
(2010) 10 CAL CK 0009
In the Calcutta High Court
Case No : C.R.R. No. 3611 of 2009

Shefali Begum

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 01-10-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 97

Citation : (2010) 10 CAL CK 0009

Hon'ble Judges : Mrinal Kanti Sinha, J

Bench : Single Bench

Advocate : Syed Shamser Ali and Moniruzzaman, for the Appellant; Swapan Kumar Mallick, for State, for the Respondent

Judgement

Mrinal Kanti Sinha, J.

Heard the learned Counsel appearing for the parties.

1. This revisional application has been directed against the order passed by learned Sub-divisional Magistrate, Kandi, Murshidabad, in case No. C/234/2009 on 3.7.2009 in a proceeding u/s 97 of the Code of Criminal Procedure, 1973 whereby the learned Sub-divisional Magistrate concerned has dropped and disposed of the proceeding u/s 97 on the ground that it was not maintainable.

2. It is the case of the petitioner that her daughter Khadija Begum was married with one Akbar Sheikh, and out of their wedlock a girl child named Rufiza Begum was born. After delivery of that child Khadija Begum died on 4.10.2005. Since birth the said Rufiza Begum was being maintained by the petitioner in her house. Besides depositing huge amount in the name of Rufiza Begum all other steps for her better living have been taken by the petitioner including her admission in a better school at Khargram. The said Akbar Sheikh has remarried one Tina Begum and is residing with her. The petitioner maintained Rufiza Begum liker her daughter since her birth, but all on a sudden Akbar Sheikh came to the house of the petitioner and snatched away Rufiza Begum aged three years seven months

and refused to return back her to the petitioner. The petitioner lodged a diary in that regard bearing G.D. No. 272 of 2009 dated 6.4.2009. As no step was taken by police, so the petitioner filed an application u/s 97 of the Code of Criminal Procedure before the learned Sub-divisional Magistrate, Kandi, Murshidabad, for getting back her grand daughter, but on 3.7.2009 relying upon the only report of Inspector-in-charge, Kandi, Police Station, the learned Sub-divisional Magistrate concerned dropped the case by the impugned order.

3. Being aggrieved and dissatisfied with the aforesaid order of the learned Sub-divisional Magistrate, Kandi, Murshidabad, dated 3.7.2009 the petitioner filed the present revisional application.

4. Learned Counsel for the opposite party No. 1, State of West Bengal appeared, but filed no affidavit-in-opposition. Other opposite parties have not appeared even after service.

5. It is to be considered whether the impugned order of the learned Sub-divisional Magistrate, Kandi, Murshidabad, was legal, correct and justified or not.

6. It has been submitted by the learned Counsel for the petitioner that the petitioner is the grand mother or mother's mother of Rufiza Begum, a minor child aged about three years seven months, whose mother Khadija Begum, daughter of the petitioner, has already died on 4.10.2005 after giving birth to her child, and that minor girl Rufiza Begum, grand daughter of petitioner, has been taken away by her father Akbar Sheikh from the house of the petitioner, but as per Section 353 of Mulla's Mohammedan Law mother's mother will have priority regarding the custody of a minor girl in case her mother dies, and search warrant u/s 97 of the Code of Criminal Procedure can also be issued for recovery of such minor girl from the custody of some other person. In support of his submissions learned Counsel for the petitioner has relied upon the decision reported in Gohar Begam Vs. Suggi alias Nazma Begam and Others, in the case of Sri Sudarshan Sau and Anr. v. The State of West Bengal and Anr. in the case of Zahirul Hassan vs. State of Uttar Pradesh, 1988 Cri. L.J. 230

7. Mr. Swapan Kr. Mallick, learned Counsel appearing on behalf of the opposite party No. 1 State of West Bengal, has contended that the petitioner has claimed guardianship of the child of her daughter, who has died after giving birth to her child, and it is also the case of the petitioner that the father of the said girl child of the daughter of the petitioner has been taken away by her daughter's husband, who has married again, and evidence is required to be taken in this regard to ascertain who is entitled to the custody of said child at present and for that reason the matter will have to be remanded back.

8. It is not disputed that the petitioner is the grand mother of a female child named Rufiza Begum, who is aged about three years seven months, and her mother or the daughter of the petitioner Khadija Begum has died on 04.10.2005 after giving birth to her. It is not also disputed that the daughter of the petitioner said Khadija Begum was married with Akbar Sheikh and out of their wedlock the

said girl child Rufiza Begum was born and she was being maintained by the petitioner in her house, but she was taken away by said Akbar Sheikh and the petitioner initiated the proceeding u/s 97 of the Code of Criminal Procedure for recovery of said Rufiza Begum and giving her in her custody as her legal guardian, on the ground that Rufiza Begum was taken away by said Akbar Sheikh from the custody of the petitioner.

9. It is not also disputed that the opposite party No. 2 Akbar Sheikh, is the father of said child of Rufiza Begum, but while the petitioner has claimed herself to be the legal guardian of said Rufiza Begum and prayed for giving her in her custody as legal guardian as per the provisions of Mohammedan Law, then opposite party No. 2, Akbar Sheikh has been stated to be the legal guardian of the said Rufiza Begum as her father, and for that reason the learned Sub-divisional Magistrate concerned has found that there is no question of wrongful confinement of the said child and accordingly he dropped and disposed of the case with the finding that the proceeding u/s 97 was not maintainable.

