

(2012) 07 CAL CK 0066**Calcutta High Court****Case No:** C.R.R. No. 532 of 2011

Nabamita Chowdhury alias
Chaudhuri

APPELLANT

State

Vs

RESPONDENT

Date of Decision: July 13, 2012**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 397, 401, 482, 97
- Hindu Marriage Act, 1955 - Section 13B
- Penal Code, 1860 (IPC) - Section 323, 343

Citation: (2012) 4 CALLT 226**Hon'ble Judges:** Dipak Saha Ray, J**Bench:** Single Bench**Advocate:** Ayan Bhattacharjee and Mr. Proloy Chatterjee, for the Appellant; Rudra Jyoti Bhattacharjee for the Opposite Party No. 2, for the Respondent**Final Decision:** Allowed

Judgement

Dipak Saha Ray, J.

The present case arises out of an application u/s 397/401 of the Code of Criminal Procedure read with section 482 of the Code of Criminal Procedure 1973. It is directed against the Order dated 23.11.2010 passed by the learned Sessions Judge, Hooghly in Criminal Motion No. 104 of 2010 setting aside the order dated 29.5.2010 passed by the learned Judicial Magistrate. Additional Court. Hooghly in Criminal Case No. 220 of 2010 under sections 343/323 of the Indian Penal Code.

2. The relevant facts of the present case are, in a nutshell, as follows:

The present petitioner/wife filed a petition of complaint u/s 343/323 IPC alongwith an application u/s 97 of the Code of Criminal Procedure for recovery of her child who was taken away from her custody by her husband. Accordingly, the said

petition of complaint was registered as CR Case No. 220 of 2010. On the basis of the application u/s 97 of the Code of Criminal Procedure, the order was passed by the learned Magistrate, Hooghly directing the I.C., Chinsurah P.S. for execution of the warrant to produce Ankush Chakraborty before the court. But the said order was not executed as the boy was not found when the Police Personnel went at the spot for execution of the said order of the learned Court. Subsequently, against the said order, passed by the learned Magistrate dated 29.5.2010. one revisional application was filed. After hearing both the sides, the learned Sessions Judge. Hooghly passed the impugned order setting aside the order of the learned Magistrate, Hooghly in the matter of production of the child before the Court after executing the search warrant u/s 97 of the Code of Criminal Procedure.

3. Being aggrieved by and dissatisfied with the said order of the learned Sessions Judge. Hooghly the petitioner/wife has preferred the instant revisional application.

4. It is the case of the petitioner that the marriage between her and her husband was dissolved under the provision of section 13B of the Hindu Marriage Act and thereafter she started living with her child at her father's house and her husband occasionally visited her father's house to meet the said child. Subsequently, on 27.5.2010. in absence of petitioner, he took away her child and finding no other alternative, she filed the said petition of complaint alongwith the application u/s 97 of the Code of Criminal Procedure for recovery of her child.

5. It is the case of the opposite party No. 2 that he is the natural guardian of the child and the petitioner is not entitled to recover the child from his position by way of search warrant as he is the lawful custodian of the said child.

6. On perusal of the record of this case, it appears that there is no controversy that the marriage between the petitioner and opposite party No. 2 was dissolved on mutual consent u/s 13B of the Hindu Marriage Act. There is also no controversy that after divorce the petitioner started living at her father's house with her child. There is no dispute that the father of the child came to father's house of the petitioner and took away the child in absence of the petitioner on 27.5.2010. There does not appear to be any controversy that the said child is still in the custody of his father i.e. opposite party No. 2 herein.

7. The controversy mainly relates to the question as to (i) whether the order passed by the learned Magistrate. Hooghly was inter locutory and (ii) whether the husband has any right to take away the child from the custody of his wife without her consent.

8. The learned counsel for the petitioner has submitted that the petition u/s 97 of the Code of Criminal Procedure has not been disposed of as yet and that the learned Magistrate on the basis of the said petition directed the police to produce the child before the court. So, from the said order it cannot be said that a final order has been passed and that the said application u/s 97 of Code of Criminal Procedure has been

disposed of. The learned counsel has further submitted that the custody of the minor child can only be determined by the Civil Court and as such the father ought to have obtained the order regarding the custody of the child from the competent Civil Court; but without obtaining such order from the competent Court, in absence of the petitioner, he took away the child from the custody of the petitioner. Accordingly, it is submitted that the learned Magistrate has rightly passed the said order; but the learned Appellate Court without considering the aforesaid facts and materials on record passed the impugned order and as such there is misappreciation of the materials on record led to material irregularities occasioning failure of justice; so, the same is required to be set aside.

