

IN THE HIGH COURT OF ORISSA AT CUTTACK
CRLREV No. 135 of 2022

Keshaba Chandra Sahoo

....

Petitioner

Mr. S. Dwibedi, Advocate

-Versus -

State of Odisha and another

....

Opposite Parties

Mr. P. Tripathy, Addition,

Mr. P.K. Nayak,

Advocate

(for O.P. No.2)

AFR

CORAM:

JUSTICE SASHIKANTA MISHRA

ORDER

29.11.2022

Order No.

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1. This matter is taken up through virtual mode.
2. The petitioner questions the correctness of order dated 28.02.2022 passed by learned Sub-Divisional Magistrate, Kuchinda in CMC No. 70 of 2022 whereby a search warrant was directed to be issued to produce before him a child said to be kept under wrongful confinement of the petitioner.
3. The brief facts of the case are that the petitioner is the father of one Diptimayee Sahoo, who had married the opposite party no.2 on 03.03.2019. A female child namely, Dolakanti Sahu was born to the couple on 15.03.2021. Subsequently, the wife of opposite party no.2 suffered from Corona virus and died during treatment on 22.07.2021. The dead body was cremated at Satichoura cremation ground, Cuttack following the COVID guidelines issued by the Government. At that time, when the opposite party no.2 was holding his daughter, the petitioner is alleged to have forcibly snatched her away and thereafter kept her under his custody in his house at village

Jitadimiria in the district of Angul. It is further alleged that being the father and natural guardian of the child, the opposite party no.2 went to the house of the petitioner and requested him to give the custody of the child, but he did not respond and on the contrary abused the opposite party no.2 in obscene language and also alleged that he had intentionally killed his daughter. On such allegations, the opposite party no.2 filed an application under Section 97 of Cr.P.C. before the learned court below seeking issuance of a search warrant and for production of the child. Learned S.D.M., after recording the allegations made in the petition by the opposite party no.2 issued a search warrant to the IIC Khamar police station to search the minor child Dolakanti in the house of the petitioner and to produce her before him. The said order is impugned in the present revision.

4. Heard Mr. S. Dwibedi, learned counsel for the petitioner, Mr. Pabitra Kumar Nayak, learned counsel appearing for the opposite party no.2 and Mr. P. Tripathy, learned Additional Standing Counsel for the State.

5. Mr. Dwibedi, while submitting that the allegations made by the opposite party no.2 are false and baseless contends that the issuance of search warrant was completely contrary to the provision of law inasmuch as no notice was issued to the petitioner to have his say in the manner. He further submits that the statute requires the Magistrate to record his subjective satisfaction that the alleged confinement amounts to an offence before issuing a search warrant. In the instant case, learned Magistrate has straightway acted upon the petition filed by the

opposite party no.2 without being so satisfied. As regards allegation of confinement of the child, Mr. Dwibedi has relied upon a decision of the Karnataka High Court in the case of ***Sri Khamarulla Khan Alias Alijan and others vs. Smt. Mujiba K. Khan*** (arising out of Criminal Revision No. 144 of 1979) in support of his contention that notice is a must before issuing a search warrant, particularly when the parties are close relations.

6. Mr. P. Tripathy, learned Additional Standing Counsel submits that the power under Section 97 of Cr.P.C is not required to be exercised after issuing notice to the other side. According to Mr. Tripathy, this is an emergent provision to be invoked immediately upon receipt of the complaint regarding wrongful confinement and therefore, it would not be practicable to issue notice to the alleged offender.

7. Mr. P.K. Nayak, learned counsel appearing for opposite party no.2 also submits that no notice is required to be sent to the other side and that the Magistrate has power to act upon the averments made in the complaint petition. According to Mr. Nayak, in the instant case, the Magistrate being satisfied as regards the wrongful confinement of the child, issued search warrant and therefore, no illegality has been committed.

8. To appreciate the rival contentions, it would be apposite to refer to the relevant statutory provision at the outset, that is, Section 97 Cr.P.C., which is quoted herein below:-

“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.”

