

Court No. - 7

A.F.R.

**Case :- MISC. BENCH No. - 10562 of 2015**

Petitioner :- Smt. Suman & Anr.

Respondent :- State Of U.P. Thru. Prin.Secy., Home & 3 Others

Counsel for Petitioner :- Chandra Bhanu Singh

Counsel for Respondent :- Govt. Advocate,B.B. Tripathi

**Hon'ble Ajai Lamba,J.**

**Hon'ble Aditya Nath Mittal,J.**

(ORAL)

1. This petition seeks issuance of a writ in the nature of certiorari quashing First Information Report lodged as Case Crime No.239 of 2015, under Section 363 I.P.C., Police Station Naseerabad, District Raebareli.

2. Counter affidavit filed on behalf of prosecuting agency sworn on 5.12.2015, is available on record. Counsel for respondent no.4 has not appeared to address arguments.

3. In judgment dated 23.7.2015, rendered by a Division Bench of this Court, of which one of us (Ajai Lamba,J) was a Member, in ***Writ Petition No.3519(M/B) of 2015 Shaheen Parveen and another versus State of U.P. and others***, the following (relevant portion) has been held :-

*"6. Petitioner no.-2 is accused of committing an offence under Sections 363/366 of the Indian Penal Code.*

*7. Section 363 of the Indian Penal Code inheres that whoever kidnaps any person from lawful guardianship shall be punished in terms of sentence provided in the provision.*

*8. "Kidnapping from lawful guardianship" has been defined under Section 361 of the Indian Penal Code. The provision when extracted reads as under:-*

*"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."*

*9. Section 366 of the Indian Penal Code inheres that whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, shall be punished with a sentence, as provided in the provision.*

*10. At the time of considering whether on admitting the allegations made in the F.I.R., offence has been committed or not, the ingredients of the offence are required to be considered, in context of the evidence collected during the course of investigation.*

*11. In the peculiar facts and circumstances of this case, the Court has minutely examined the facts that have emerged on investigation of the case.*

*14. The Investigating Agency is concluding that at the point in time when the victim left in the company of the accused, she was a few months less than 18 years, which is the relevant age mentioned in Section 361 of the Indian Penal Code, above extracted. Clearly, the Investigating Agency is taking a hypertechnical view of the issue. The other relevant facts and circumstances of the case are being ignored.*

*15. The issue whether the victim was kidnapped or abducted is required to be examined in context of the statement of the prosecutrix recorded under Section 164 Cr.P.C.*

*16. If the statement of the prosecutrix, above noted, is taken into account, it becomes evident that ingredients of the offence under Sections 363/366 of the Indian Penal Code in regard to coercion, kidnapping or abduction allegedly committed by Sarfaraj, are not satisfied. The provisions of Section 363 of the Indian Penal Code are required to be considered in context of provisions of Section 361 of the Indian Penal Code. So as to satisfy the ingredients of Section 361 of the Indian Penal Code, it has*

to be established by the prosecuting agency that the accused/sarfaraj took or enticed the prosecutrix out of the keeping of the lawful guardian of the prosecutrix, without the consent of the guardian/respondent no. 4. In the case in hand, it is the case of the prosecutrix herself that she of her free will went with Sarfaraj, lived with him, wants to live with him and is expecting his child. Element of coercion and enticement by Sarfaraj is absent, although consent of the guardian had not been taken.

17. The writ court, being a court of equity, must take into consideration all relevant factors brought before it to deliver substantial justice. Equity justifies bending the rules, where fair play is not violated, with a view to promote substantial justice. A writ court cannot contemplate any limitation on its power to deliver substantial justice. It has to be ensured that a consumer of justice gets complete justice, instead of going into the nicety of law. Under the circumstances, the court cannot be a mere onlooker if injustice is likely to be caused.

18. Petitioner No.1 the victim/prosecutrix would be the best witness, rather the only witness of commission of offence under Sections 363/366 I.P.C. Surely, the victim will not support the prosecution case, as has been made evident by her in her statement, recorded in the course of investigation under Section 164 Cr.P.C., and therefore the trial would result in acquittal. During course of trial, considerable number of man hours would be wasted in prosecution/ defending and judging the case. No useful purpose would be served and the entire exercise of trial would be in futility because the victim has declared that she was not victimised or kidnapped.