10. As per the provision of 353 of Mulla's Mohammedan Law failing the mother the custody of a boy under age three years and a girl who has not attained puberty, belongs to the female relatives in the order given in the said section.

11. Section 353 of Mulla's Mohammedan Law reads such:

353. Right to female relations in default of mother.

Failing the mother the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:

- (1) mother's mother, how soever high,
- (2) father's mother, how soever high,
- (3) full sister;
- (4) uterine sister;
- (5) [consanguine sister];
- (6) full sister's daughter;
- (7) uterine sister's daughter;
- (8) [consanguine sister's daughter];
- (9) maternal aunt, in like order as sisters; and
- (10) paternal aunt, also in like order as sisters.

12. In the instant case it appears that it is the case of the petitioner that her daughter has died on 4.10.2005 living a girl child named Rufiza Begum, who is aged three years seven months now and who is being maintained by the

petitioner in her house since her birth, but the son-in-law of the petitioner Akbar Sheikh has taken away said Rufiza Begum from the custody of the petitioner, and said Akbar Sheikh has remarried Tina Begum and is living with her. So in view of Section 353 of Mulla's Mohammedan Law the mother's mother of said Rufiza Begum or the present petitioner was entitled to get custody of said minor girl named Rufiza Begum, who is yet to attain puberty. As per Mulla's Mohammedan Law a girl generally attains puberty at the age of 14/15 years. In such a case the welfare of the child is of paramount consideration. There is no such case that the petitioner has lost her right of custody of her grand child or has become disqualified for any other reason. It also appears from the impugned order that said Akbar Sheikh is the father of the said girl named Rufiza Begum and her legal guardian, but said Akbar Sheikh is residing at Chandigarh, Punjab, and he has married again as per the case of Shefali Begum, grand-mother of the said child Rufiza Begum.

13. It has been decided by the decision reported in 1960 SC 93 that as per the Mohammedan Law, the appellant, a Muslim woman, was entitled to the custody of her illegitimate daughter, no matter who her father was, and the respondent had no legal right whatsoever to the custody of the child and in circumstances the interests of the child would be better served if she was left to the custody of the said appellant rather than in the custody of the respondent.

14. It has also been held therein that the Civil Court will consider the welfare of the child and will pass necessary order in accordance with law after hearing both the parties on the basis of evidence and materials on record. In the decision reported in (2007) 1CCrLR (Cal) 682 it was held that in the circumstances of that case search warrant was rightly issued, but the circumstances of this case are not similar.

15. It has been held by the decision reported in Zahirul Hassan vs. State of Uttar Pradesh, 1988 Cri. L.J. 230 that according to Muslim Law mother has custody of male child till he completes age of seven years in preference to father and when father forcibly removes child from the mother's custody during that period that amounts to wrongful confinement and the provisions of Section 97 of the Code of Criminal Procedure is attracted in such case.

16. In the decision reported in 1978 Cr LJ NOC 98 (Kerala) also it has been held that where a Muslim mother was entitled in law to custody of her child and the child was aged about four years only and the child was in her custody, then search warrant u/s 97 of the Code of Criminal Procedure could be issued at her instance when the child was removed from her custody by the father of the child by using physical force.

17. In this case it is apparent that the petitioner is the grand-mother or mother's mother of the minor child of Rufiza Begum, who is now aged about three years seven months only and whose mother Khadija Begum has already died giving birth to her and her father Akbar Sheikh has already married another woman

again and is residing at Chandigarh, Punjab, and the petitioner was maintaining her minor grand-daughter properly while she was living with her and suddenly she was taken away by her father from the petitioner. As such the learned Sub-divisional Magistrate, Kandi, Murshidabad, was not legal, correct and justified in passing the impugned order of dropping the case with the finding that the proceeding u/s 97 is not maintainable, and he ought to have considered the prayer of the petitioner u/s 97 of the Code of Criminal procedure according to law. But as he has not done that so there has been failure of justice.

18. Having considered the submissions of the learned Counsel for the parties, aforesaid decisions and other materials on record and circumstances it appears that the learned Sub-divisional Magistrate, Kandi, Murshidabad was not legal, correct and justified in passing the impugned order dropping the proceeding u/s 97 with the finding that the same was not maintainable and he ought not to have dropped that proceeding without considering proper evidence in that regard. Rather he has committed an error in his aforesaid finding and that is an error of law apparent on the face of the record. As such the impugned order is required to be interfered with in this revision for the ends of justice.

19. Accordingly the revisional application bearing CRR No. 3611 of 2009 is allowed. The impugned order dated 3.7.2009 passed in case No. C/234 of 2009 is set aside.

20. But it is made clear that this Court has not gone into the merits of the case and the learned Magistrate concerned is directed to reconsider the prayer of the petitioner by petition u/s 97 of the Code of Criminal Procedure bearing No. C/234 of 2009 in accordance with law and to dispose of the same in accordance with law expeditiously.

21. Criminal Section is directed to forward a copy of this order to the learned Sub-divisional Magistrate, Kandi, Murshidabad, expeditiously for information and necessary action.

22. Urgent xerox certified of this judgement, if applied for, be supplied to the parties upon compliance of necessary formalities.