

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Crl. Revision No. 739 of 2015
Date of decision : 22.12.2015

Lalit Prakash Sharma

..... Petitioner

versus

State of Haryana and another

... Respondents

CORAM:- HON'BLE MRS. JUSTICE ANITA CHAUDHRY

1. Whether Reporters of the local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

Present: Mr. J.S. Mehndiratta, Advocate
for the petitioner

Mr. Deepak K. Grewal, DAG Haryana

Mr. Arvind Kumar Yadav, Advocate
for respondent No. 2

ANITA CHAUDHRY, J.

This petition is directed against the order dated 11.2.2015 passed by Additional Sessions Judge, Narnaul who set aside the order dated 30.8.2014 passed by SDJM, Mohindergarh and directed the trial Court to hear the parties again and pass fresh orders.

The facts which are relevant needs reproduction.

Renu Sharma filed an application before SDJM Mohindergarh under Section 97 Cr.P.C. for issuance of warrants. The facts which emerge are that she had a matrimonial dispute which had been got resolved by the police and she and her husband started living separately from in-laws in the rented premises. It was agreed that their child would remain in the custody of the mother. On 18.8.2014 relations between them got strained and she was locked in a room and telephone call was made by her father to the

police and the police got them released but the child was not handed over and she had made a complaint to the Superintendent of Police, Narnaul. The petitioner pleaded that the husband had illegally obtained the custody of the child from the General Hospital, Mohindergarh by hatching a conspiracy and got him referred to another hospital and took him away from the hospital and in this regard a complaint was made to SMO, Mohindergarh.

The prayer made in the petition was that the child had been illegally confined and warrants should be issued and custody of child should be given to her.

Notice of the application was given to the State and after hearing both the sides the application was dismissed.

Aggrieved by the order revision was filed and the revisional Court allowed the prayer observing as under :-

“8. Learned trial Court has declined the application solely on the ground that who is entitle for the custody can not be decided by that Court, but this Court is of the view that in view of provisions of this section, the custody shall ordinarily with the mother i.e. petitioner. It can not be lose of sight that Lalit Prakash has submitted an affidavit, in which he agreed that he will not separate Tejasvi his son from the custody of his mother i.e. petitioner. In this scenario, son Tejasvi has been snatched from custody of the petitioner. No doubt parties, should approach for the custody of the child under the Minority and Guardianship Act, by way of petition. In Inderjit Shah vs. State of West Bengal and others, 2013(4) Law Digital in 249 Calcutta, held – wrongful confinement. Proceedings under Section 97 Cr.P.C. quashed. As per petition/complaint daughter of opposite party no. 2 has been snatched away by

husband and others from her custody. Held. So long, the issue is not resolved by a civil court, wife is competent to take recourse. Recovery under Section 97 of Cr.P.C. for immediate custody of child. No illegality and impropriety in the order. Application dismissed.

9. *The husband has filed petition for divorce before District Courts at Bhiwani and in view of the above position, the intention of the husband cannot be said to be bonafide.*

10. *Considering all the facts and circumstances, this Court is of the view that interim custody of the minor child may be given to the mother of the child i.e. petitioner and in case the husband wants to take the custody of the child may approach to the civil court and with this observation the revision petition is hereby accepted and trial court order is hereby set aside with the direction to trial court to decide the matter afresh in view of observations made above. Copy of this judgment be sent with the record of the trial court. File be consigned to record room, after due compliance.”*

The petition was accepted and the order passed by the Magistrate was set aside and a direction was given to the Court to decide the matter afresh in view of the observations made by it.

Aggrieved by the order a revision has been preferred by the husband primarily on the ground that power under Section 97 Cr.P.C. could only be exercised if a person is confined and confinement amounted to an offence. It was pleaded that the custody of the minor was with the father who was the natural guardian and it could not attract any penal provision and provisions of Section 97 Cr.P.C. would not be applicable. It had pleaded that

the petitioner was not arrayed as a respondent in the revision petition and on dismissal of the application by the SDJM no adverse order could be passed against the petitioner without issuing notice to him and deliberately he had not been made a party. It was pleaded that his counsel had appeared before the Court but was not allowed to address arguments.

Notice of the petition was given to the respondent. In her reply it was pleaded that notice was issued to the petitioner but it was received back unserved and bailable warrants were issued and Sh. Karan Singh Yadav, Advocate appeared and had filed his Power of Attorney on his behalf. It was denied that no opportunity of hearing was granted. It was pleaded that the petitioner had filed a petition seeking divorce and had also filed an application under Section 26 of the Hindu Marriage Act seeking custody of the child and petition filed under Section 13 of the Hindu Marriage Act had been dismissed on 24.7.2015. It was pleaded that that the petitioner was guilty of concealment of true facts and he had not disclosed about the affidavit executed by him whereby he had undertaken that he would not separate the child from the mother. It was pleaded that the child was below 5 years and only the mother could have the custody.

