

HIGH COURT OF BOMBAY

Bench: Justice Vinay Joshi

Date of Decision: 6 October 2023

CRIMINAL APPLICATION NO.552 OF 2023

Shri Ash ish ... APPLICANT.

VERSUS

1. State of Maharashtra,
2. Dr. Manisha ... **NON-APPLICANTS.**

Legislation:

Section 361, 363 of the Indian Penal Code (IPC)

Section 6 of the Hindu Minority and Guardianship Act, 1956

Section 4(2) of the Guardians and Wards Act, 1890

Subject: Whether a father can be booked for kidnapping his own minor child when taking the child away from the mother's custody.

Headnotes:

Kidnapping – Biological Father's Act of Taking Minor Son from Mother's Custody – Examination of whether a biological father taking his minor son from the mother's custody amounts to kidnapping under Section 363 of the IPC – Father's role as natural guardian under Hindu law considered. [Para 4-5, 12]

Lawful Guardianship – Hindu Minority and Guardianship Act, 1956 – Discussion on the rights and obligations of parents as natural guardians – Reference to Section 6 of the Hindu Minority and Guardianship Act, 1956, establishing the father as the natural guardian of a minor, subject to certain conditions. [Para 6, 9, 11]

IPC Section 361 – Interpretation and Applicability – Analysis of Section 361 of the IPC, pertaining to kidnapping from lawful guardianship – Emphasis on the term "lawful guardian" and its implications on the case involving a biological father taking his child from the mother's custody. [Para 7-8, 12-13]

Precedents – Reference to Prior Judgments – Citing various judgments, including from Orissa, Kerala, Karnataka, and Gujarat High Courts, supporting the view that a biological father taking his own child does not amount to kidnapping under Section 363, IPC. [Para 14-17]

Decision – Quashing of FIR – The Court finds no prima facie case for kidnapping under Section 363, IPC and deems the continuation of prosecution as an abuse of the process of the Court – The FIR in Crime No.431 of 2023 is quashed and set aside. [Para 18-19]

Referred Cases:

- Shri Ashok Kumar Seth vs. State of Orissa 2002 SCC OnLine Ori 138 (Orissa HC)
- Capt. Vipin Menon vs. State of Karnataka I.L.R. 1992 KAR 2622
- Court of its own Motion vs. Ram Lubhaya and ors. 1985 Cri.LJ 896
- Maunish Dinkar Shaw and ors. vs. State of Gujarat and ors 2023 SCC OnLine Guj 743
- Chandrakala Mnon (Mrs) and anr. vs. Vipin Menon (CAPT) and anr. (1993) 2 SCC 6.

Representing Advocates:

Shri Pavan Dahat, Advocate h/f Shri A.B. Moon, Advocate for the applicant.

Shri Ghodeswar, Addl.P.P. for the State.

Shri V.N. Mate, Advocate for non-applicant no.2.

ORAL JUDGMENT : (Per : Vinay Joshi, J.)

Heard. **ADMIT.**

2. The matter is taken up for final disposal by the consent of learned Counsel appearing for the parties.
3. This is an application seeking to quash the First Information Report in Crime No.431 of 2023 registered with the Gadge Nagar Police Station, Amravati City for the offence punishable under Sections 363 of the Indian Penal Code ('IPC').
4. At the instance of the report lodged by the biological mother, crime has been registered against the biological father. The informant mother has alleged that, on 29.03.2023 the applicant father forcibly took away their minor son aged 3 years, and thus committed an offence of kidnapping. A short issue falls for consideration is whether a father can be booked for the offence of kidnapping for taking away his own minor child from the custody of the mother.

5. Learned Counsel for the applicant would submit that by no stretch of imagination the act of the applicant attracts the offence of kidnapping as defined under Section 361 of the IPC, punishable under Section 363 of the IPC. It is his contention that the applicant being a father and natural guardian of a minor, he cannot be booked for the aforesaid offence.

6. There is no dispute that the parties are governed under the Hindu Law. Moreover, it is not in dispute that the applicant is a biological father whilst the informant is the biological mother of a minor son aged 3 years.

7. Section 361 of the IPC which is relevant for our purpose, reads as below :

“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.”

8. The explanation added thereto expands the words “lawful guardian” to include any person lawfully entrusted with the care or custody of such minor or other person. However to complete the offence the person who takes away the minor must not fall within the conspectus of the terms “lawful guardian”.

9. Contextually, it necessitates us to advert towards Section 6 of the Hindu Minority and Guardianship Act, 1956 (‘the Act’), which reads as below :

“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;”

10. Though the parties are governed under the Hindu law, we have also taken into account the term “Guardian” as defined under Section 4(2) of the Guardians and Wards Act, 1890, which reads thus :

“4.(2) “guardian” means a person having the care of the person of a minor or of his property, or of both his person and property.”

