

(2014) 08 GUJ CK 0087

In the Gujarat High Court

Case No : Criminal Revision Application (Against order passed by Subordinate Court) No. 367 of 2014 and Misc. Criminal Application No. 11595 of 2014 in Criminal Revision Application No. 367 of 2014

Girishbhai Harishbhai Chhatwani

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 22-08-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 97
Hindu Minority and Guardianship Act, 1956 — Section 6

Citation : (2014) 3 GLR 2509

Hon'ble Judges : S.G. Shah, J

Bench : Single Bench

Advocate : Viral K. Shah, Advocate for the Appellant; Jirga Jhaveri, A.P.P, Advocate for the Respondent

Judgement

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S.G. Shah, J.—By way of present Criminal Revision Application, the applicant has prayed to quash and set aside the judgment and order dated 17-6-2014 passed by the learned 8th (Ad-hoc) Additional Sessions Judge, Junagadh in Criminal Revision Application No. 40 of 2014. Heard Mr. Viral K. Shah, learned Advocate for the applicant, Mr. Dipal R. Ravaiya, learned Advocate for the respondent No. 2, and Ms. Jirga Jhaveri, learned A.P.P. for the respondent No. 1-State.

2. While admitting this matter on 1-7-2014, Interim relief in terms of Para 8(C) of the main application was granted whereby, implementation, operation and execution of the impugned judgment and order dated 17-6-2014 passed in Criminal Revision Application No. 40 of 2014 by the learned 8th (Ad-hoc) Additional Sessions Judge, Junagadh was stayed. By such impugned judgment and order, the Sessions Court has directed the present applicant to hand over the custody of his minor son Jeky, aged two and half years to respondent No. 2

herein by setting aside the order dated 19-5-2014 passed by the Chief Judicial Magistrate, Junagadh in Misc. Criminal Application No. 213 of 2014. Such proceedings was arising from the said Misc. Criminal Application No. 213 of 2014 preferred by the present respondent No. 2 under Sec. 97 of the Criminal Procedure Code requesting the Court to issue search warrant against her minor son namely Jeky. The Sessions Court has observed that if the applicant herein fails to hand over the custody of the minor son as aforesaid, then the trial Court is at liberty to initiate further action against the applicant herein. Therefore, the basic issue in this litigation is with reference to the custody of minor Jeky, aged about two and half years whose father is present applicant and present respondent No. 2 is his mother.

3. Pursuant to such interim order as aforesaid, staying handing over of the custody of the minor from the applicant to the respondent No. 2, respondent No. 2 has preferred Misc. Criminal Application No. 11595 of 2014 for vacating interim relief. Therefore, to avoid further complication and more particularly considering the fact that the matter is pertaining to the custody of minor boy aged two and half years only, both the learned Advocates for respective parties have agreed to decide the main Criminal Revision Application.

4. The sum and substance of the Criminal Revision Application is to the effect that the applicant-father is a statutory guardian of the minor son and when custody of the minor was with the father, nobody can take away the custody of the minor from him except without following the provisions of law which relates to the custody of minor i.e. Hindu Minority and Guardianship Act and Guardian and Wards Act. Thereby, it is specifically contended that there cannot be a search warrant and direction to hand over the custody of minor to anybody else from the legal custody of the father, more particularly under Sec. 97 of the Criminal Procedure Code where the Court does not have the powers to issue search warrant to take away the custody of minor from his legal guardian. For the purpose, reference to Sec. 97 of the Criminal Procedure Code is material which reads as under:

"97. Search for persons wrongfully confined:- If any District Magistrate, Sub-divisional Magistrate or Magistrate of the First Class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper."

5. The bare reading of above provisions, makes it clear that the basic requirement to exercise jurisdiction under Sec. 97 of the Criminal Procedure Code is presence of reason to believe that any person is confined under such circumstances that such confinement amounts to an offence. Rest of the wordings of Section are not much material, at present. However, at the cost of

repetition, it is made clear that the primary requirement for issuance of search warrant is confinement of any person, and that too, such confinement amounts to an offence. Every reading of the Section specifically makes it clear that it is provided for a search for person who is wrongfully confined. Therefore, there must be prima facie evidence regarding the confinement of any person and such confinement must be wrongful and thereby it must amounts to an offence. Thereby, if there is no such condition or fact attached with the person for whom search warrant is prayed for, then, only because the applicant wants the custody of such person, the Magistrate does not have powers to issue search warrant.