I have heard both the sides.

It was submitted on behalf of the petitioner that provisions of Section 97 Cr.P.C. were not attracted to the fact and circumstances of the case and the child was living with his father and the Additional Sessions Judge could not have passed an order to pass over custody to the father even by interim arrangement and no direction could be given for deciding the matter afresh. It was urged

that the Apex Court in ***Ramesh vs. Laxma Bai, (1998) 9 SCC 266*** was hearing the matter which was almost similar on facts and it had held that the provisions of Section 97 Cr.P.C. were not attracted. He had also referred to ***Ramesh vs. Laxma Bai, (1998) 9 SCC 266, Anjali Anil Rangari vs. Anil Kripasagar Rangari and others, (1997) 10 SCC 342, Bir Singh and another vs. State of Punjab and another, (CRM-M 5552 of 2011) decided on 30.10.2013, Mohit alias Sonu and another vs. State of Uttar Pradesh and another, (2013) 7 SCC 789.*** It was urged that the wife could take recourse to the remedy under Minority and Guardianship Act and it was not a case of snatching the child as they were living in the same house and the wife had gone away.

The submission on the other hand was that the custody of 5 years old child has always to be with the mother and the husband has already filed a petition under the Minority and Guardianship Act and till that application is decided custody should be with the mother. It was urged a wrong plea had been taken that the notice of the petition was not given as the petitioner had put in appearance before the revisional Court. It was urged that custody of the child can be handed over to the mother in proceedings initiated under Section 97 Cr.P.C. and even in a writ of habeas corpus as the paramount consideration is the welfare of the minor and not the rights of the parties. Reliance was placed upon ***Parmod v. Kamble vs. Jyoti P. Kamble, 2013(1) Bom.C.R. (Crl.) 63, Sri Piyush Chamaria vs. Hemanta Jitani and others, 2012(4) RCR(Criminal) 222, Dr. Mrs. Veena Kapoor vs. Varinder Kumar Kapoor, 1982 AIR (SC) 792,***

Jasbir Kaur vs. State of Punjab, 1998(2) RCR(Criminal) 369 and Purushottam Wamanrao Thakur and others vs. Warsha w/o Narendra Thakur and others, 1993(3) BCR 587.

There is marital discord between the husband and wife. The husband had filed a petition seeking divorce but the same had been dismissed on 24.07.2015 as the Court before whom it was filed, did not have the territorial jurisdiction. The wife approached the SDJM with an application under Section 97 Cr.P.C. which was dismissed by the Magistrate rightly holding that the provisions could be invoked only when the confinement amounted to an offence. The wife preferred a revision. She did not implead the husband as a party which should have been done. Though the respondent has placed on record documents to show that a Power of Attorney had been filed on behalf of the husband but the judgment does not refer to his presence. The summoning order Annexure R-2/1 shows that the Court had issued bailable warrants to secure his presence as the summons could not be served. That besides, the issue is whether the provisions of Section 97 Cr.P.C. could be invoked and whether custody of the child could be said to be unlawful with the father.

It is necessary to note some judgments of the Hon'ble Apex Court and other High Courts.

In ***Ramesh's case (supra)*** Hon'ble Apex Court in para 4 has held as under:-

4. From a perusal of the impugned order of the High Court, it appears to us 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 petition seeking search warrants under Section 97 Cr.P.C. in the established facts of the case is untenable. Section 97 Cr.P.C. prima facie is not attracted to the facts and circumstance of the case when the child was living with his own father. Under the circumstances, we are of the opinion that the orders of High Court dated 17.7.1996 and that of the learned Additional Sessions Judge dated 9.7.1996 can not be sustained and we accordingly set aside the orders and the directions given therein.

In **Anjali Anil Rangari's case (supra)**, the father moved an application seeking warrants and custody of the minor children. Hon'ble Apex Court in para 3 has held as under:-

“3. The only question that needs to be considered in the context of the facts and circumstances of the present case is as to whether provisions of Section 97 Cr.P.C. could be invoked. It can not be disputed that the mother is also a natural guardian under Section 6 of the Hindu Minority and Guardianship Act, 1956. It is so, could it be said that the custody of the two minor children with the mother was illegal and they were under her wrongful confinement? In the facts and circumstances of the case, we are unable to hold that the custody of the children with the mother was either unlawful or they were wrongfully confined by the mother at Delhi. If this be so the very basis of the impugned order can not be sustained and consequently the impugned order is required to be set aside. We accordingly do so.”