19. The facts that have emerged from the record make it evident that the impugned criminal proceedings have been initiated because mother of the Prosecutrix/victim ( respondent no.-4) has not accepted the marriage of her daughter with petitioner No.2.

20. In case, despite the evidence that has come on record, as noted above, proceedings are not quashed, petitioner no.-2 would be required to face criminal charges and undergo the agony of a trial.

21. We have also taken into account the fact that in case the petitioner No.2 is allowed to be prosecuted, the matrimonial life of petitioner No.1/the alleged victim

would be disrupted. Her husband would be incarcerated and there would be no one to take care of her child, who is yet-to-be-born.

22. If a minor, of her own, abandons the guardianship of her parents and joins a boy without any role having been played by the boy in her abandoning the guardianship of her parents and without her having been subjected to any kind of pressure, inducement, etc and without any offer or promise from the accused, no offence punishable under Section 363 I.P.C. will be made out when the girl is aged more than 17 years and is mature enough to understand what she is doing. Of course, if the accused induces or allures the girl and that influences the minor in leaving her guardian's custody and the keeping and going with the accused, then it would be difficult for the Court to accept that minor had voluntarily come to the accused. In case the victim/ prosecutrix willingly, of her own accord, accompanies the boy, the law does not cast a duty on the boy of taking her back to her father's house or even of telling her not to accompany him.

23. A girl who has attained the age of discretion and was on the verge of attaining majority and is capable of knowing what was good and what was bad for her, cannot be said to be a victim of inducement, particularly when the case of the victim/girl herself is that it was on her initiative and on account of her voluntary act that she had gone with the boy and got married to him. In such circumstances, desire of the girl/victim is required to be seen. Ingredients of Section 361 I.P.C. are required to be considered accordingly, and not in mechanical or technical interpretation.

24. Ingredients of Section 361 I.P.C. cannot be said to be satisfied in a case where the minor having attained age of discretion, alleged to have been taken by the accused person, left her guardian's protection knowingly (having capacity to know the full import of what she was doing) and voluntarily joins the accused person. In such a case, it cannot be said that the victim had been taken away from the keeping of her lawful guardian.

25. So as to show an act of criminality on the part of the accused, some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house

*of the guardian, is required to be shown. Conclusion might be different in case evidence is collected by the investigating agency to establish that though immediately prior to the minor leaving the guardian's protection, no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. (The Court in above regards takes a cue from the judgment rendered by Hon'ble Supreme Court of India reported in (1965)1 SCR 243 S. Varadarajan versus State of Madras).*

*26. When the above noted situation is considered in context of the facts and circumstances of the present case, it would become evident that the victim (petitioner No.1) was a few months short of attaining age of 18 years. The said petitioner had attained age of discretion, however, not age of majority. Petitioner No.1, the victim in her statement recorded under Section 164 CrPC has clearly demonstrated that it was she who went of her free will and accord on 10.2.2014 with Mohd. Sarfaraj, without any coercion, and stayed with him, and got married to him willingly. It is a consensual act on the part of petitioner No.1 all through. Such clear stand of the victim makes it evident that Mohd. Sarfaraj respondent No.2 cannot be attributed with coercing petitioner No.1, inducing petitioner No.1 or kidnapping or abducting her in commission of offence, as alleged. Surely, a girl who has attained an age more than 17 years and who is already carrying pregnancy cannot be stated to have not attained age of discretion. In such circumstances, a technicality in law would not be attracted. The Court has not been shown any material which would indicate coercion, inducement or forceful act on the part of Sarfaraj (petitioner No.2) so as to conclude that offence has been committed by him.*

*27. The writ Court considering totality of fact and circumstances, cannot ignore or disregard the welfare of the petitioners, particularly when the exercise of trial is going to be in futility, as observed hereinabove.*

*28. In view of the facts and circumstances of the case noted above, the Court is convinced that the impugned*

