
(2007) 08 CAL CK 0069
In the Calcutta High Court
Case No : C.R.R. No. 1803 of 2007

Alia Bibi

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 07-08-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 342, 482, 97
Penal Code, 1860 (IPC) — Section 323, 34, 342

Citation : (2008) 3 CHN 279

Hon'ble Judges : Tapan Mukherjee, J

Bench : Single Bench

Advocate : Prasenjit Kr. Das and Dilip Kr. Maisic, for the Appellant; Joy Sengupta, for the Respondent

Final Decision : Allowed

Judgement

Tapan Mukherjee, J.—This application u/s Cr.PC registered as C.R.R. No. 1803 of 2007 is directed against the order dated 10.4.2007 passed by learned Additional Sessions Judge, 2nd Court, Berhampur in Criminal Revision No. 224 of 2006 affirming the order of learned Judicial Magistrate, Berhampur in CR. No. 318 of 2006 refusing to issue search warrant for recovery of son aged 4 and 1/2 years of the petitioner.

2. The petitioner is a legally married wife of O.P. No. 2, Amjad Hossain according to Mohammedan Law. In wedlock of the parties one son aged four and half years and one daughter aged 3 years were born. All the O.P. Nos. 2 to 4 subjected the petitioner to cruelty and on 1.6.2007 the O.Ps" assaulted the petitioner and snatched her children from her custody and drove her out of their house. Then the father of the petitioner took her to his house. The O.P. Nos. 2 to 4 wrongfully confined the children of the petitioner. P.S. was informed. The petitioner filed petition of complaint u/s 323/342/34 IPC and in that complaint petition she also filed a petition for search warrant for recovery of her children from the O.P. No. 2 only.

3. Learned Magistrate found a prima facie case against the O.Ps. No. 2 only and issued process u/s 323/342 IPC and also issued search warrant for recovery of the daughter of the petitioner but refused to issue search warrant for recovery of son of the petitioner.

4. Being aggrieved, the petitioner moved a revision before the learned Sessions Judge and learned Additional Sessions Judge by his impugned order dismissed the revision affirming the order of the learned Magistrate.

5. Being aggrieved by the said order of the learned Additional Sessions Judge the petitioner has filed this application u/s 482 of the Cr.PC.

6. None appears for the O.P. No. 2 though served with the notices.

7. Learned Counsel for the petitioner has contended that both the children of the petitioner were snatched away by her husband at the time of driving her out of her house and they have been detained and learned Magistrate issued process u/s 323/342 IPC and so learned Magistrate should have issued search warrant for recovery of the children i.e. both the daughter and the son u/s 97 Cr.PC as the case u/s 97 Cr.PC was made out. But learned Magistrate misappreciated the law and fact and issued search warrant for the recovery of the female child and refused to issue search warrant for the recovery of the male child.

8. Learned Additional Sessions Judge also committed grave error of law and fact in affirming the said order and he mis-interpreted the decision of the Apex Court in the case of Ramesh v. Laxmi Bai and the said order is not sustainable and the order of learned Additional Sessions Judge should be quashed and search warrant should be issued.

9. The fact remains that both the son and daughter of the petitioner aged about 4 and half years and 3 years respectively were residing under the protective care of the mother of the petitioner. The O.Ps. No. 2 to drove out the petitioner from their house assaulting her and snatched her children and confined them wrongfully as alleged by the petitioner and learned Magistrate was satisfied that there was wrongful confinement and assault and issued process against the accused Amjad Hossain, the husband. Learned Magistrate issued process under Sections 323 and 342 IPC. Learned Magistrate issued search warrant for recovery of female child of the petitioner aged 3 years but refused to issue search warrant for recovery of the male child aged about four and half years of the petitioner. Reasons assigned by the learned Magistrate are that the male child is aged about four and half years and he is residing with his father.

