
Sri Rama Chandra Sahoo and Another Vs State of Orissa

CRLREV No. 260 of 2012

Court: Orissa High Court

Date of Decision: Jan. 31, 2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 97#Penal Code, 1860 (IPC) â€” Section 304, 304B, 34, 498A

Citation: (2013) 115 CLT 1113 : (2013) 3 Crimes 34 : (2013) 1 OLR 841

Hon'ble Judges: B.K. Nayak, J

Bench: Single Bench

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

B.K. Nayak, J.

Heard learned counsel for the parties. Order dated 23.03.2012 passed by the learned Sub-Divisional Magistrate, Cuttack

Sadar in Criminal Misc. Case No. 18 of 2010 issuing a search warrant u/s 97 of Cr.P.C. to the I.I.C., Kissan Nagar Police Station to rescue the

child-Satyaprakash from the petitioners and to hand over the child to opposite party No. 2, has been assailed in this revision.

2. The admitted facts are that the petitioner No. 1 is the maternal grandfather and petitioner No. 2 is maternal uncle of the child-Satyaprakash,

who is now aged about 7 to 8 years. Opposite party No. 2 married the daughter of petitioner No. 1 in January, 2005 and the child-Satya Prakash

was born out of their wedlock in January, 2006. In February, 2010 the daughter of petitioner No. 1 (mother of the child) died in unnatural

circumstances for Which the wife of petitioner No. 1 lodged FIR against opposite party No. 2 and his family members for commission of offences

under Sections 498-A/ 304-B/ 34 of the IPC. On completion of investigation, charge sheet was submitted against the accused persons,

cognizance was taken and after commitment the case is pending trial in the Court of the learned Additional District and Sessions Judge, FTC,

Cuttack. During investigation, opposite party No. 2 and his mother were apprehended and were taken to judicial custody and therefore, the child-

Satyaprakash was handed over to the petitioners and since then he has been staying in the house of the petitioners, who are taking care of him.

After being released on bail, opposite party No. 2 filed an application under-Section 97, Cr.P.C. before the learned Sub-Divisional Magistrate,

Cuttack for issuance of search warrant on the allegation that the child has been confined by the petitioners and is not being handed over to

opposite party No. 2, though he is the legal guardian and that was registered as Criminal Misc. Case No. 18 of 2010. Initially order was passed

for issuance of search warrant, but at the instance of the petitioners in criminal revision No. 844 of 2011 this Court set aside the order passed by

the learned Sub-Divisional Magistrate and remanded the matter back for fresh hearing and disposal in presence of both the parties. Thereafter, the

present impugned order has been passed.

3. The contention of the learned counsel for the petitioners is that keeping of the child-Satyaprakash by the petitioners in the facts and

circumstances of the case does not amount to an offence of wrongful confinement and therefore, the Sub-Divisional Magistrate has no jurisdiction

to issue a search warrant u/s 97, Cr.P.C. It is his further submission that the petitioners are taking good care of the child-Satyaprakash and have

admitted him in a good school and the allegations made by the opposite party No. 2 before the Sub-Divisional Magistrate that the petitioners are

ill-treating the child and not providing him food and are not taking proper care of him are all false. Learned counsel for the petitioners has also

drawn the attention of this Court to Annexure-4, i.e., copy of the enquiry report submitted to the learned Sub-Divisional Magistrate by the

Tahasildar, Kissan Nagar on the direction of the former which reveals that the Tahasildar interacted with the child confidentially and the child did

not complain of any ill-treatment by the present petitioners and stated that he was not deprived of any food nor he was suffering from mal-

nourishment. The Tahasildar also learnt that the child was studying in nearby Saraswati Sishu Mandir, Jagannathpur. It is also his submission that

opposite party No. 2 is a taxi driver and most of the time he stays away from the house while driving the taxi-to different places and it will not be

possible on his part to look after the child properly.

