

201 **IN THE HIGH COURT OF PUNJAB AND HARYANA**
AT CHANDIGARH

CRM-M-35177-2022 (O&M)

Date of decision: 05.01.2024

Geeta

....Petitioner

Versus

State of Haryana and another

...Respondents

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Kuldeep Sheoran, Advocate
for the petitioner.

Mr. Vikas Bharadwaj, AAG, Haryana.

Ms. Kushboo, Advocate
for Mr. Padamkant Dwivedi, Advocate
for Respondent No.2.

HARPREET SINGH BRAR, J. (ORAL)

1. The present petition is preferred under Section 482 of the Cr.P.C for quashing the complaint no. 21/2015 dated 30.04.2015 filed under Sections 363, 452 and 120-B of the IPC (Annexure P-1) and order dated 11.10.2018 passed by learned Judicial Magistrate Ist Class, Bahadurgarh(Annexure P-2) whereby the petitioner has been summoned to face trial for commission of offence punishable under Section 363 of the IPC.

FACTUAL BACKGROUND

2. The facts, briefly, are that the petitioner is married to the son of respondent no. 2-complainant and out of the wedlock a daughter namely Prachi was born. However, some matrimonial discord ensued between petitioner and her husband and the petitioner registered a complaint against him and his

family, in which he was granted the concession of bail while respondent no. 2 and his wife (mother-in-law of the petitioner) were found innocent during police investigation. The petitioner had also filed a petition under Protection of Women from Domestic Violence Act, 2005 (hereinafter 'DV Act') before Chief Metropolitan Magistrate, Tis Hazari Courts, Delhi.

3. Allegedly, on 28.04.2015, an unknown lady, accompanied by a man, came to the clinic of respondent no. 2 complaining of severe abdomen pain due to a kidney stone and while he was preparing the injection for the lady, the man accompanying her entered the house of respondent no. 2 and took his sleeping grand daughter- Prachi and said that their job is done and some people are waiting for them in the Santro car. Thereafter, they hurriedly left the place without even collecting the balance amount. When respondent no. 2 went to the police station to lodge a complaint, he received a mobile call from the petitioner informing him that the minor child-Prachi was with her and he can do whatever he wants to do. Subsequently, respondent no. 2 filed a complaint against the petitioner, her father, mothers, sister and brother who hatched a conspiracy to kidnap his 3 years old grand daughter in collusion with the unknown man and lady who had visited his clinic.

4. It is also pertinent to mention that a compromise was arrived at between the petitioner and her husband in the year 2015 which is recorded by the Delhi High Court in its order dated 16.11.2017 whereby a formal compromise deed dated 15.12.2016 has been executed. Further, the petitioner recorded a statement on 12.01.2017 regarding her unwillingness to pursue her complaint under DV Act any further as she is now residing in her matrimonial home with her husband and his family since one month. However, in the year 2020, she was shunned out of her matrimonial home again. The petitioner filed

for guardianship of her minor daughter before the Family Court, Jhajjar where the custody of the child was granted to the her husband. An appeal titled as '*Geeta v. Raj Kumar Jangra*' in FAO-1182-2022 was filed before this Court wherein the Division Bench granted custody of the minor child to the petitioner-mother vide order dated 26.04.2022.

5. On being satisfied about the existence of a *prima facie* case against the petitioner, the learned trial Court issued summoning order dated 11.10.2018 against her. Due to reasons of not keeping well, the petitioner failed to appear before the learned trial Court and bailable warrants were issued against her vide order dated 13.06.2022 (Annexure P-3).

CONTENTIONS

6. Learned counsel of the petitioner assails the impugned order on the ground that the ingredients of the offence of kidnapping as envisaged under Section 361 of the IPC are not made out as the petitioner-mother is equally a natural guardian of the minor child, especially where the child is under 5 years of age. He further argues that respondent no. 2 has concealed the fact that two days prior to the date of the alleged incident, the son of respondent no. 2 (petitioner's husband) took the petitioner back to her matrimonial home after apologising to her parents. However, the next day itself, the son of respondent no. 2 gave her beatings, harassed her for dowry and kicked the petitioner and her daughter out of the matrimonial home.

