

Arundhati Vs. Ajay

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Court : Madhya Pradesh

Decided On : Jun-30-1990

Reported in : I(1991)DMC157

Judge : Gulab C. Gupta, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 97 and 482

Appeal No. : Misc. Criminal Case No. 1431 of 1985

Appellant : Arundhati

Respondent : Ajay

Judgement :

Gulab C. Gupta, J.

1. The applicant, by filing this application under Section 482 Cr. P.C., seeks to challenge the legal validity of proceedings in Misc. Judicial Case No. 70 of 1985 pending before the Chief Judicial Magistrate Ambikapur and prays that those proceedings including the order dated 13-5-85 (Annexure-5) passed by the said Chief Judicial Magistrate be quashed as it amounts to abuse of the process of the Court, resulting in gross miscarriage of justice.

2. The petitioner is the legally married wife of respondent. They were married in February, 1979 in Bhandara and have two children viz Parimal, who was about 4-

1/2 years old at the time of filing this application and Nachiket, who was about 2-3/4 years old on the date of this application. It appears that they could not live together because of serious differences between them. The petitioner left the respondent in July 1982 to give birth to her second child at her father's place. She is since then staying with her parents at Bhandara. It appears that the respondent filed an application for restitution of conjugal rights on 11-6-84 in the Court of District Judge Balaghat. The petitioner also filed an application for divorce on 11-6-84 in the District Court, Bhandara. From the facts stated in this application, it appears that the respondent's application for restitution of conjugal rights remained stayed during the pendency of the petitioner's application for divorce.

3. It appears that the respondent filed a criminal complaint before the Chief Judicial Magistrate Ambikapur in February, 1984 alleging the commission of offence by the petitioner and others under Sections 448, 323, 506, 427, 147 and 500 IPC which was registered as Cr. Case No. 1018 of 1984. The learned Magistrate issued process to the petitioner and others for their appearance before him. The order issuing process was challenged by the petitioner by filing a criminal revision before the Sessions Judge Ambikapur where it was subject matter of Criminal Revision No. 102 of 1984. The learned Sessions Judge was pleased to quash the proceedings and set aside the order issuing process, by his Judgment dated 20-2-85. Since then, it appears that the criminal proceedings in the aforesaid criminal complaint came to an end.

4. It also appears that the respondent moved the Chief Judicial Magistrate Ambikapur under Section 97 Cr. P.C. for obtaining the custody of his two children in 1984. The said application was registered as Misc. Judicial Cr. Case No. 11 of 1984. In pursuance to the order dated 7-12-84, the petitioner and his two children appeared before the CJM Ambikapur wherein she made the statement that neither she nor her children were in illegal confinement and the allegations made in the application were false. The Chief Judicial Magistrate Ambikapur by his order dated 6-1-85, released the petitioner and her children and dropped the proceedings in M.J.C. No. 1-1 of 1984. The respondent does not appear to have taken any further action in the matter and therefore the said order achieved finality.

5. In the meantime, it appears that the respondent could obtain the custody of his two children from Nagpur (Maharashtra) on 15-5-84. The petitioner therefore moved an application under Section 97 Cr. P.C. before the Chief Judicial Magistrate Nagpur, seeking recovery of her two children from the respondent. This was registered as Cr. Case No. 95 of 1984 in the Court of Chief Judicial Magistrate Nagpur. On a search warrant being issued by the Chief Judicial Magistrate Nagpur, the children were produced before him. The learned Magistrate passed order dated 21-5-84 directing the custody of children to be given to the petitioner.

6. The respondent felt aggrieved by the aforesaid order and challenged its illegality by filing a Cr. Revision in the Court of Sessions Judge Nagpur where it was registered as Cr. Rev. No. 859 of 1984. Unfortunately for the respondent, the learned Sessions Judge, by his order dated 11-10-84, dismissed the revision and upheld the order of the Chief Judicial Magistrate Nagpur. It is stated that the respondent thereafter challenged the legality of the order of the Sessions Judge by filing an application under Section 482 Cr. P.C. before the Nagpur Bench of High Court of Judicature of Bombay which was registered as Cr. Application No. 90 of 1985. Unfortunately for the respondent, this application was summarily rejected on 30-1-85.

7. It is thereafter that the respondent filed another application which is the subject matter of this order. On 24-4-85 in the Court of Chief Judicial Magistrate Ambikapur claiming custody of children under Section 97 Cr.P.C. The learned Magistrate by his order dated 29-4-85, issued a search warrant for production of children before him. It appears that only the elder son Parimal was produced before the learned Magistrate in execution of the warrant on 30-4-85. On that date the learned Magistrate asked the chief whether he would like to go to his father and finding his answer in the affirmative, directed that the child should be given in the custody of the respondent. It appears that the petitioner moved an application before the Chief Judicial Magistrate on 14-5-85 praying for cancellation of earlier order dated 13-5-85 but since no action was taken, she moved this Court for quashing these proceedings and for obtaining the custody of her child.

8. Though the respondent is a Drug Inspector in the State Service, it has been difficult for this Court to serve notice on him. He could not be served for one reason or the other, which he was at Ambikapur. Later on he was transferred to Jagdalpur. Even there it took quite sometime to be; served. It was fortunately on 8-3-90 that he could be served at Jagdalpur. Inspite of this service, he has not cared to enter appearance in this Court. Under the circumstances, this matter is being decided in his absence on the basis of material placed on record by the petitioner.

9. The main submission of the learned counsel for the petitioner is that once an application under Section 97 Cr.P.C. has been decided and disposed off by a court of competent jurisdiction whose judgment has achieved finality, the second application on the same cause of action should not have been entertained.