In **Vishal Jiwan Jogure vs. Smt. Megha Vishal Jogure and another, 2006(1) Criminal Court Cases 1078 (Bombay)**, it was held as under:-

“6. The question of invoking power under section 97 of the Code, as mentioned earlier, is available only if it is asserted and is established before the Magistrate, prima facie though, that confinement of any person in the circumstances amounts to an offence. By no stretch of imagination, custody of the children with the real father by itself can amount to an offence. Something more has to be alleged and established to support that position. No such allegation is forthcoming in the application, as has been filed. Viewed in this perspective, the Magistrate could not have assumed jurisdiction to issue search warrant in such fact situation, as the basic requirement of section 97 of the Code is not fulfilled. This is not to say that the Respondent No.1, who is the natural guardian of the children, being mother, has no other remedy in law to secure the custody of the said children. We are presently concerned with the question whether search warrants can be issued by the Magistrate merely because the mother complains that she apprehends that something will happen to the children, who are in custody of their father.”

It was further held that Magistrate can exercise power to issue search warrants only in the situation provided for by Section 97 Cr.P.C.

It would also be relevant to refer to the similar facts and the findings of Bombay High Court in **Marotrao vs. Usha Marotrao Pachare, 2004 (1) Criminal Court Cases 701 (Bombay)**, wherein it was held as under:-

“22. In the case before hand while narrating the facts in earlier part of judgment it is stated that the children were in the custody of the applicant No. 1 and the non-applicant till the time they were living together. It is a matter of record that the non-applicant left the matrimonial home, leaving the children in the custody of the applicant No. 1, that was also three months before the institution of the application by the non applicant in the court of the

Magistrate. Taking into consideration the material on record, the learned Magistrate had come to the conclusion that the children being remaining in the custody of the applicant No. 1 did not amount to an offence of wrongful confinement, nor there was any specific allegation by the non applicant that the applicant No. 1 has by use of physical force, taken the children in his custody and retained them. The learned Magistrate also found that the non applicant was not in any manner deprived of the custody of the children. It is needless to say that if at all the non applicant desired to have custody of the child, the only recourse which she could have was to initiate proceedings for custody of the children as contemplated under section 6 of the Hindu Minority and Guardianship Act. The very fact that the children having in the exclusive custody of the applicant No. 1 for over three months, justified the Magistrate to come to the conclusion that there was no wrongful confinement of the children by the applicant No. 1. In such circumstances the learned Magistrate was perfectly justified in not exercising jurisdiction under section 97 of Criminal Procedure Code for issuance of production warrant. As against that the learned Additional Sessions Judge has committed an error in law as well as in exercise of jurisdiction under section 97 of the Criminal Procedure Code, in issuing direction to produce the children in the court. There was absolutely no jurisdiction and justification also for Additional Sessions Judge to issue production warrant under section 97 of Criminal Procedure Code, if that is so, then this court has justification to interfere with the order. The order passed by the learned Additional Sessions Judge can not sustain being intrinsically

illegal and in excess of the jurisdiction envisaged under section 97 of Criminal Procedure Code. The revision application, therefore, has to be allowed and hence the following order is passed.....”

Reverting to the facts of the present case.

The child was below 5 years old. The couple were living together in a tenanted premises. A dispute arose and the wife called up her father who brought the police to their doorstep. The wife alleges that the husband did not allow her to take the child away. She also urges that the husband had played fraud and had taken child from the hospital to another doctor. The basic ingredient to attract Section 97 Cr.P.C. is that the child is confined under such circumstances, that confinement amounts to an offence. By no stretch of imagination, custody of the child with the real father by itself would amount to an offence. Something more has to be alleged and established to support that position. The revisional Court could not have exercised the revisional powers. Even hard cases cannot persuade a Court to ignore the legal principles and it is in these circumstances, it is held that the wife can not seek relief from criminal Court by invoking the powers under Section 97 Cr.P.C., therefore, the order passed by the Additional Sessions Judge can not be sustained. There was no need to even remit the matter back to the Magistrate or give directions. The impugned order is set aside. It is clarified that nothing said herein before this Court shall be construed as an expression of opinion on the merits of the controversy regarding the custody of the child which is now pending adjudication before the competent Court having jurisdiction. That

case would be decided on its own merits uninfluenced by the order made here.

The revision petition is allowed on the terms noticed above.

December 22, 2015

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**(ANITA CHAUDHRY)
JUDGE**