
(2012) 07 BOM CK 0109

In the Bombay High Court

Case No : Criminal Writ Petition No. 123 of 2012

Shri. Pramod V. Kamble

APPELLANT

Vs

Sou. Jyoti P. Kamble and Anr

RESPONDENT

Date of Decision : 20-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 97

Citation : (2013) BomCR(Cri) 63

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : S.G. Deshmukh instructed by Mr. Vilas Kolekar, for the Appellant; V.B. Konde-Deshmukh, APP for Respondent No. 2 and Mr. Amit Karande, for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J.

1 Rule. By consent, rule made returnable forthwith. By consent, heard finally. The applicant is the husband of respondent no.1. After marriage they had been residing at their matrimonial home at Palus. Later, matrimonial disputes between the petitioner and respondent no. 1 arose, and that, the respondent no.1 has been staying separately from the petitioner i.e. at her parent's house, is not in dispute, though since when, and what circumstances, they came to be separated is in dispute. Respondent no.1, some time in October 2011, made an application before JMFC-Malshiras, purporting to be one u/s 97 of the Code of Criminal Procedure, alleging that the applicant (respondent before the Magistrate) had taken away Rahulson of the applicant and respondent no. 1, from the house of respondent no. 1's parents to his house at Palus. It was also alleged by respondent no. 1 in the said application that the applicant was contacted by her on telephone repeatedly, but the applicant was saying that respondent no. 1 should bring some amount from her parents and that it is only thereafter that the said child Rahul would be given to respondent no. 1.

2 It appears that instead of issuing a search warrant, the learned Magistrate issued a notice to the respondent before him i.e. present petitioner (hereinafter referred to as "the father"). The child Rahul was also caused to be produced before the Magistrate. The learned Magistrate after hearing the parties came to the conclusion that the provisions of Section 97 of the Code of Criminal Procedure were not applicable to the case. The Magistrate was of the view that for the applicability of the provisions of Section 97 of the Code of Criminal Procedure, the "confinement" must be such, as would amount to an offence. The learned Magistrate, therefore, rejected the application.

3 Respondent no. 1, herein (hereinafter referred to as "the mother") moved the Court of Sessions in Revision challenging the order passed by the Magistrate. The learned Additional Sessions Judge, who heard the revision, allowed the same and set aside the order passed by the Magistrate. The learned Additional Sessions Judge directed a search warrant to be issued for the search of the said child Rahul in the house of the father or at any other place where the child would be found, and directed the production of the child before JMFC-Malshiras, who was further directed to hand over the custody of the said child to the mother.

4 Being aggrieved by the said order passed by the Additional Sessions Judge in revision, the father has approached this Court invoking its constitutional jurisdiction.

5 I have been taken through the order passed by the learned JMFC-Malshiras as well as the order passed by the Additional Sessions Judge, Malshiras.

6 The contention of the learned counsel for the father is that, there was no occasion to exercise the powers u/s 97 of the Code of Criminal Procedure. According to him, the conditions requisite for exercise of such powers were absent in this case, as the alleged confinement of the said child, if any, by the father, did not amount to any offence. He also placed reliance on two decisions delivered by this Court, in which a similar view was taken. He also submitted that on facts also, there was no case for the mother and that, the very basis of the allegations levelled by her: namely, that the child Rahul was forcibly taken away by the father, was not believable.

7 Counsel for the mother, on the other hand, submitted that since the child was forcibly taken away from the custody of the mother, the taking away of the child would amount to an offence. He also submitted that according to the mother, the father had been demanding money from her for the purpose of handing over the custody of the said child to her. The learned counsel for the mother, has also relied upon a decision of this Court, in which the issuance of search warrant for the purpose of handing over the custody of the minor child to his mother was held to be proper and legal.

8 Section 97 of the Code of Criminal Procedure reads as under:

97: Search for persons wrongfully confined-If any District Magistrate,

Subdivisional 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.

(Emphasis Supplied.)

9 A bare reading of the said section indicates that the section would operate where the Magistrate would have reason to believe that any person is confined under such circumstances that the confinement amounts to an offence. It is only then that a search warrant can be issued. The question which, therefore, arises is whether a father's taking away his minor child from the mother and keeping the child with him, would amount to "confining" the child; and further, whether such "confinement" would amount to an offence. In my opinion, the answer would be in the negative.

10 The Learned counsel for the father has drawn my attention to the decision of this Court in Vishal Jivan Jogure v/s. Smt. Megha Vishal Jogure and Anr. 2005(4) Mh. L.J., wherein this Court held that for invoking powers u/s 97 of the Code, it must be asserted and established before the Magistrate, although prima facie, that the confinement of any person in the circumstances, amounts to an offence. It was observed by this Court as follows:

By no stretch of imagination custody of the children with the real father by itself can amount to an offence. Something more had to be alleged and established to support that position.