11. Bare perusal of Section 6 of the Hindu Minority and Guardianship Act, 1956 conveys that for a Hindu minor, the father is a natural guardian, and after him, the mother. Sub-clause (a) only speaks about the custody of a minor up to the age of 5 years. Therefore, it is abundant clear that the applicant father is a natural guardian of a minor in absence of the order otherwise passed by a Court of competent jurisdiction. Section 361 of the IPC states about the lawful guardian as explained in the section itself. If the minor of the age specified in the Section, is taken out of the custody of the lawful guardian of such a minor, then the offence would be complete. It is not a case that the mother was lawfully entrusted with the care or custody of the minor by the order of competent Court.

12. In case at hand, the applicant is a natural guardian. Moreover, he is a lawful guardian too along with the mother, therefore, in absence of any prohibition by the order of the competent Court, the applicant father cannot be booked for taking away his own minor child from the custody of his mother. The expression “Guardian” under Section 4(2) of the Guardians and Wards Act, encompasses any person who is having the care of the person of a minor or of his property. Therefore, in our view in absence of legal prohibition, a father cannot be booked for the offence of kidnapping of his own child.

13. The father of a child will not come within the scope of section of 361 of the IPC, even if he takes away the child from the keeping of the mother, she may

be a lawful guardian as against any other except the father or any other person who has been appointed as a legal guardian by virtue of an order of the Competent Court. So long there is no divestment of the rights of the guardianship of a father, he cannot be guilty of an offence under Section 361 of the IPC.

14. We are also fortified with our view by the decision cited by the applicant of the Orissa High Court in case of **Shri Ashok Kumar Seth vs. State of Orissa 2002 SCC OnLine Ori 138**, particularly paragraph 8 of the said decision, which runs as below :

“8. 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 booked for taking away his minor child from the custody of his wife because he is the natural guardian and therefore, the offence under Section 363, I.P.C. cannot be attracted against him for taking the child from the custody of the mother.....”

15. In the above decision the Orissa High Court equally held that the father cannot be booked for taking away his minor child from the custody of his wife because he is the natural guardian, and therefore, the offence punishable under Section 363 of the IPC cannot be attracted against him.

16. The Kerala High Court in case of **Ismail Aboobaker and ors vs. State of Kerala** after considering the similar issue pertaining to the parties governed under the Muslim law and after referring the relevant provisions about the guardianship and custody of the a minor, has expressed in paragraph 4 as below :

“4.....It may be noted that the section speaks of lawful guardianship' and taking of a minor out of the keeping of the lawful guardian. The mother has only the right to the custody of the minor until a particular age. That will not make the father criminally liable if he takes the child from the custody of the mother, the reason being that when the father takes the child from the custody of the mother, he is only taking the child to the custody of the lawful guardian. The father, according to the Privy Council, is the natural and legal

guardian of the minor. A legal guardian is certainly a lawful guardian, and if he takes a minor child from the custody of the mother who is certainly not the legal or natural guardian, though entitled to the custody of the child until it reaches a particular age, can he be said to commit the offence of kidnapping? I think not. When a father takes his minor child from the custody of the mother he is not taking the child out of the keeping of the lawful guardian. The right of the mother to the custody of the minor child is something different from the right of the lawful guardian. The right of the mother to the custody of the child is not an absolute right. The right is subject to the superior right of lawful guardian. I do not think that in taking the minor child from the custody of P.W. 1 any offence has been committed by the accused...”

17. The similar view has been expressed by the Karnataka High Court in case of ***Capt. Vipin Menon vs. State of Karnataka I.L.R. 1992 KAR 2622***, the Punjab and Haryana High Court in case of ***Court of its own Motion vs. Ram Lubhaya and ors. 1985 Cri.LJ 896*** and the Allahabad High Court in case of ***Khyali Ram and ors vs. State of U.P. and ors.*** Recently, the Gujarat High Court by relying on the above decision of the Karnataka High Court in case of ***Capt. Vipin Menon vs. State of Karnataka (supra)*** took a similar view in case of ***Maunish Dinkar Shaw and ors. vs. State of Gujarat and ors 2023 SCC OnLine Guj 743***, which was affirmed by the Supreme Court in case of ***Chandrakala Mnon (Mrs) and anr. vs. Vipin Menon (CAPT) and anr. (1993) 2 SCC 6.***

18. The effect of natural father taking away the child from custody of the mother in real sense amounts to taking a child from the lawful guardianship of the mother to the another lawful guardianship of the father. Natural father of the minor child is also a lawful guardian along with the mother, and therefore, father of the minor cannot be said to have committed the offence under Section 361 of the IPC so as to made punishable under Section 363 of the Code of Criminal Procedure.

19. Under such circumstance, on acceptance of the prosecution case in its totality a *prima facie* case is not made out for the offence punishable under Section 363, IPC by satisfying the ingredients of offence of kidnapping. Continuation of such prosecution amounts to abuse of the process of the Court, hence, the application is allowed. We hereby quash and set aside the First Information Report in Crime No.431 of 2023 registered with the Gadge Nagar Police Station, Amravati City for the offence punishable under Sections 363 of the Indian Penal Code.
20. The application stands disposed of accordingly. No costs.

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