*proceedings have been initiated in abuse of process of the Court and process of the law. A personal grudge against marriage of choice of the daughter is being settled by virtue of initiating impugned criminal proceedings, which would not be permissible in law. Such prosecution would abrogate constitutional right vested in the petitioners to get married as per their discretion, particularly when there is no evidence to indicate that the marriage is void.*

*30. In view of above, petitioner No.2 cannot be said to have committed offence either under Section 363 I.P.C. read with Section 361 I.P.C. or under Section 366 I.P.C.*

*31. In the above noted facts and circumstances, we are of the view that ends of justice would be served if the petition is allowed."*

4. The facts and circumstances of this case are that allegedly petitioner no.1 got married to petitioner no.2 of her own free will. Respondent no.4, however has not accepted the marriage. Under the circumstances, impugned criminal proceedings have been initiated.

5. The investigating officer of the case has placed on record statement of the prosecutrix/ victim of the offence, recorded under Section 164 Cr.P.C., as Annexure No.SCA-1. Perusal of the statement indicates that father of petitioner no.1 wanted to get her married to an aged person. Petitioner no.1 refused the proposal. Petitioner no.1 was given beatings. Approximately, six months before the statement was given, petitioner no.1 left her house for railway station. Petitioner no.2 Manoj Kumar was approached telephonically and she went with him to Delhi. On returning back to Lucknow, the petitioners got married in Arya Samaj Mandir and also through court. It has been stated clearly that petitioner no.1 wanted to live with Manoj Kumar and she got married with Manoj Kumar of her free will.

6. Perusal of Annexure SCA-2, appended with the counter affidavit of investigating agency, indicates the age of petitioner no.1 to be about 18 years.

7. Considering the medical age of petitioner no.1 and her statement recorded under Section 164 Cr.P.C., it has become evident that case of the petitioners is covered by judgement

rendered in Shaheen Parveen's case (supra), portion whereof has been extracted above.

8. We have also taken into account the fact that the victim of offence of kidnapping/abduction would be petitioner no.1. Petitioner no.1 has admitted that she has not been kidnapped or abducted, rather had gone of her own free will. In such circumstances, continuance of proceedings would be an exercise in futility. Conviction cannot possibly be recorded in view of statement of victim of offence as has been demonstrated through her statement recorded under Section 164 Cr.P.C.

9. We have considered the law laid down in **AIR 1992 SC 604 State of Haryana and others versus Ch. Bhajan Lal and others.**

10. Hon'ble Supreme Court of India while taking notice of various judgments on the issue in **Ch. Bhajan Lal's case(supra)**, has summed up as follows in paragraph 108. The said para when extracted reads as under :

*"108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such powers should be exercised.*

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their

entirety do not prima facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

**(emphasised by us)**

11. In the considered opinion of the court, case of the petitioner would be covered by sub para 2 of para 108, extracted

above, from the judgement rendered in Ch. Bhajan Lal's case (supra). The material that has come on record to which reference has been made hereinabove establishes that ingredients of Section 363 I.P.C. are not satisfied. Offence has not been committed.

12. Criminal proceedings have been initiated only on account of ego. Petitioner no.1 got married against the wishes of her parents, which apparently has aggrieved them in initiating criminal proceedings. In the considered opinion of the court by initiating impugned criminal proceedings, the process of the court and the law has been abused.

13. The court has been informed that investigation had been concluded and no further evidence is likely to come on record to draw a different conclusion as drawn above.

14. This court also takes judicial notice of the fact that the prosecuting agency and the courts are heavily burdened with cases. Cases of this nature if are brought to trial would burden the judicial system, unnecessarily.

15. Considering the law, as laid down in Ch. Bhajan Lal's case(supra) and Shaheen Parveen(supra), portion from which has been extracted above, this petition is allowed. Impugned First Information Report, lodged as Case Crime No.239 of 2015, under Section 363 I.P.C., Police Station Naseerabad, District Raebareli, is hereby quashed.

16. Let a copy of this order be conveyed to the Court concerned as also to the Superintendent of Police, Raebareli through Senior Registrar of the Court and learned Additional Government Advocate.

Order Date :- 22.1.2016

Shukla.