10. As noticed earlier, this very matter has been the subject matter of M.J.C. No. 11/84 before the same Chief Judicial Magistrate. In the said application also, a warrant for production of the petitioner and her two children was issued. The petitioner had appeared before the learned Magistrate on 6-1-85 and gave the statement that there was no truth in any of the allegations made against the respondent. She further stated that neither she nor her children were confined in any manner. It was on this statement that the learned Magistrate had dropped the proceedings by order dated 6-1-85. It is well known that a person is not to be vexed more than once on the same cause of action. The present application does not indicate anything new to justify exercise of jurisdiction again. From the present application, it appears that the petitioner had gone to Nagpur leaving her two children with her parents (See Para 7). This allegation clearly indicates that the children were not confined but were left in temporary custody of her parents by the petitioner. From the order-sheet dated 29-4-85, it does not appear that the learned Magistrate ever read this paragraph or made any enquiries in relation to Section 97 Cr.P.C. The application filed by the respondent does not mention the previous litigation. Had the previous litigation been honestly mentioned,, it would have been difficult for the respondent to submit that the children were illegally confined. The decision of the Chief Judicial Magistrate Nagpur which had been confirmed by the Sessions Judge and the High Court, leaves no manner of doubt that the two children were in lawful custody of the petitioner and as long as they were so kept,

they could not be treated as confined. Apparently therefore the respondent had made this second application on incomplete allegations with a view to obtain unfair advantage from the Court. It is surprising that the learned Chief Judicial Magistrate has so readily issued warrant and thereafter gave custody of the elder child to the respondent by writing a cryptic order. Vague allegations, suppression of facts and thereafter not considering the application dated 14-5-85 of the petitioner is sufficient to give rise to suspicion about the honesty and integrity of the Chief Judicial Magistrate. This Court is happily informed that Shri T.C. Mahobia who was the Chief Judicial Magistrate at the relevant time is no longer in judicial service. It is, therefore, not considered necessary to dilate on the matter any further. Suffice it to say that the orders passed in earlier application by his own Court and the Court of Chief Judicial Magistrate Nagpur deserved respect in the matter.

11. As regards this Court, it has to ascertain whether this complaint amounts to abuse of the process of the Court. The respondent was fully aware of earlier, proceedings before the Chief Judicial Magistrate Ambikapur and Chief Judicial Magistrate Nagpur. In spite of it, he has not made any mention of those proceedings in the application apparently because that information would not have even made out a prima facie case in his favour for issuance of a warrant. The respondent is, therefore, guilty of suppression of vital information from the Court. It is, therefore, possible to hold him guilty of making of an unfair attempt to influence the process of the Court and obtain undeserved benefit. This by itself, in the opinion of this Court, is sufficient to allow this application and quash proceedings.

12. Even on merits, it was submitted that there is no even prima facie case for entertaining application under Section 97 Cr.P.C. Section 97 Cr.P.C. deals with those cases where a person is confined under such circumstances that the confinement amounts to an offence. This provision is not intended to decide the guardianship of minor children for which appropriate remedy has to be undertaken under the relevant provision of law. Then, the allegations in the application by themselves are not enough as the section casts a duty on the Magistrate to determine that he has 'reason to believe' that there is confinement of the person which in the context of facts and circumstances of the case amounts to an offence.

The word 'reason to believe' casts an obligation on the Magistrate to consider all relevant material with a sense of responsibility and reach the said conclusion. Unfortunately the impugned order does not indicate any such exercise conducted by the learned Chief Judicial Magistrate. Then, it is difficult to hold in the context of facts and circumstances of the case that the two children were confined and the circumstances are such that the confinement amounts to an offence. There is not even the allegation in the application filed by the respondent that their alleged confinement amounts to a criminal offence. In the earlier cases, the Courts have held that the children were in lawful custody of the petitioner. The matter of custody which has been held to be lawful cannot by any stretch of imagination be held to be an illegal confinement. Therefore, there is not even a prima facie case to hold that the children were illegally confined and that their confinement amounts to a criminal offence. In this view of the matter, the application filed by the respondent should not have been entertained.

13. While on the subject, the order of the learned Magistrate dated 13-5-85 handing over custody of the child Parimal may also be considered. The said order illustrates total lack of legal knowledge on the part of the C.J.M. A bare reading of Section 97 Cr.P.C. would indicate that he has to, before taking such an action, hold that the child was illegally confined in the circumstances which amount to a criminal offence. As long as these necessary ingredients were not present, the child could not have been given to the respondent in custody. It is true that the learned Magistrate had asked the child whether he would like to live with the respondent and the child had expressed his readiness and willingness to live with him. This, in the opinion of this Court, is a wholly unjustified and unwarranted exercise. The child had been taken in the police custody and the aforesaid question was being asked to him in the absence of his mother, the petitioner. The child was, therefore, making a choice between the police custody and his father and not between the custody of his mother and father. If in such a situation, the child prefers the custody of his father to the custody of police, it would be the expression of his natural instinct. Such a choice cannot, however, be decisive of the matter nor can it be considered sufficient to set at naught previous judgments on the subject. Under the circumstances, not much legal weight can be attached to this exercise in futility.

14. In view of the aforesaid, it is a clear case of misuse of the process of the Court and hence, it is the obligation of this Court to exercise powers under Section 482 Cr.P.C. and quash those proceedings. The proceedings in Criminal Case bearing No. M.J.C. 70 of 1985 pending in the Court of Chief Judicial Magistrate Ambikapur are therefore quashed. As a necessary consequence, the order of issuance of warrant for production of the petitioner and the children and also the order dated 13-5-85 giving the custody of Parimal to the respondent is also quashed. The petitioner would, therefore, be entitled to obtain the custody of the said child from the respondent and it will be obligation of the Chief Judicial Magistrate Ambikapur to restore the said child to her custody.

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