11 In the case of Anil s/o. Baburao Angalwar v/s St. Cyuthia Bernard Samuel w/o. Anil Baburao angalwar and Anr 2007 ALL MR (Cri) 1611, also, a similar question arose before this Court and it was held that the "taking away of a child by the father from the mother of the child and detaining him in the father's custody does not amount to confinement and consequently under the said circumstances search warrant could not be issued for the production of the child."

12 A slightly different view, however, appears to have been taken in the case of Purushottam Wamanrao Thakur and others Vs. Warsha Thakur and others, on which reliance has been placed by the learned counsel for the mother. The observations made by this Court in the said judgment indicate that under certain circumstances, a search warrant can be issued to take search and cause production of a child who has been taken away by the father of the child from the mother of the child.

13 I have gone through all the three decisions referred to above. No decision of a Division Bench or Full Bench of this Court or of the Supreme Court of India on this issue, has been brought to my notice. If the facts in the case of Purushottam

Thakur (supra), as reflected from the reported judgment are considered, it becomes clear that, in that case, the father of the children, had, after removing the children from the custody of the mother, kept the children with his own father i.e. grandfather of children. It was held that under such circumstances, a search warrant u/s 97 of the Code of Criminal Procedure could be issued for production of the children before the Court and for handing over them to their mother.

14 The authorities, strictly speaking, do not seem to be uniform in their view about applicability of Section 97 of the Code, where the dispute is primarily about the custody of a minor child. In my opinion, the invocation of the provisions of Section 97, just for securing the custody of the child from the other parent, would not be proper or legal. In my opinion, this is not what the section contemplates.

15 Even otherwise, the crucial aspect of the matter, insofar as the present case is concerned, is, whether the learned Additional Sessions Judge was justified in interfering with the order passed by the Magistrate while exercising revisional jurisdiction.

16 The learned Magistrate had categorically held that the custody of the child Rahul with the applicant would not amount to wrongful confinement, or any other offence. It also appears, that the story of the mother that the child had been snatched away from her custody by the father, was not believed by the Magistrate. The Magistrate observed that, had it been so, the mother would have reported the matter to the Police, but that she had not done so. The Magistrate also observed that the mother had a remedy of seeking the custody of the child under the civil law.

17 The learned Additional Sessions Judge did not deal with these findings recorded by the Magistrate while passing the impugned order. In fact, para 6 of the order passed by the learned Additional Sessions Judge, makes an interesting reading and all that can be said from the observations made in the para, is that the learned Additional Sessions Judge was of the view that, in any case the custody of the child must remain or be given to the mother only. Thus, with whom the custody of the child should be, was the only question that was considered by the Additional Sessions Judge and not "whether there was a case for issuing search warrant under the provisions of Section 97 of the Code". The learned Sessions Judge also did not consider whether the disbelief in the version of the mother to the effect that the child was suddenly taken away from her by the father, as formed by the Magistrate, was unreasonable or without any basis. The learned Additional Sessions Judge forgot that the question of custody of the child could be dealt with more appropriately by a Civil Court. It is clear that the mother did not want to take a recourse to criminal proceedings for the alleged assault and snatching away of the child, in which case, the facts could be examined by the investigation agency; but was merely interested in securing the custody of the child by resorting to the provisions of Section 97. Thus, the

mother neither wanted the allegations levelled by her to be investigated into, nor did she want examination of the issue of the custody of the child, by a Civil Court. The Learned Additional Sessions Judge failed to grasp the significance of this, and consider, in this context, whether the disbelief in the version of the mother, formed by the Magistrate, which was indicated soberly by him, in his order, could be said to be erroneous or unreasonable. The view of the Magistrate, which was certainly a possible view, was not liable to be disturbed, in revisional jurisdiction.

18 It is settled legal position that revisional jurisdiction is meant to be exercised for correcting a manifest error of law, resulting in miscarriage of justice. I do not see that the order passed by the Magistrate was suffering from any error of law, much less a manifest error of law resulting in miscarriage of justice.

19 In my opinion, the learned Additional Sessions Judge did not view the matter in proper perspective. He was overwhelmed by his view that the child must remain with his mother only; and consistently with this view he set aside the order by invoking revisional jurisdiction, overlooking that he was not acting as a Civil Court for determination of the rights of the parties as to the custody of the child. The order passed by the learned Sessions Judge is not tenable in law. The Additional Sessions Judge has acted with the material irregularity and has acted in excess of the revisional jurisdiction, conferred upon him. The impugned order, therefore, needs to be set aside.

20 The petition is allowed.

21 The impugned order passed by the Additional Sessions Judge-Malshiras is quashed and set aside.

22 The Revision Application No. 29 of 2011 shall stand dismissed.

23 Rule is made absolute in the aforesaid terms. In the circumstances, no order as to costs.