in a position to distinguish this decision upon any footing and, therefore, the judgment in this case is binding upon us.

7. Relying on the above judgment, she submits that the lawful guardian is required to be considered in the light of the connotation of that words, on this

ground she submits that this petition may kindly be dismissed as only FIR is under challenge and the final form is not submitted as yet.

8. It is an admitted position that the petitioner and the respondent No.5 are husband and wife and out of the wedlock they have been blessed with two female children and everything was not going good between the husband and wife and it appears that the dispute arose between the parties. The Court has gone through the judgment of the learned Additional District and Sessions Judge, Alipore, South 24 Parganas, wherein he has discussed in detail the mode of torture by the petitioner upon the wife in internal page No.4 at paragraph No.(i). The said guardianship case was instituted by the petitioner, the learned Sessions Judge has discussed elaborately about the facts and has come to a conclusion that both the girl children are safe in custody of the mother and has been pleased to dismiss the petition. The said application was filed by the petitioner under the Guardianship and Ward Act. By way of interim arrangement when the visiting right was provided to the petitioner, the petitioner used to visit the children and on a particular date that is on 19.08.2023 he has taken away both the children without informing the wife. This conduct of the petitioner of taking away the children without informing the wife clearly suggests that the intention to take the children with maneuvering was the plan made earlier by the petitioner and by way of alluring them he has taken them along with him. In this background, the FIR was registered under Section 361 of IPC.

9. Section 361 of IPC is quoted here-in-below:

Section 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.

10. The petitioner may be a father of the children but once the competent court has passed the order to visit in a particular date, he was required to follow that direction and without following the same fraudulently he has taken away the two children. It has been rightly held by the Bombay High Court in the case of State versus Ramji Vithan Chaudhari (supra) relied by the learned counsel appearing for the respondent No.5 that the word "lawful" under Section 361 has been deliberately used in its wider connotation and that word would mean that wherever 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 words lawful guardian as used in Section 361 of IPC. Admittedly the child were along with the respondent No.5-the wife and the way the petitioner has taken away them without informing the wife and prima facie ingredients of Section 363 of IPC are made out.

11. In view of above discussions, reasons and analysis, the Court finds that only FIR is under challenge and there are parameters of quashing of the FIR and

investigation is still going on and this fact has been admitted by the petitioner that the girls are along with him before the police in the investigation as pointed out by the learned counsel appearing for the respondent State.

12. No case of interference is made out, this petition is dismissed.

13. The police, who is investigating the matter and found that the child is with the petitioner, will ensure the compliance of the order passed by the learned Additional District & Sessions Judge, Alipore, South 24 Parganas forthwith.

14. The investigation will continue in accordance with law, this order is passed in the light of the well settled legal proposition and the said investigation will be without prejudice to this order.