

**(2007) 05 CAL CK 0058**  
**In the Calcutta High Court**  
**Case No : C.R.R. No. 3595 of 2006**

Md. Nurul Islam Mondal

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

**Date of Decision :** 10-05-2007

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 125, 156(3), 482, 97  
Guardians and Wards Act, 1890 — Section 7  
Penal Code, 1860 (IPC) — Section 120B, 307, 323, 343, 361

**Citation :** (2007) 4 CHN 461

**Hon'ble Judges :** Sadhan Kumar Gupta, J

**Bench :** Single Bench

**Advocate :** Sekhar Basu, Kallol Mondal and Sanghamitra Basu, for the Appellant; Abhijit Auddy, for the Respondent

**Final Decision :** Allowed

## Judgement

Sadhan Kumar Gupta, J.—This revisional application has been preferred u/s 482 of the Cr. PC praying for quashing of a proceeding of G.R. Case No. 901 of 2006 corresponding to Baruipur P.S. Case No. 214 dated 12.9.2006.

2. Case of the petitioner is that opposite party No. 2 was married with petitioner as per Muslim rites. But due to mal-adjustment in between the spouse, matrimonial relationship broke down and ultimately, petitioner gave talak on 3.5.2006 to opposite party No. 2. Before that, said opposite party No. 2 left the matrimonial house on 23rd April, 2006 leaving her minor son in the house of the petitioner.

3. On 2.5.2006 the opposite party No. 2 filed a petition of complaint before the Id. Additional Chief Judicial Magistrate, Baruipur against the petitioner for alleged commission of offence punishable u/s 323/343 of the Indian Penal Code and the said case was numbered as C-321 of 2006. On the same day the opposite party No. 2 filed a petition praying for issuance of search warrant u/s 97 of the Cr. PC for recovery of her minor son from the custody of the petitioner. Such prayer was

allowed and the O.C. Baruipur P.S. was directed by the Id. Magistrate to recover the said son. Against that order, petitioner filed a revisional application before the Id. Additional Sessions Judge, Alipore. But the Id. Additional Sessions Judge by his order dated 25.9.2006 was pleased to dismiss the said revisional application.

4. The opposite party No. 2, before institution of the present case, filed another petition of complaint before the Id. Additional Chief Judicial Magistrate, Baruipur who was pleased to sent the same to the P.S. for investigation u/s 156(3) of the Cr. PC. On the basis of that, Baruipur P.S. Case No. 99 of 2006 dated 9.5.2006 was registered for investigation in respect of alleged commission of offence punishable u/s 498A/406/307 of the Indian Penal Code. That case is still pending for investigation.

5. That apart, opposite party No. 2 on 23.8.2006 filed another application u/s 125 Cr. PC before the Id. Additional Chief Judicial Magistrate, Baruipur praying for maintenance for herself @ 2,500/- per month. Said application is still pending for adjudication.

6. In the meantime, an application u/s 7 of the Guardianship and Wards Act, 1890 has been filed before the Id. District Judge, Alipore, praying for custody of the minor son of the petitioner. Said application is still pending for final decision.

7. In spite of pendency of all those cases, opposite party No. 2 filed a petition of complaint before the Id. Additional Chief Judicial Magistrate, Baruipur who was pleased to send the same to the Baruipur P.S. for investigation. Pursuant to such direction of the Id. Magistrate, Baruipur P.S. case No. 214 (9) of 2006 dated 12.9.2006 was registered for investigation on the alleged commission of offence punishable u/s 363/366 of the Indian Penal Code against the petitioner and his brother. It has been alleged in the said petition of complaint that on 23.4.2006 complainant/opposite party No. 2 was driven out of the matrimonial house with her minor son and since then she was living in her paternal house. On 27.4.2006 when complainant/opposite party No. 2 went for casting her vote, accused persons came to her paternal house and abducted her minor son. Police did not take any action. As such, the complainant filed a petition of complaint before the Id. Additional Chief Judicial Magistrate, Baruipur alleging commission of offence by the accused/petitioner punishable u/s 323/343 of the Indian Penal Code and simultaneously a prayer for issuance of search warrant was also made.

8. So far as the present police case is concerned, the petitioner has claimed that he was arrested by the police in connection with the case and ultimately he was released on bail. On 2.11.2006, I.O. prayed for addition of Section 364A/365/506 of the Indian Penal Code and the Id. Magistrate was pleased to allow such prayer. During the course of investigation of the said case, the I.O. recovered the minor son of the petitioner and produced him before the Id. Magistrate who was pleased to grant interim custody of the said child in favour of the opposite party No. 2.

9. Petitioner, in this revisional application, has claimed that it is very much clear that the opposite party No. 2. in order to take revenge has filed several cases on the self-same cause of action only to harass the petitioner and his family members. I.O. also joined hands with the opposite party No. 2 in this respect and without any reason whatsoever has added the Section 364A/365/120B of the Indian Penal Code claiming therein that the petitioner demanded ransom from the opposite party No. 2 for return of the child and also threatened that the said child would be murdered if the amount was not paid. According to the petitioner, the allegations, as made in the present case, are patently absurd and improbable in nature. Since on earlier occasion on the self-same cause of action, a petition of complaint was filed by the opposite party No. 2, so on the basis of same allegation it is not permissible for the opposite party No. 2 to file another criminal case. In order to give a different colour, investigating agency added Section 364A/365/120B of the Indian Penal Code. Since the allegations are all improbable in nature, petitioner submitted that continuation of further proceeding of the said police case will be an abuse of the process of the Court and it should be quashed immediately.

