
(1985) 09 AP CK 0006

In the Andhra Pradesh High Court

Case No : Criminal Miscellaneous Petition No. 2079 of 1985

Raj Srinivas and Others

APPELLANT

Vs

Usha K. Pillai and Another

RESPONDENT

Date of Decision : 30-09-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 360, 361

Citation : (1985) 09 AP CK 0006

Hon'ble Judges : Anjaneyulu, J

Bench : Single Bench

Advocate : K.N. Achary, for K.G. Kannabiram, for the Appellant; A. Anand Rao and Public Prosecutor, for the Respondent

Judgement

1. The four petitioners herein are accused 1 to 4 in the complaint filed by Smt. Usha Pillai in C.C. 234/85 in the Court of the IV-Metropolitan Magistrate, Hyderabad. The petitioners ask for the quashing of the proceedings in the aforesaid C.C. No. 234/85 in exercise of the powers vested in this Court under S. 482, Cr.P.C.

2. A few facts relevant for the purpose of disposing of this petition may be noticed. The respondent's daughter Geetha was married to Raj Srinivas, accused 1 in the complaint on 29-10-1976 at Hyderabad. After the marriage the first accused left for Ireland to prosecute further studies accompanied by his wife. On 27 July 1978 a female child named Nivedetta was born to Geetha. The first accused along with his wife and daughter left Ireland for the United States later. The respondent claims that the first accused and his wife entrusted Nivedetta in November 1979 to her care, as the maternal grand-mother, to bring up Nivedetta in India. It is further claimed that the relations between Geetha and the first accused were not very cordial in the United States and therefore Geetha returned to this country on 14-3-1980 and committed suicide and died on 21-3-1980 at the respondent's house. It is further claimed that after the demise of Geetha the

first accused converted himself to Christianity and married an American lady some time in 1983. The respondent filed an application O.P. 203/84 in November 1984 before the Chief Judge, City Civil Court, Hyderabad, to appoint her as guardian of the person of the minor Miss Nivedetta who continued to live in India with the respondent. The respondent's contention was that for some unknown reasons the first accused wanted to remove Nivedetta from the custody of the respondent and came to India in December 1984 for achieving that purpose. It is alleged that with the connivance of accused 2 and 3, who are the sister and sister's husband of accused 1, and accused 4, an employee of accused 3, the first accused kidnapped Nivedetta from Bharatiya Vidya Bhavan School by making false representation to the Principal of the School. The respondent further alleged in the complaint that the first accused made false representation to the City Police that the passport of Nivedetta was lost and obtained a "Leave India Certificate". It is said that the passport of Nivedetta was actually with the respondent. The complaint filed by the respondent proceeds to say further that the first accused assisted by the remaining three accused proceeded to Madras along with the child Nivedetta. It is stated that the respondent's son went to Madras on 15-12-1984 and reached the Airport to prevail on the first accused not to take away the child. While Nivedetta was crying and refusing to follow the first accused, it is said that the first accused put Nivedetta on the Aircraft and took her away to the United States via Singapore. Based on the aforesaid allegations the respondent sought prosecution of all the four accused for offences allegedly committed under S. 120B, S. 363, S. 34 and S. 109 and S. 420, IPC.

3. The petitioners urge that no offence is made out in the complaint filed by the respondent and the purpose of the complaint is to harass the accused for no offences committed by them. It is claimed that the first accused, as the father and the natural guardian, has a right to take away Nivedetta along with him and in doing so he committed no offence. It is further claimed that accused 2, 3 and 4 have unnecessarily been implicated in the matter and they did not commit any offence under the Penal Code. The petitioners, therefore, seek the intervention of this Court to quash the proceedings before the IV-Metropolitan Magistrate, Hyderabad, by exercising power u/s 482, Cr.P.C.

4. Sri K. N. Achary appearing for the petitioners, has put forward very effectively his submissions in support of the plea that no offence is made out in the complaint filed by the respondent and this court should, therefore, exercise jurisdiction under S. 482, Cr.P.C. and quash the proceedings before the Magistrate in order to prevent abuse of the process of the Court or otherwise to secure the ends of justice. Learned counsel has also drawn my attention to a number of judicial pronouncements in support of the plea that as father and natural guardian accused 1 was entitled to take away his daughter Nivedetta along with him and he needed nobody's consent for the purpose. It is pointed out that the respondent's application for appointing her as the guardian of the person of the minor Nivedetta was allowed by the Chief Judge, City Civil Court, only on 2nd day of March 1985 in O.P. 203/84 while on the own showing of the

respondent the first accused had taken his daughter along with him in December 1984. It is, therefore, urged that the respondent could not be considered to be a lawful guardian and no offence can be made out under sections 360 and 363, IPC.

5. Having given my careful consideration to the matter I am unable to accept the contention that the complaint filed by the respondent does not disclose prima facie that no offence was committed by the accused. Power can be exercised by this Court under S. 482, Cr.P.C. to quash the proceedings before a Magistrate in any of the following circumstances;

(1) where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

Please see the judgment of the Supreme Court in Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, .

It is not possible to accept the contention that the allegations made in the complaint taken at their face value make out absolutely no case against the accused or that the complaint filed by the respondent does not disclose the essential ingredients of offences alleged against the accused.