6. Such position is very much made clear by the Hon''ble Supreme Court in the case of Ramesh Vs. Laxmi Bai (Smt), wherein the issue was almost similar when a search warrant was prayed for child aged 9 years living with his own father. It cannot be ignored that here in this case also, there is similar request i.e. a prayer by the respondent No. 2 to issue search warrant for the child Jeky aged about two and half years living with his own father i.e. present applicant. The Hon''ble Supreme Court has, after narrating the factual details, observed and held that Sec. 97 of the Cr.P.C. prima facie is not attracted to the facts and circumstances of the case when the child was living with his own father, and therefore, the orders of the Additional Sessions Judge and High Court with direction given therein were set aside. On perusal of the entire judgment, it becomes clear that the facts of such reported case and the present case are perfectly similar, only the age of the minor in the reported case is nine years and in present case, it is two and half years. In such reported case also, the First Court being Sub-Divisional Magistrate opined that the father is natural guardian of minor, and therefore, he could not be said to be under any illegal confinement and consequently, the application for issuance of search warrants under Sec. 97 of the Cr.P.C. filed by the mother of the child was dismissed. However, when the mother has filed a revision, Additional Sessions Judge, allowed the petition and directed that the custody of the child is to be given to the father. The second revision petition filed by the father was dismissed by the High Court. However, the Hon''ble Supreme Court has held that though the points which should weigh with a Court while determining the question of grant of custody of a minor child have been correctly detailed, the opinion of the High Court that the Revisional Court could have passed an order of custody in a petition seeking search warrants under Sec. 97 Cr.P.C. in the established facts of the case is untenable.

7. Therefore, practically, when the applicant has relied upon such judgment on the date of admission, the Court has granted interim relief in terms of Paragraph No. 8(C) referred hereinabove.

8. However, the respondent No. 2-mother has come forward for immediate relief to vacate the stay and thereby to execute the order of search warrants by impugned judgment and order which would make the revision petition infructuous. Therefore, entire revision is heard and decided at admission stage.

9. The sum and substance of the submissions by the respondent No. 2-wife is to

the effect that initially the minor child was in custody of the mother and during matrimonial disturbance between the husband and wife, the applicant-husband has dragged away the minor from her by snatching the minor son, and thereafter, he was detained and confined in a room by locking the room. It is further alleged that she cannot stay without minor son and that minor son is also not taking any food and crying constantly which would affect his health and that since the applicant and his family members are headstrong people because of continuous cry of the minor they may get anger and may injure the child seriously. It is also alleged that she was ill-treated, abused and dragged out of the house. Whereas, the reply by the applicant before the trial Court is referred, content of which is recorded by the learned Chief Judicial Magistrate, Junagadh in his order dated 19-5-2014, it is stated that for filing the reply, the applicant has already disclosed the reason that minor is sick, and therefore, they need some more time to file reply so as to prove that the applicant is not taking care of the minor and thereby his custody is to be handed over to the respondent-mother.

10. However, the Chief Judicial Magistrate, Junagadh has considered all factual details and provisions of Sec. 97 of the Cr.P.C., as well as decision cited before him for coming to the conclusion that there cannot be an order of search warrants against the minor when minor is in custody of the father - legal guardian. It has also been noted by the learned Chief Judicial Magistrate, Junagadh in his order that custody of one daughter namely Chhaya is with the mother whereas the son Jeky is with the father and that his custody cannot be treated as illegal confinement of the minor resulting into commission of any offence.

11. The Chief Judicial Magistrate has also relied upon the decision of Rajesh Govindbhai v. Anitaben Rajeshbhai, reported in 2009 Law Suit (Guj.) 305 wherein it is held by this High Court, relying upon the case of Ramesh (supra), that Magistrate has no power to issue search warrant for a custody of a child since power regarding custody of a child is vested with the Civil Court, and therefore, so far as the custody of the child is concerned, the competent Court is only Civil Court and Criminal Court is not empowered to issue search warrant so as to disturb the lawful custody of the father.

12. However, the 8th (Ad hoc) Additional Sessions Judge, Junagadh has relied upon other issues that so far as the custody of child is concerned, paramount consideration would be to protect welfare of the child, his health, study and development etc. For the purpose, the Sessions Court has relied upon the decision in the case of Gaurav Nagpal Vs. Sumedha Nagpal, . However, the said decision is with reference to the Hindu Minority and Guardianship Act and the Guardians and Wards Act and not with reference to Sec. 97 of the Cr.P.C.

