
(2015) 01 CAL CK 0059
In the Calcutta High Court
Case No : C.R.R. No. 2984 of 2014

Amber Majumdar

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 20-01-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482, 97
Hindu Minority and Guardianship Act, 1956 — Section 6
Penal Code, 1860 (IPC) — Section 344

Citation : (2015) 3 CCR 279 : (2015) 4 CHN 249 : (2015) CriLJ 1510 : (2015) 4 RCR(Civil) 423 : (2015) 3 RCR(Criminal) 136

Hon'ble Judges : Shib Sadhan Sadhu, J

Bench : Single Bench

Advocate : Avirup Chatterjee, for the Appellant; Imran Ali, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Shib Sadhan Sadhu, J.—The instant Revisional Application is filed by the petitioner challenging the judgment passed by the Learned Additional District and Sessions Judge, 17th Court, Alipore, South 24-Parganas on 30-1-2014 in Criminal Motion No. 348 of 2012 dismissing the Revisional Application preferred by the present petitioner against the judgment dated 10-1-2012 passed by the Learned Chief Judicial Magistrate, Alipore in case No. C- 3325 of 2003. The aforesaid case number being C-3325 of 2003 on the file of the Chief Judicial Magistrate Court arose on the complaint filed by the complainant Mahua Majumdar (O.P. No. 2 herein) alleging forceful taking away of her suckling baby aged about 18 1/2 months by her husband (the present petitioner herein) and driving her out from his house. It was further alleged that she was not allowed access to her husband's house even for seeing her baby. So she was compelled to institute the case alleging wrongful confinement of the baby against the petitioner and also she made a prayer for recovery and custody of the child by issuance of Search Warrant. Accordingly, Search Warrant was issued, the baby

was recovered and handed over to the temporary custody of the mother. Thereafter, the present petitioner filed an application for an order directing the complainant wife to hand over the child to him. That application was heard and rejected on contest. Thereafter, the trial of the complaint case proceeded and after trial, the Learned Chief Judicial Magistrate, Alipore acquitted the accused i.e. the present petitioner of the charge under Section 344 of the Indian Penal Code. It was observed by the Learned Chief Judicial Magistrate that since the petitioner is the father and he used to look after and take care of the baby in absence of her mother, he cannot be indicted for any criminal liability because of absence of any mens rea on his part. It was further observed that since the baby was aged about 18 1/2 months, the mother was entitled to have the custody of the child as per provisions of Section 6 of Hindu Minority and Guardians Act, 1956 and the baby's custody in favour of his mother could in no way be disturbed for the sake of welfare of the child and the claim of the accused for returning the baby is not sustainable in law. It was further observed that the accused can have the custody of the child by making trial before the Court of competent jurisdiction under the Guardians and Wards Act.

2. Being aggrieved by such observations the petitioner has filed the revision before the Learned Additional-District and Sessions Judge, Alipore contending that the Learned Chief Judicial Magistrate had no jurisdiction to pass an order under Section 97 of the Code of Criminal Procedure and for final custody of the child and that the child was not a suckling baby at the relevant time and the Court should have restored the custody of the child in favour of the present petitioner as he had been acquitted of the charge.

3. The Learned Additional District and Sessions Judge observed that the baby was of so tender age that his mother only can provide proper care and that the petitioner should have given custody of the child to his wife as the child was suckling baby. He further observed that since the child was less than 5 years old, the Trial Court has properly exercised its jurisdiction by issuing Search Warrant and giving custody of the child to his mother. He further concurred with the finding of the Trial Court that the petitioner father could not be held guilty of wrongful confinement of the child being the natural guardian. He, therefore, rejected the contention of the present petitioner for restoration of the custody of the child and dismissed the revisional application.

4. I have heard Mr. Avirup Chatterjee, Learned Counsel for the accused/petitioner and Mr. Imran Ali, Learned Counsel appearing on behalf of the State/Opposite Party. I have also perused all the available materials on record including the impugned judgment.

5. Before I enter into the merits of the application made under Section 482 of the Code of Criminal Procedure, I would like to say at the very outset that although the petitioner ventilated grievance regarding issuance of the Search Warrant and handing over custody of the child to the O.P. mother, but strangely enough, he did not challenge such orders. Instead he chose to file an application

before the Learned Chief Judicial Magistrate praying for an order directing the complainant to hand over the custody of the child to him. His such prayer was rejected but still he kept quiet and did not prefer any revision challenging such order.

6. Looking into the factual background of the case, I find that the petitioner/father removed the child from the custody of the O.P./mother by using physical-force and that the child was a suckling baby of a tender age of 18 1/2 months only. This act on the part of the father of placing the child beyond the reach of the mother, in such circumstances tantamount to confinement of the child giving rise to an offence. There is no scope for any controversy to accept the proposition that it is the subjective satisfaction of the Magistrate to invoke the power under Section 97 of the Court.

7. It is needless to say that where the question of custody of the minor is involved 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 under Section 97, Cr.P.C. 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. Therefore, when the petitioner/father had forcibly removed his child of 18 1/2 months from custody of his mother and the mother has filed application under Section 97 of the Criminal Procedure Code and the ingredients of such section 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. Therefore, it is apparent that the Learned Chief Judicial Magistrate rightly exercised jurisdiction vested upon him and no fault can be found with such orders passed by him.

8. Coming to the contention raised by the petitioner that the Learned Chief Judicial Magistrate could not exercise jurisdiction under the Guardians and Wards Act and he was duty bound to restore back the custody of the child to him, I find that neither the Learned Chief Judicial Magistrate nor the Learned Additional District and Sessions Judge exercised any such jurisdiction at all. They have only observed that in terms of the provision of Section 6 of the Hindu Minority and Guardianship Act, 1956, the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. It was further observed that the accused (petitioner herein) can have such custody by submitting a prayer before the Court of competent jurisdiction under the Guardians and Wards Act. I find nothing wrong in making such observation and in my opinion they have rightly done so.

9. In this context, I think it appropriate to mention that the Hon"ble Supreme Court in the case of Dr. (Mrs.) Veena Kapoor Vs. Shri Varinder Kumar Kapoor, AIR

1982 SC 792 : (1981) 3 SCC 92 : (1981) SCC(Cri) 650 has held that -"It is well settled that in matters concerning the custody of minor children, the paramount consideration is the welfare of the minor and not the legal right of this or that particular party....." In the result, this application filed by the petitioner/husband for interference under Section 482 of the Cr.P.C. fails and is rejected summarily. The impugned judgment and order dated 30.01.2014 passed by the Learned Additional District and Sessions Judge, 17th Court, Alipore is affirmed.