4. Learned counsel for opposite party No. 2 on the other hand, submits that he being the father of the child is the natural guardian and therefore, he

has a preferential right to take custody of the child and therefore, the order passed by the learned Sub-Divisional Magistrate cannot be said to be

improper. He also submits, relying on the decision of Patna High Court reported in Harakh Singh Vs. Lalmuni Kuer, that the order passed u/s 97,

Cr.P.C. is an interlocutory order and therefore not revisable.

5. In exactly a similar fact situation in Civil Appeal No. 4960 of 2008 (Ratan Kundu and another v. Abhijit Kundu) disposed of on 8.8.2008,

where the father of the child being released on bail in a case u/s 498-A/ 304, IPC filed a petition under the Guardians and Wards Act, 1890 for

taking custody of his child from the maternal grand parents of the child, the Supreme Court held that in such a situation the welfare of the minor

child is the paramount consideration and that the opinion and the wishes of the child as to with whom he wants to stay, is extremely relevant.

6. Pursuant to the direction of this Court dated 22.01.2013 the parties along with their respective counsel and Mr. Kanungo, learned Additional

Standing Counsel are present. The minor child Satyaprakash Sahoo has also been produced by the petitioners. I interacted with the child

Satyaprakash, who stated that he is staying in the house of his maternal grandfather and is being well taken care of and well fed and that he has

been admitted in the Saraswati Sishu Mandir, where he is a student of Standard-II. He also stated that his father (opposite party No. 2) visits him

at times. He has expressed that he is quite happy in the house of his maternal grandparents and that he would like to continue to stay with the

maternal grandparents.

7. The Magistrate u/s 97, Cr.P.C. assumes jurisdiction to issue search warrant only when he is satisfied that a person is confined under such

circumstances that the confinement amounts to an offence. In the instant case the petitioners are not strangers but are the maternal grand father and

maternal uncle of the child. As has been noted before, the child expressed his desire to stay with the petitioners, who are taking good care of him.

In the aforesaid circumstances, living of the child with the petitioners cannot be said to be commission of offence of wrongful confinement by the

petitioners. Therefore, the finding of the Sub-Divisional Magistrate, Cuttack in the impugned order that the detention of the child by the petitioners

amounts to wrongful confinement is not correct.

8. This Court has observed in the decision reported in Duryodhan Mahanta Vs. Saraswati Mahanta, that in order to believe reasonably that the

confinement of a person is wrongful confinement which amounts to an offence, the Magistrate has to apply his judicial mind to all the materials

available on record. It is apparent that the Sub-Divisional Magistrate has not applied his mind to the report submitted by the Tahasildar, nor did he

ascertain the wishes of the child. In such circumstances, it must be held that the Sub-Divisional Magistrate has no reason to believe that the child

has been confined which amounts to an offence of wrongful confinement.

9. Coming to the question of maintainability of the revision, I perused the decision of the Patna High Court in the case of Harakh Singh (supra)

cited by the learned counsel for opposite party No. 2, and found that in a criminal case for commission of offence of kidnapping of two minor girls

a petition was filed before the Magistrate for issuance of a search warrant for rescuing the children from the custody of the kidnapper-accused and

order having been passed on such application, it was held that it was an interim application in the original criminal proceeding and the order being

passed on such interim application it was interlocutory in nature. The said decision has no application to the facts and circumstances of the case

inasmuch as the petitioners are neither kidnappers of the child-Satyaprakash and their custody of the child cannot be said to be wholly illegal and

that the proceeding u/s 97, Cr.P.C. is not by way of an interim application filed in another proceeding, but an independent proceeding which has

stood terminated by passing of the impugned order. In the circumstances, the impugned order cannot be termed as interlocutory. The contention of

the learned counsel for opposite party No. 2 regarding maintainability of the revision therefore fails.

10. In the light of the discussion made above, the impugned order is liable to be set aside and accordingly I set aside the same. The revision is

therefore allowed.