13. There cannot be any second opinion of thought that while considering the custody of the minor, the paramount consideration should be his welfare, health, study and development, but it is with reference to confirm the custody of a particular person against the lawful guardian may be amongst the parents or a

third person. However, in none of the above cited cases by the Sessions Court, it is confirmed that the learned Magistrate has power to issue search warrants. The Sessions Court has also considered needs and requirements of the minor, however, it would be a consideration when legal custody and guardianship of a child is to be decided, for the simple reason that taking away custody of a minor child through police is not warranted in any manner. If at all, the respondent-wife is able to prove that the applicant-husband is not able to take care of the minor child, then she could have certainly filed an application for custody and guardianship under appropriate law.

14. The respondents have also relied upon the provision of Sec. 6 of the Hindu Minority and Guardianship Act, which provides that the custody of a minor who has not completed five years shall ordinarily be with the mother. When respondent is aware about such provision, it would be appropriate for her to file necessary application under such statute where competent Court can consider the relevant aspect while deciding the issue of custody, otherwise, the same Section also confirms that the natural guardian of a minor in respect of minor son is the father and mother will be natural guardian in absence of father. The consideration governing custody of a child is a welfare of children and not the right of the parents. Similarly, jurisdiction to grant custody is vested in a Civil Court and not under Sec. 97 of the Cr.P.C.

15. The respondents have also relied upon the decision of the Division Bench of this Court in the case of Radha Sinha W/o. Shashikant Prasad D/o. Birendra Prasad, reported in 2013 Law Suit (Guj.) 82, wherein the Division Bench has in exercising inherent jurisdiction under Art. 226 of the Constitution of India while dealing with writ of Habeas corpus allowed the prayer of custody to mother. But only because the High Court has allowed writ of Habeas corpus for a custody of a minor, it cannot be said that the Magistrate has similar power under Sec. 97 of the Cr.P.C. On perusal of unreported judgment, it becomes clear that there is specific history and disturbance where there is an allegation that the petitioner had illicit relationship with another person and he is incapable in taking care of minor. But the fact remains that in that case also, though the application under Sec. 97 of the Cr.P.C. was initially filed for search warrant, ultimately, it was withdrawn, and thereafter, writ of Habeas corpus was filed wherein considering the typical facts and circumstances of the case when the High Court was exercising the power under Art. 226 of the Constitution of India instead of directing the petitioner to initiate proceedings under the Guardians and Wards Act, allowed the writ petition to hand over the custody of the minor when it was proved that custody of minor was taken away from her forcefully. In the present case, there is no such allegation, on the contrary, in the reported case, the petitioner's mother was highly educated lady who has passed B.Tech. and working in reputed company in Noida and capable to not only maintain but to take care of the minor. It is also clear that after matrimonial disturbance, father and mother of the minor was residing separately at Bangalore and drawing salary of Rs. 9.5 lacs with 10% rise per year and that on a particular date, father and

his colleague forcefully entered into the house of the mother and taken away the minor Kritika with them when minor was returning from the school. Therefore, factually when the custody was with the mother at the relevant time which was forcefully taken of and thereby the Division Bench has considered to allow the writ for Habeas corpus. However, in absence of such factual details, considering the judgment of Ramesh (supra), when a Magistrate has no jurisdiction to issue search warrant in such cases, though the reasoning by the Additional Sessions Judge seems to be attractive, it is against the settled principles of law, and therefore, such order requires to be interfered and quashed.

16. Therefore, a Criminal Revision Application is allowed. However, it is made clear that nothing stated hereinabove shall be construed as any expression of opinion on the merits of the controversy regarding the guardianship and custody of the minor Jeky, for which the respondent may initiate appropriate proceedings in accordance with law. Such proceedings shall be decided by the Competent Authority without being influenced by present judgment and on its merits.

17. In view of the above facts and circumstances, this Criminal Revision Application succeeds and is allowed and whereby the impugned judgment and order dated 17-6-2014 passed in Criminal Revision Application No. 40 of 2014 by the learned 8th (Ad-hoc) Additional Sessions Judge, Junagadh, is hereby quashed and set aside, restoring the judgment and order dated 19-5-2014 passed by the Chief Judicial Magistrate, Junagadh in Misc. Criminal Application No. 213 of 2014. Rule is made absolute, accordingly. Pursuant to final determination of main Criminal Revision Application, which is allowed in above terms, the Criminal Misc. Application (For vacating interim relief) No. 11595 of 2014 stands dismissed.