9. On the contrary, the learned counsel for opposite party No. 2 submits that the learned Appellate Court has passed the said order rightly because there was illegality and impropriety in the order of the learned Magistrate. It is submitted that the child is in the custody of his legal guardian and it cannot be said that the father wrongfully confined the child. It is further submitted that section 97 of the Code of Criminal Procedure cannot be attracted in the facts and circumstances of this case as the said section relates to the search of the persons who are wrongfully confined.

10. The learned counsel for the opposite party No. 2 has referred to decisions which have been reported in V.C. Shukla Vs. State through C.B.I., ; Rajendra Kumar Sitaram Pande and Etc. Vs. Uttam and Another, : Madhu Limaye Vs. The State of Maharashtra, : Amar Nath and Others Vs. State of Haryana and Another, ; 2001 Cr. LJ 1223 [State of Gujarat v. Manoj Kumar Achalaji Khatri; Arvind Kumar Tewari and Another Vs. The State of Uttar Pradesh and Another, and Sureshbhai Jehaji Thakor Vs. State of Gujarat and Another,

11. By referring the said decisions, the opposite party No. 2 has tried to impress upon the court that the order passed in connection with the application u/s 97 of the Code of Criminal Procedure is not an interlocutory order as the said order affects the right of the opposite party No. 2. Some decisions have also been cited on behalf of opposite party No. 2 viz. Ashok Thadani Vs. Ramesh K. Advani and Others, V.S. Kuttan Pillai Vs. Ramakrishnan and Another, 2010 (2) CHN (Cal) 556 [Atanu Chakraborty v. State]: (2010) 2 Cal Cr. LR (Cal) 569 [Saikat Saha v. Kakali Panja (Saha)] Ramesh Vs. Laxmi Bai (Smt), : Century Textiles Industries Ltd. Vs. Deepak Jain and Another, : State of Bihar Vs. Kalika Kuer @ Kalika Singh and Others, and Ahamed Hossain Sk. Vs. State of West Bengal and Others. By referring the said decisions he has tried to establish that the child is in the lawful custody of his father and as such search warrant cannot be issued for recovery of the said child from the custody of his legal guardian/father.

12. On careful perusal of the order dated 29.5.2010 passed by the learned Magistrate. Hooghly, it appears that on the basis of the application u/s 97 of the Code of Criminal Procedure filed by the wife/petitioner herein, the learned Magistrate, Hooghly passed an order directing the Police to produce the child

before the Court. From the said order it is evident that the said petition u/s 97 of the Code of Criminal Procedure has not been disposed of as yet as no order has been passed by the learned Magistrate, Hooghly in the matter of returning the child to the custody of his mother or anybody else.

13. Now, on careful perusal of the decisions referred to on behalf of opposite party No. 2. it appears that the decisions reported in 1982 CrLJ 1446 [Ashok Thandani v. Ramesh Kr. Advani] [V.S. Kuttan Pillai Vs. Ramakrishnan and Another, \(2010\)2 CHN \(Cal\) 556](#) [Atanu Chakraborty v. State]: (2010)2 Cal Cr. LR (Cal) 569 [Saikat Saha v. Kakali Panja (Sana)]; [Ramesh Vs. Laxmi Bai \(Smt\), Century Textiles Industries Ltd. Vs. Deepak Jain and Another, ; State of Bihar Vs. Kalika Kuer @ Kalika Singh and Others, and Ahamed Hossain Sk. Vs. State of West Bengal and Others,](#) re not relevant in the facts and circumstances of the instant case.

14. In the instant case, the child was in the custody of his mother/ wife: but the father/husband took away the said child from the custody of the mother/wife without her consent. Admittedly, the custody of a child can only be determined by the order of the civil court under the provisions of the Guardians and Wards Act (8 of 1890). But before getting any such order from the competent court regarding the custody of the child, the husband taking the advantage of the absence of wife, took away the child from her custody.

15. Now, from the decisions reported in Zahirul Hassan vs. State of Uttar Pradesh, 1988 Cri. L.J. 230 and [Purushottam Wamanrao Thakur and others Vs. Warsha Thakur and others,](#) it appears that removing the child by father from the custody of the mother and keeping him in his custody amounts to wrongful confinement and accordingly, issuance of search warrant u/s 97 of the Code of Criminal Procedure is justified and proper.

16. Having regard to the facts and circumstances and discussions made above, it appears that the learned revisional court is not justified in setting aside the order of the learned Magistrate. Hooghly in the matter of issuance of search warrant for recovery of the child and to produce him before the Court.

17. Accordingly, the instant revisional application succeeds.

18. CRR 532 of 2011 is allowed and in the nature and background of the case without cost.

19. The impugned order dated 23.11.2010 passed by the learned Sessions Judge. Hooghly in Criminal Motion No. 104 of 2010 is hereby set aside. Let a copy of this judgment be sent to the learned Trial Court for information and necessary action.

Urgent Photostat certified copy of this judgment be supplied to the parties, if applied for, subject to compliance with all necessary formalities.