
(2006) 12 P&H CK 0013

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous No. 54382 of 2005

Sehnaz alias Santosh Gupta

APPELLANT

Vs

State of Punjab and another

RESPONDENT

Date of Decision : 15-12-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (2007) 1 RCR(Criminal) 990

Hon'ble Judges : Ranjit Singh, J

Bench : Single Bench

Advocate : Ranjan Lakhanpal, for the Appellant; M.C. Berry, D.A.G., Punjab For the Respondent No. 2 Mr. P.S. Brar, for the Respondent

Judgement

Ranjit Singh, J.—Strangely, a mother, one of the natural guardian, is an accused of an offence of kidnapping of her own child with further allegation that this was with the intent to secretly and wrongfully confine the child. Unmindful of the relationship of mother and child, the police has registered the FIR in this regard and has gone ahead to present a challan. Crying hoarse, the mother is saying that being natural guardian she cannot be blamed for kidnapping her own child. She has, accordingly, filed the present petition u/s 482 Cr.P.C. seeking quashing of the said FIR and the subsequent proceedings being held against her.

2-3. On 10.10.1995, the petitioner, a Hindu by religion, has performed an inter-religious marriage with respondent No. 2, a Muslim, a male child named Jasan Ashish was born out of this wedlock on 18.1.1999. Differences between the couple led to divorce between them on 23.1.2002. The petitioner says that she became extremely upset due to break up of this marriage and respondent No. 2 taking advantage of her infirm mental health got the custody of their child, who at that time was 3 years old. Claiming law to be in her favour, the petitioner has averred that the mother is a natural guardian for a male child upto the age of 7 years as per the Muslim Law. The petitioner has, otherwise, been meeting her child with prior permission of respondent No. 2. The petitioner admits to have

taken her child on vacations as she was going to Mount Abu with her colleagues. As per the petitioner, this was with prior permission of respondent No. 2, her ex-husband. On this, respondent No. 2 got registered a criminal case against the petitioner with the allegation that she had kidnapped the child. During the course of arguments, it was conceded before me that the child presently is in custody of respondent No. 2.

4. Notice of motion was issued in this case and reply has been filed by the State. Unmindful of the relationship between the petitioner and the child allegedly kidnapped, the police and the State continue to defend their action in registering the FIR and in filing challan. They have justified their action on the ground that the FIR was rightly registered as per law, which was found true during the investigation and challan presented leading to framing of charges as well.

5. Can a mother be accused of kidnapping of her minor son ? Mr. Ranjan Lakhanpal, learned counsel for the petitioner would say that registration of a case of kidnapping and continuing of the proceedings against the mother-petitioner is nothing but an abuse of process of Court. On the other hand, Mr. P.S. Brar, learned counsel for respondent No. 2 is equally vehement in opposing the prayer of the petitioner. Counsel for respondent No. 2 has maintained that the petitioner had earlier given up the custody of the child voluntarily and hence would not have any right to take child in the manner she did. He otherwise conceded that respondent No. 2 was permitting the petitioner to meet the child. Accordingly, he has prayed that the present petition to be dismissed.

6. I have considered the rival contentions raised before me by the respective counsels. It has not appealed to my senses that mother can really be accused of kidnapping of her own child. Can the divorce granted between the couple lead to severance of relation of mother and child ? This relationship in fact would continue to subsist irrespective of the fact whether the marriage is subsisting or not. It is conceded by respondent No. 2 that petitioner-mother was visiting and meeting the child. Even if, on some weaker moment, the petitioner happened to take the child along with her, this would be more out of love and affection rather than with any intention to kidnap the child. What motive can be attributed to the mother for taking the child is really not understood. It cannot be anything but love and affection. Can she thus be accused of an offence of kidnapping, which per force has to have some mens rea in case allegations are to be pursued. No such mens rea or motive can really be alleged against the petitioner. In addition, she is claiming that she had taken prior permission of the husband for taking the child with her. It would rather be difficult to deprive the mother to forgo her love and affection for her own child. Making allegations of kidnapping in this background certainly cannot be sustained. The allegation is really far fetched and appears to be made by respondent-husband out of spite and vengeance. A natural guardian cannot be accused of an offence of kidnapping and in this regard, reference can be made to decision of Hon''ble Supreme Court in the case of Chandrakala Menon v. Capt. Vipin Menon, 1993(2) RCR(Cri) 5 (SC). This was a

case where girl child aged 7-1/2 years was residing with maternal grand parents when her father came to see her and took her to Bombay. A complaint was lodged with the police. Magistrate took cognizance of the matter and directed the father to produce the child on a particular date. He did not do so claiming that he was held up in Bombay due to unavoidable reasons. Adjournment sought by the father was declined and he was directed to hand over the custody of the child to the police so that it could be restored to the grand parents. When the father failed to produce the child before the police, a case was registered and father was declared proclaimed offender. This order was challenged u/s 482 Cr.P.C. The High Court quashed the order of Magistrate by recording a finding that accused being natural guardian could not be charged with an offence of kidnapping. This order of the High Court was challenged before Hon"ble Supreme Court by the wife and her parents and it was held by the Hon"ble Supreme Court that in view of the facts and circumstances of this case, the High Court was justified in quashing the criminal proceedings against the respondent-father. It was further held that no fault can be found with the High Court order and the same was upheld. Even this Court in Harbans Singh and others v. Jaswant Singh, 1987 (1) RCR(Cri) 628 (P&H) had the occasion of dealing with a similar case where the wife had left the house along with minor child against the wishes of her husband and the allegation of abduction was made against the parents of wife as she was staying with them. This was a case where the parents and young unmarried sister of the mother of the child were summoned by the Judicial Magistrate Ist Class to face trial under Sections 363 and 366 IPC. It was held that mother of the minor is equally competent legal guardian. Not only the complaint and the summoning order qua these petitioners were quashed but the submission that minor son of the complainant was taken away from the custody of natural guardian without his consent and would reveal an offence u/s 363 IPC was also not accepted. Single Judge of this court held that there was no merit in the stand in view of the fact that mother of a minor too is an equally competent legal guardian of the said minor. Ultimately, the Court found that complaint was complete misuse of the process of Court and complainant could have restored to remedies under Hindu Marriage Act or in the Civil Court instead of choosing the petitioners in the said case for this harassment. It is no body's case that mother even if she had voluntarily given up the custody of the child to her former husband would be debarred from the custody of the minor child being a natural guardian for all times to come. Under these circumstances, it can be said that no offence of kidnapping u/s 363 IPC or for that matter u/s 365 IPC would be made out against the petitioner, who had taken her child being a natural guardian. Present FIR and the subsequent proceedings taken against her are nothing but abuse of process of court and they need to be quashed. It is ordered accordingly.

7. FIR No. 51 dated 22.4.2005 under Sections 363 and 365 IPC registered at Police Station City Faridkot and all subsequent proceedings arising therefrom will stand quashed relieving the petitioner of the consequences of these proceedings.