7. *Per contra* learned counsel for respondent no. 2 argues that a perusal of order dated 18.02.2015 passed by Mahila Court, West, Tis Hazari Courts, Delhi indicates that the minor child was in custody of the son of respondent no. 2. In compliance of the orders of the learned trial Court, the minor child was brought to the Court to meet her mother, however, the minor

child refused to recognise her. As such, the interest of the minor child cannot lie with the petitioner as she is guilty of removing her unlawfully from the custody of respondent no. 2- grand father of the minor child.

8. Learned counsel for the State submits that the petitioner had failed to comply with the order dated 11.10.2018 and did not appear before the learned trial Court. He argues that the learned trial Court rightly issued bailable warrants against the petitioner vide order dated 13.06.2022 as she was actively evading the process of law.

OBSERVATION AND ANALYSIS

9. Having heard the learned counsel for the parties and after perusing the record of the case, it transpires that the ingredients for the offence of kidnapping are not made out in the instant case. A perusal of Section 361 of the IPC and Section 6 of the Hindu Minority and Guardianship Act, 1956 (hereinafter 'HMGA, 1956) is necessary for proper adjudication of the case. The same are reproduced as under:

Section 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 or 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 the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Section 6. Natural guardians of a Hindu minor.

The natural guardians 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;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl--the mother, and after her, the father;

(c) in the case of a married girl the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section--

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation.--In this section, the expressions "father" and "mother" do not include a step-father and a step-mother.

10. A perusal of the above provisions indicates that for an offence of kidnapping to be made out, it is necessary that the minor child is taken away from the custody of a 'lawful guardian.' However, a mother falls well within the ambit of 'lawful guardian,' especially in absence of an order divesting her of the same passed by a competent Court. This Court is of the view that a parent cannot be held guilty of the offence of kidnapping as both the parents of the child are her equal natural guardians. Even though the matrimonial relationship between the parents has soured, the relationship between a parent and child subsists and it is only natural for a parent to want to be in company of her child, especially in absence of an order of the competent Court prohibiting the same.

11. The Court of Appeals in **In Re McGrath (infants), [1893] 1 Ch. 143**, speaking through Lindley L.J., made the following observations:

"... The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, or by physical comfort only. The word welfare must be taken in its widest sense. The moral or religious welfare of the child must be

considered as well as its physical well-being. Nor can the ties of affection be disregarded.”

Furthermore, Section 6 of HMGA, 1956 categorically states that the custody of minor child upto the age of 5 years shall ordinarily be with the mother. In doing so, the legislature has recognised the indispensable and inimitable role of a mother in the upbringing of a young child. A mother's love for her children is selfless and the lap of the mother is God's own cradle for her children and therefore, children of tender years ought not to be deprived of said love and affection. *Per contra* it would be very difficult for the mother to forego the love and affection she has for her child and an attempt to be with the said child cannot be seen as an act fuelled by *mens rea*. The Hon'ble Supreme Court in ***Rosy Jacob v. Jacob A. Chakramakkal (1973) 1 SCC 840*** and ***Mausami Moitra Ganguli v. Jayant Ganguli 2008 (4) RCR (Civil) 551*** has held that the welfare and interest of the child are of paramount consideration with respect to custody of a child. Admittedly, at the time of the alleged occurrence, the age of minor child Prachi was only 3 years as such, in view of Section 6 of HMGA, 1956, it would be in the best interest of the minor child to be in custody of her mother.

CONCLUSION

12. In view of the facts and circumstance of the case and the discussion above, this Court is of the opinion that complaint no. 21/2015 dated 30.04.2015 and summoning order dated 11.10.2018 passed by learned Judicial Magistrate Ist Class, Bahadurgarh deserve to be set aside. Accordingly, the present petition stands allowed and the aforesaid impugned complaint and summoning order along with all subsequent proceedings emanating therefrom are hereby quashed.

13. Pending applications, if any, shall also stand disposed of.

(HARPREET SINGH BRAR)
JUDGE

05.01.2024
*Neha/Pankaj**

Whether speaking/reasoned : Yes
Whether reportable : Yes