10. From the Sanskrit sloks "Pita Sarga Pita Dharma Pitahi Paramangtapa Pitori Pritimapanne Priyante Sarbodebata" and "Janani Janmabhumishcha Sargadopi Garioshi" it appears that Pita that is father has been compared with heaven and mother and motherland have been considered to be greater than heaven. So, to a child mother in whose womb a child is born is considered to be greater than the father. The position of mother in comparison to father has also been nicely

dealt with in the ruling of Bombay High Court reported in 1992 Cr. LJ at page 1688. There it has been embodied that it is universally accepted that "Mother is the name for God in the lips and hearts of little children," Jewish proverb is "God could not be everywhere and therefore, he made mothers". It is also said that "What is home without a mother?" It is also common experience of all that "A mother loves her child more than the father does because she knows it's her own, while the father only thinks it's his". Napoleon Bonaparte said that "The future destiny of the child always the work of the mother". Tennyson also said that "The bearing and the training of a child is woman's wisdom". So mother has been considered to be greater than the father and mother's protection of children in tender age is indispensable. Considering the role of mother in the life of the tender aged children the personal laws of both Hindus and Muslims have answered issue of custody of tender aged children in favour of mother. In Mulla's Principles of Mohammedan Law para 352 deals with the right of mother to custody of infant children.

11. It provides that the mother is entitled to the custody (Hizanat) of her male child until he has completed the age of 7 years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father.

12. In the case of Zahirul Hassan v. State of Uttar Pradesh decided by Allahabad High Court reported in 1988 Cr. LJ 230, the question is custody of child and also the propriety of the order of issue of search warrant for the recovery of the child came up for consideration. In that case His Lordship quoted from Hamilton Hiday Vol. 1 at page 385 where it was observed as follows:

If a separation takes place between a husband and wife who are possessed of infant child, the right of nursing and keeping is vested with the mother because it is recorded that the woman once applied to the Prophet saying:

O Prophet of God; This is my son the fruit of my womb cherished in my bosom and suckled at my breast and his father is desirous of taking him away from me in his own "care" to which the Prophet replied." Thou hast a right in the child prior to the husband, so long as thou does not marry with a "stranger" moreover a mother is not only more tender but also better qualified to cherish a child during infancy so that committing the care to her is of advantage to the child....

13. So the fact remains that in Mohammedan Law the mother is entitled to lawful custody of her tender aged children up to certain age in case of male child up to seven years, in case of female child up to age of attaining puberty. When the father of the child invites preferential right over the mother to have custody of the children and deprives her of her such right and detains the child sacrificing the natural inclination of the child to be with his mother at the altar of oppression, then surely the occasion arises to take resort to legal procedure provided u/s 97 Cr.PC for getting the child back from the custody of her father. In

this regard reference may be made in the case reported in 1988 Cr. LJ 230, where it was held that it is revolting to judicial conscience and modern sense of justice and fair play that a person who has lawful custody of the minor should be deprived of such a custody by crude method of forcible removal. Removal of the child by father by using physical force from the custody of the mother is prima facie a wrongful act, more so when the child is of a tender age of 1½ years only. This act on the part of the father of placing the child beyond the reach the mother. In such circumstances itself amounts to wrongful confinement. The provisions of Section 97 Cr.PC are therefore attracted.

14. It was further held in that case that where the question is of custody of minor the type of remedy proceeded with by an applicant whether by way of an application under the Guardians and Wards Act, or by way of an application u/s 97, Cr.PC or by way of a writ of habeas corpus is not relevant. In all such situations, the paramount consideration is the welfare of the minor. Where the father has forcibly removed his child of 1 1/2 years from custody of his mother and the mother has filed application u/s 97 of Criminal Procedure Code and the ingredients of Section 97 were satisfied, the mother was entitled to the speedy remedy available to her under the law because of the tender age of the child and the exigency of the situation that demanded restoration of the custody of the child to the mother at the earliest possible moment. The mother cannot be denied relief in summary proceedings taken by her and it will be unjust and against the welfare of the child also to ask her to take recourse to the relevant provisions available under the Guardians and Wards Act.

