



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 23.02.2018

PRONOUNCED ON : 02.03.2018

CORAM:

THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

WEB COPY

CrI.O.P.(MD)No.12761 of 2013

and

CrI.M.P.(MD)Nos.1 & 2 of 2013

1.Laucer

2.Rosammal @ Rajeswari ... Petitioners/Accused No.1&2

Vs.

1.State rep. by,
The Inspector of Police,
Sivakasi Town Police Station,
Virudhunagar District.
(Crime No.541 of 2012)

.. 1st Respondent/Complainant

2.R.Mallika .. 2nd Respondent/ Defacto Complainant

PRAYER: The Petition filed under Section 482 Cr.P.C. to call for the records in C.C.No.59 of 2013, on the file of the learned Judicial Magistrate, Sivakasi and quash the same.

For Petitioners : Mr.P.T.Ramesh Raja

For Respondent No.1 : Mr.A.Robinson

Government Advocate (Criminal side)

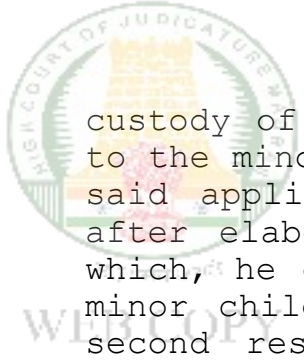
For Respondent No.2 : Mr.M.P.Senthil

ORDER

The petitioners herein are the accused Nos.1 & 2 in C.C.No.59 of 2013, pending on the file of the learned Judicial Magistrate, Sivakasi. This application is filed by the petitioners to call for the Charge Sheet pertaining to C.C.No.59 of 2013 and to quash the same as illegal.

2. The gist of the prosecution case is as follows:

Admittedly the second petitioner herein is the mother of the first petitioner. In the early days, before the date of occurrence, the first petitioner married one Kala, who is the daughter of the second respondent and one Rajarathinam, now cited as L.W.2 in the Charge Sheet. After the marriage, the first petitioner and his wife were blessed with two children, named as Barath and Lara. After giving birth to the two children, the wife of the first petitioner died. After the death of his wife, the minor children were residing with the petitioners herein in Cuddalore District. In the above circumstances, the second respondent filed a petition for the



custody of the minor children and for appointing her as a guardian to the minor children before the District Court, Srivilliputhur. The said application was taken on file as G.W.O.P.No.23 of 2009 and after elaborate enquiry, the above said Court passed an order in which, he directed the petitioners to handover the custody of the minor children within a period of 30 days from 30.09.2009 to the second respondent. Since the said order was not obeyed by the petitioners, the second respondent herein filed an execution petition in E.P.No.11 of 2010 for handing over the minor children and the same is pending. In the meantime, she filed another one writ petition in H.C.P.No.855 of 2012 before this Court to produce her grand children. Thereafter, this case has been registered, as per the complaint given by the second respondent herein.

3. Now, the learned counsel appearing for the petitioners made submission that the first petitioner herein being the natural guardian having the right to maintain the children. Further, he added that as per Section 361 of IPC, the petitioner herein did not commit the offence of kidnapping.

4. Now, it is relevant to extract Section 361 of IPC as follows:

" 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.

Explanation: - The words "lawful guardian" in this section include any person lawfully entrusted with the care of custody of such minor or other person.

Exception: - This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

5. Considering the above said provisions with the explanations, the legal luminaires defined the "lawful guardian" means any person lawfully entrusted with the care of custody of such minor. In the case on hand, the learned District and Sessions Judge, by order, dated 30.09.2009, in G.W.O.P.No.23 of 2009 ordered to entrust the custody of the minor children to the second respondent and in this regard, the execution petition is pending. But, in the statement given by the second respondent and her husband and other



witnesses, it is not at all stated as to when the children were handed over to the custody of the second respondent. So, since the order passed by the learned District and Sessions Judge is appealable one, till the custody is taken over by the second respondent. It cannot be treated as she is the custodian for the minor children. In a statement made before the police officer, the second respondent did not say anything about the date, on which the minor children are handed over to her custody by the petitioners herein and the date from which she is taking care of the children. Since it is not stated in the charge sheet that on the date on which the second respondent took the custody of the minor children, the complaint lodged by the second respondent against the petitioners for the offence of kidnapping is not legally sustainable.

6. Though as per the observation made by this Court, in the order passed in H.C.P.No.855 of 2012, dated 21.09.2012 the custody of the minor children with the petitioners amounts to legal detention, now, as per the case of the prosecution, on the date of occurrence, the children are not in the custody of the petitioners. Hence, this Court come to the conclusion that the petitioners herein are not kidnapped the minor children from the lawful guardianship.

7. Hence, this Court is inclined to allow this application Accordingly, this Criminal Original Petition is allowed and the case in C.C.No.53 of 2009 is quashed. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(AS)

/True Copy/

Sub Assistant Registrar

To

1.The Judicial Magistrate, Sivakasi.

2.The Inspector of Police,
Sivakasi Town Police Station,
Virudhunagar District.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

+1cc to M/S.M.P.Senthil, Advocate SR.No. 52736

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