10. I have heard the submissions of the Id. Advocates for the petitioner as well as for the State. At the out set it may be pointed out that registered notice with A/D was sent to the opposite party No. 2/ wife. But postal endorsement shows that she refused to accept the said notice. As such, the revisional application was heard in her absence.

11. There is no dispute that opposite party No. 2 was the legally married wife of the petitioner and according to the petitioner, he gave talak to the opposite party No. 2 by observing legal formalities. How far that talak is valid or not that is not the subject-matter to be considered in this revisional application. Fact remains that for more than one year the parties are living separately. There is no dispute that opposite party No. 2 at present is staying in her father's house. It is also admitted position that out of said wedlock a son was born who is now aged about 2 and 1/2 years. It appears from the revisional application that first of all opposite party No. 2 filed a complaint case against the petitioner alleging that she was assaulted and her minor son was kept confined in the house of petitioner and for that she prayed for issuance of search warrant, which was allowed. This fact has not been disputed by the opposite parties. That apart, it appears that opposite party No. 2/wife also filed a case u/s 498A/406/307 of the Indian Penal Code and that police case is also allegedly pending. It is also claimed by the petitioner that opposite party filed a petition u/s 125 Cr. PC praying maintenance for herself only. All these facts necessarily point out that said minor son was in the custody of the father when the opposite party No. 2 had to leave the matrimonial house. Be that as it may, it appears that allegation, as made in the petition of complaint of the complaint case which is still pending, are almost similar with the allegations, as made in the present case by the opposite party No. 2. There cannot be any doubt that over self-same allegation a complaint case and a police case cannot run together. In all probability, in order to overcome this

bar, in the police case subsequently a case has been set up to the effect that the petitioner snatched away the minor son from the father's house of opposite party No. 2 and demanded money for return of said child otherwise he would be murdered. But it appears that when a petition of complaint was filed before the Id. Magistrate and when it was sent to the P.S. for investigation at that time there was no such allegation. Case diary reveals that the statements were recorded to that effect subsequently. It is not difficult to understand that this claim, as made subsequently regarding demand of ransom and threat to murder the child, was nothing but an afterthought in order to suit the purpose of the opposite party No. 2. I have got no hesitation to hold that from the materials on record, it must be said that this police case, as started against the petitioner at the instance of the opposite party No. 2, is an afterthought and has been filed only to harass the petitioner. I have already pointed out that over the self-same allegation another criminal case is pending before the Id. Magistrate. As such it is not permissible for the opposite party No. 2 to file another police case over the self-same allegation against the petitioner.

12. Admittedly, the petitioner is the father of the said minor child. It appears from the revisional application that during the course of investigation said minor child was taken away by the police from his custody and he is now in the interim custody of his mother as per direction of the Id. Magistrate. In the revisional application it has been stated that the petitioner being the father of the said child has already filed a petition before the Id. District Judge, Alipore under the Guardianship and Wards Act, praying for custody of the said child and that petition is still pending. It is the settled position of law that in case of a dispute in between the parents of a child, it is always open for the parties to move the appropriate Court under the Guardianship and Wards Act for having custody of the said child. Exactly such step has been taken by the petitioner. The action taken by the petitioner in this respect appears to be perfectly legal and justified. I have already pointed out that the opposite party No. 2 alleged in the petition of complaint that the petitioner is guilty of abducting her minor child and for that has committed an offence u/s 363 and other related sections. But it is settled position of law that father being a natural and lawful guardian, even if he is guilty of removing his son below five years of age, from the custody of his mother, same cannot be treated to be an offence u/s 363 of the Indian Penal Code. In this respect the decision reported in *Shesh Narain Vs. State*, is relevant. It has been further decided in the case reported in *Ismail Aboobaker, Puthuparambil, Thodupuzha and Others Vs. State of Kerala*, to the effect that when accused alleged to have taken away his child aged about 2 and 1/2 years from his wife's custody after entering into the house of his father-in-law then it cannot be said that an offence u/s 361/363/448 of the Indian Penal Code has been committed. I have already pointed out that it is a fight in between the parents of the child over the custody of the minor son, and this question can only be effectively decided by the District Judge, before whom appropriate petition praying for custody, has already been filed. No purpose will be served by filing a criminal case against the

husband by the wife. I have already pointed out that the allegations, as made in the First Information Report appear to be patently absurd and improbable in nature and I have got no hesitation to hold that same has been filed in order to take revenge upon the husband by the wife. That apart, admittedly another criminal case, over the selfsame allegation, is also pending before the Id. Magistrate and under such circumstances, I have got no hesitation to hold that further continuation of this criminal case against the petitioner will be an abuse of the process of the Court and to mind said criminal case should immediately be quashed.

13. In the revisional application succeeds on contest. G.R. case No. 901 of 2006 corresponding to Baruipur P.S case No. 214 dated 12.9.2006 which is now pending before the Id. Additional Chief Judicial Magistrate, Baruipur is quashed. The accused persons be discharged at once.

14. Send a copy of this judgment to the Court below at once for information and necessary action.

15. Xerox certified copy of this order be handed over to the parties, if applied for, on urgent basis.