

(2002) 07 OHC CK 0048

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 487 of 2001

Shri Ashok Kumar Seth

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 25-07-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Guardians and Wards Act, 1890 — Section 4(2)
Hindu Minority and Guardianship Act, 1956 — Section 4
Penal Code, 1860 (IPC) — Section 361, 363

Citation : (2002) 94 CLT 447 : (2003) CriLJ 642 : (2002) OLR 403 Supp

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

P.K. Tripathy, J.—Perused the letter of the wife of the petitioner. The sum total of the contents in that letter is failure of the settlement which had been made between the parties on the efforts of this Court. The rest of the allegations are matters for her to take up appropriate legal action in appropriate forum.

2. Heard learned counsel for the petitioner and learned Standing Counsel, and this application u/s 482, Cr.P.C. is disposed of in the following manner.

3. Petitioner's prayer is to quash the order of cognizance in G.R. Case No. 284 of 2000 of the Court of S.D.J.M., Talcher. It appears from that order dated 13.9.2002 of learned S.D.J.M. that he has taken cognizance of the offence under Sections 452/363/34, IPC on the allegation that the petitioner came to the house of his father-in-law and took away the child from the custody of his wife and in that process used some criminal force. Learned counsel for the petitioner, Mr. Dey argues that there was no intention nor any occurrence of use of criminal force, and a fabricated allegation has been made to add gravity to the allegation. This Court is not inclined to go into that aspect at this stage of the proceeding, because the allegation prima facie makes out a case u/s 452, IPC. However, at

the stage of consideration of charge or trial, petitioner, if so advised, may plead about his innocency by bringing appropriate evidence on record either through the P.Ws. or by adducing defence evidence.

4. So far as the cognizance of the offence u/s 363, IPC is concerned, learned counsel for the petitioner states that the totality of the allegation on kidnapping is that petitioner took away his male child from the custody of his wife while she was in her parent's house (father-in-law's house of the present petitioner) and, therefore, no offence of kidnapping is made out in this case. Accordingly, he prays to quash the order of cognizance of that offence. Learned Standing Counsel, while not disputing on position of law in that respect, argues that petitioner may raise such a plea at the stage of consideration of charge.

5. It is the settled principle of law that an order of cognizance is not to be lightly interfered with by the superior Courts unless it finds that such an order is infested with illegality or mala fide. Admittedly, in this case petitioner does not allege mala fide against the S.D.J.M, for taking cognizance of the offence u/s 363, IPC. On the other hand, he alleges illegality of that order on the ground of lack of prima facie case. Thus, on perusal of the allegation made in the FIR and the evidence collected by the Investigating Officer in course of investigation if a case of kidnapping was not made out but the cognizance taking Magistrate has taken cognizance of that offence for no good reason than such an order can be termed as an illegal order for not taking recourse to provision of law regarding ascertaining existence of prima facie case when passing order in taking cognizance of offences.

6. On analysing the facts as it exists on record, it is seen that to constitute the offence of kidnapping which is punishable u/s 363, I.P.C., there must exist prima facie case that a minor or a person of unsound mind is taken or enticed away out of the keeping of the lawful guardian without consent of such guardian. The term "lawful guardian" has been explained in Section 361, Cr.P.C. to include any person lawfully entrusted with the care or custody of such minor or person of unsound mind. So far as the present case is concerned, admittedly parties are Hindu by religion and the provision in Hindu Minority and Guardianship Act, 1956 (in short the Act, 1956) is applicable to the parties. In Section 4(b) of the Act, 1956 "guardian" has been defined as a natural guardian and guardian appointed in various manner. In that respect Section 4(c) read with Section 6 defines the term "natural guardian". For ready reference relevant portion from Section 6 is quoted below :

"6. Natural guardians of a Hindu minor: The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are :

(a) in the case of a boy or an Unmarried girl-the father, and after him, the mother;

Provided that the custody of a minor who has not completed the age of five years

shall ordinarily be with the mother.

Even according to Section 4(2) of the Guardians and Wards Act, 1890 (in short "the Act, 1890") "guardian" means a person having the care of the person of a minor or of his property or of both his person and property. The provision in Act, 1890 provides for appointing a person other than the father as the guardian of a minor with respect his person or property only in appropriate cases. On a conjoint reading of the aforesaid provisions in the said two statutes it appears that the father who is the natural guardian, has right of domain over the minor unless there is order of a competent court debaring him to have custody or guardianship of such minor. In the case of *S. Bhardarajan V, State of Madras* AIR 1965 SC 952 while dealing with a case u/s 363, IPC, their Lordships of the Apex Court have held that "even where the minor girl is kept by her father at the house of his relative, she still continues to be in the lawful guardianship of the former."

7. It is thus clearly readable from the position of law as noted and discussed above that unless there is legal prohibition by order of a Court of competent jurisdiction, the father cannot be looked for taking away his minor child from the custody of his wife because he is the natural guardian and, therefore, the offence u/s 363, I.P.C. cannot be attracted against him for taking the child from the custody of the mother. Under such circumstance, on acceptance of the prosecution case in its totality (as per the statement recorded in course of investigation) a prima facie case is not made out for the offence punishable u/s 363, IPC by satisfying the ingredients of offence of kidnapping. Once that be so, taking cognizance of the said offence is illegal. Learned S.D.J.M. without properly perusing the provision of law vis-a-vis the allegation by the prosecution has mechanically passed the order taking cognizance of the offence u/s 363, IPC.

8. Thus, this Court finds the cognizance of the offence u/s 363, IPC not sustainable in the eyes of law and accordingly the same is quashed. In other words, while maintaining the order of cognizance for the offence u/s 452, IPC, this Court sets aside the order of cognizance u/s 363, IPC.

The Criminal Misc. Case is accordingly allowed in part.