15. Reference may also be made to the ruling reported in 1992 Cr. LJ 1688, where children were in custody of her mother and she was driven out it was held that there is no dispute that the mother is entitled to the custody of the child below the age of 5. The children were in custody of mother, when she reached her parents' place for next delivery. The children were taken away from her custody by her husband on the assurance of returning them to her custody. However the husband took the children to his parents residing at "D". When wife's brother approached husband for bringing back the children, he was driven out where it was held that wife was prevented from love and affection and custody of the children and search warrant u/s 97 was legal, just and proper.

16. In the instant case both the children were under the protective care of mother in other words in her custody. Their father not only drove their mother out of his house assaulting her but snatched away them and refused to give them back denying her to their love and affection and also denying them to love and affection of their mother which were doubtless essential at their very tender age for their growth in other words physical and mental existence. The cruel act on the part of her husband not only deprived her of her lawful custody of her children but she was prevented from love and affection of her children. The act on the part of the husband amounted to wrongful confinement so as to attract the application of provision u/s 97 Cr.PC. Learned Magistrate issued search

warrant for the recovery of the female child but he did not issue search warrant for recovery of the male child and the grounds taken by him are not at all tenable. The welfare of the minor does not lay in separating the tender aged children from their mother by the husband. The exigency of the situation and the welfare of the children demanded restoration of the custody of me children to the mother at the earliest possible moment and the mother was entitled to the speedy remedy available to her under the law in the form issue of search warrant u/s 97 Cr.PC for recovery of both the children.

17. It appears that the learned Additional Sessions Judge in dealing with the case failed to consider the facts and circumstances of this case and erroneously held that facts of this case is similar to the fact in the case of Ramesh v. Laxmi Bai reported in 1998(9) SC 266. In the case before the Apex Court the appellant divorced the respondent-wife Smt Laxmi Bai through a decree of divorce dated 16.12.1993 and at that time son was living with his father-appellant. After elapse of more than a year after divorce on 16.2.1995 when the said son aged eight years was living with his father the divorced wife sought search warrant u/s 97 of the Code of Criminal Procedure for recovery of son. The wife had filed an application under the Guardians and Wards Act in 1995. The Apex Court observed that Section 97 Cr.PC prima facie is not attracted to the facts and circumstances of the case when the child was living with his own father.

18. In this case, the son was not living with his father for a considerable time. To the contrary, on the very date of driving the mother of the children out of his house the husband snatched the children and refused to give them back. In this case, learned Magistrate has issued process u/s 342 Cr.PC being satisfied prima facie with the fact of wrongful confinement. So, the facts and circumstances of this case are not similar to the facts and circumstances of the case before the Apex Court.

19. Learned Additional Sessions Judge in his impugned order also considered the contention of the O.P.-husband that the boy is studying in the should under the care of the father. So interest of education of the son of the petitioner influenced learned Additional Sessions Judge in determining the question of welfare of the son.

In the ruling reported in AIR 2000 Madhya Pradesh at page 330, the welfare of minor in the matter of custody of minor children has been dealt with. It has been held that 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.

20. In this case the wellbeing of the son of the petitioner will not be made only by making arrangement for his education by his father in his father's house. In the formative years, he requires emotional wellbeing. In other words, he does not only need the education but parental love and affection. When his father has driven out his mother company and her his heart will cry for his mother and he

will badly need his mother's love and affection, his mother can get maintenance including educational expenses of her son from her husband and at the same time she can shower love and affection upon her son which is essential for his growth. So, the balance of welfare of the tender aged son of the petitioner is on the side of keeping the son in her custody and the question of welfare of the son justifies immediate custody of her son by the petitioner. The order of the learned Additional Sessions Judge is not on proper appreciation of the factual and legal matters involved in this case and the same is erroneous, and the said order is to be interfered in the interest of justice by invoking the provision of Section 482 Cr.PC.

In the result the instant application u/s 482 Cr.PC stands allowed.

21. The impugned order of the learned Additional Sessions Judge affirming the order of learned Magistrate in refusing issue of search warrant is hereby set aside.

Learned Magistrate is directed to issue search warrant for the recovery of the son of the petitioner as prayed for in accordance with law.

Send a copy of this order to learned Magistrate at once for his information and necessary action.

22. Urgent xerox certified copy, if applied for, be given to the parties as early as possible.