6. Sections 360 and 361, IPC deal with kidnapping. Whether on the facts and in the circumstances of the case and in the light of allegations made in the complaint an offence is made out either under S. 360 or under S. 361 or both of the IPC, is a matter that calls for considerable debate in the present case. The expression "lawful guardian" occurring in S. 361, IPC cannot be held to mean only a person legally entitled to be a guardian of minor child. That expression is used in S. 361, IPC in a much wider context. In the legal acceptance of the expression "lawful guardianship" it would apply to the case of either a natural or testamentary guardian or a guardian appointed under the Guardians and Wards Act. The question for consideration, however, is whether that expression would include for the purpose of S. 361, IPC the case of a person to whom the custody of a minor is entrusted. By the Explanation to S. 361, IPC the words "lawful guardian" occurring in the section included any person lawfully entrusted with the care or custody of the minor person. It may be pointed out that the concept of dual guardianship is by itself not repugnant to law and it is not difficult to

conceive of cases where there can be a "lawful guardian" apart from a "legal guardian". There is nothing in law to prevent the father or the mother of a minor child, who may be the lawful guardian of such minor child for the time being, from entrusting lawfully the care and custody of such minor to any other person. (see the judgment of the Patna High Court in Samarendra Kumar Chakarvarti and Another Vs. Emperor, , which supports the above proposition). Reference may also be made to the Full Bench judgment of the Bombay High Court in Emperor Vs. Ismail Sayadsaheb Mujawar, . The question that arises in the present case, therefore, is whether the respondent-complainant could be considered as "lawful guardian" within the meaning of the Explanation to S. 361, IPC. The respondent states in the complaint that she is the maternal grandmother of the minor Nivedetta and the custody of the minor was lawfully entrusted to her by the first accused and the deceased daughter of the respondent. Then again it is not in dispute that at the time when the first accused admittedly conveyed the minor Nivedetta in December 1984 without the consent of the respondent, proceedings were already pending before the Chief Judge, City Civil Court in O.P. 203/84 for appointment of the respondent as guardian of the person of the minor Nivedetta. It is not disputed that by order dt. 2-3-1985 the Chief Judge, City Civil Court, allowed the application of the respondent and appointed her as the guardian of the person of the minor Miss Nivedetta and the first petitioner was directed to hand over the custody of the minor Nivedetta to the respondent at Hyderabad. What is the effect of this order of the learned Chief Judge for the purpose of determining whether the petitioners committed an offence under S. 361, IPC is a matter that requires careful consideration. The question whether the appointment of the respondent as the guardian would relate back to November 1984 when the respondent filed the application before the Court of the Chief Judge, or whether in the peculiar facts and circumstances of the case it would take effect only on 2-3-1985 when the respondent was appointed as guardian, is also a matter that calls for careful examination. It is, not, therefore, possible to straightway come to the conclusion that the allegations made in the complaint by the respondent make out absolutely no case against the accused or that the complaint does not disclose the essential ingredients of an offence alleged against the accused. In order to come to such a conclusion it is necessary to enter into a debate and adopt a process of reasoning, logic and interpretation of various provisions of law with particular reference to various judicial pronouncements in the matter. A matter which requires such a serious debate does not merit this Court exercising inherent jurisdiction under S. 482, Cr.P.C.

7. I am also not willing to accept that the facts and circumstances of this case would justify this Court exercising its inherent jurisdiction under S. 482, Cr.P.C. It cannot be denied that the inherent power under S. 482, Cr.P.C. can be exercised in exceptional cases where this Court considers necessary to exercise such power to secure the ends of justice. The allegations in the complaint would prima facie indicate that the first accused stealthily carried away the child from India

reportedly against her wishes. The mother of the minor child had died in unfortunate circumstances. The allegation is that the first accused converted himself to Christianity and married an American lady. All these facts would necessitate the consideration of the larger issue whether it would assure the welfare of the child and serve her interests to be brought up by the first accused in the aforesaid circumstances. Indeed, this may be a larger question that calls for consideration keeping in mind the observations of the Supreme Court in this regard in *Rosy Jacob Vs. Jacob A. Chakramakkal*, regardless of the fact whether accused 1 committed an offence in conveying the child outside India without even informing the respondent admittedly having custody of the child at the relevant time.

8. During the course of the hearing I put it to the learned counsel for the petitioners whether the first petitioner would be willing to produce the minor Nivedetta in this Court so that this Court could elicit from her directly her wishes. The child is 7 years old and should be reasonably intelligent to understand her own interest and indicate her preference either to live with the first petitioner or with the respondent-complainant. Based on the wishes of the minor child it might perhaps be possible to consider whether accused 1 committed any offence. Unfortunately the learned counsel for the petitioners reports that he could not contact accused 1 although sufficient time was given to him.

9. For all the aforesaid reasons I am unable to accept the contention of the learned counsel for the petitioners that circumstances of this case would justify the exercise of the inherent power vested in this Court under S. 482, Cr.P.C. to quash the proceedings in C.C. 234/85 in the Court of the IV-Metropolitan Magistrate at Hyderabad. The petition is accordingly dismissed.

10. Petition dismissed.