9. Reading of the provision clearly suggests that the Magistrate can exercise such power and there is no provision for issuing notice to the alleged offence. However, it also provides that search warrant may be issued if the Magistrate has “reason to believe” that the person concerned is confined under such circumstances that the confinement would amount to an offence. In other words, the Magistrate is required to be subjectively satisfied as regards wrongful confinement of the person concerned before exercising power under Section 97 of Cr.PC. This Court had the occasion of examining the circumstances for exercise of power under Section 97 of Cr.P.C. in the case of ***Smt. Bijaya Soren @ Murmu vs. State of Odisha and others*** (CRLMC No.1623 of 2020, decided on 24.11.2021) wherein it was held as follows:-

“A plain reading of the provision quoted above clearly reveals that three conditions need to be satisfied for exercise of order thereunder:

- i. A person is confined.*
- ii. Such confinement amounts to an offence and*
- iii. The Magistrate has reasons to believe in the existence of the aforementioned two conditions.*

What is the meaning of ‘confinement’ and when can such confinement become wrong or illegal so as to ‘amount to an offence?’ The dictionary meaning of “confinement” is ‘the situation in which a person or animal is kept somewhere, usually by force.’ Thus, the application of force is sine qua non for a situation to

qualify as confinement vis-à-vis a person or an animal. Section 340 of I.P.C. defines wrongful confinement as a punishable offence depending on the period, place and intention as delineated under Sections 343 to 348. For the confinement to amount to an offence as required under Section 97 of Cr.P.C. quoted above, the same must be as described under Section 340 IPC read with the penal provisions enumerated under Section 343 to Section 348 of I.P.C. Of course, every confinement cannot be wrongful so as to constitute an offence. Therefore, the facts and circumstances surrounding every confinement are to be taken into account to determine whether the same is wrongful or not because, unless it is wrongful it cannot partake the nature of an offence so as to attract the provisions of Section 97 Cr.P.C.”

10. In the case of **Sri Khamarulla Khan Alias Alijan (supra)** cited by Mr. Dwibedi, the Karnataka High Court after analyzing the provisions of Section 97 Cr.P.C. has taken similar view. More importantly, the Karnataka High Court has taken the view that when the allegations are between close relations it would be prudent for the Magistrate to hear the other side before finally deciding whether the alleged confinement is wrongful in nature and/or amounts to an offence.

11. Mr. Nayak argues that the cited decision would not be applicable to the present case as the same was a case between husband and wife. But in the present case, the dispute is between a person and his father-in-law.

12. After hearing learned counsel for the parties, this Court is of the view that having regard to the nature of allegations made in the petition as reflected in the impugned order and the fact that the parties are closely related to each other, it would have been better for the Magistrate to issue a notice to the

other side so as to grant an opportunity of hearing. This would have enabled the Magistrate to arrive at a definite finding or to be subjectively satisfied that the child in question has in fact been wrongly confined. Only then the order directing issuance of the search warrant should have been passed.

13. The impugned order directing issuance of the search warrant does not reveal as to how the Magistrate had reason to believe that the so called confinement of the child amounts to an offence. The impugned order is therefore rendered unsustainable in the eye of law. Resultantly, the revision is allowed, the impugned order is set aside. The matter is remitted to the learned Sub-Divisional Magistrate to pass necessary orders on the petition under Section 97 of Cr.P.C. filed by the opposite party No.2 afresh after granting due opportunity of hearing to the petitioner. It goes without saying that it is open to the Magistrate to pass appropriate orders if he is satisfied or has reason to believe that the child in question is wrongly confined by the petitioner. Parties are directed to appear before the learned Magistrate on 14th December, 2022 to receive further instructions. Learned Magistrate is directed to act upon a production of certified copy of this order. Further, the entire proceeding shall be disposed of within a period of two weeks thereafter.

14. The CRLREV is disposed of accordingly.

(Sashikanta Mishra)
Judge