

**indrajit Saha Vs. the State of West Bengal and Another**

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**Court :** Kolkata

**Decided On :** May-16-2012

**Judge :** Prasenjit Mandal

**Appeal No. :** C.R.R. No. 1687 of 2011

**Appellant :** indrajit Saha

**Respondent :** The State of West Bengal and Another

**Judgement :**

Prasenjit Mandal, J.

This application is for quashing the proceeding of Complaint Case No.833 of 2011 under Sections 342/344 of the Indian Penal Code pending before the learned Judicial Magistrate, 2nd Court, Barasat.

The short fact is that the elder brother of the petitioner was married to the opposite party No.2 on January 29, 2001 according to Hindu Customs and Rites and one daughter, namely, Tanish Saha was born in the wedlock. There is no good relationship between the husband and wife and as such, dispute arose between the two. The guardians of the parties tried to solve the dispute in vain. As per contention of the husband, the wife mixed with one Sambhunath Saha and the criminal case was lodged against both of them and they, i.e., the wife and the said Sambhunath Saha pleaded guilty to the allegation under Section 290 of the Indian Penal Code. Thereafter, the wife filed a criminal case under Section

498A/406/323/324/34 of the Indian Penal Code against the husband and his other relations. That case is still pending for investigation.

The wife filed a Complaint Case also under Section 342/344 of the Indian Penal Code against the husband and two others and in that case, she filed an application under Section 97 of the Criminal Procedure Code (henceforth shall be called as 'Cr.P.C.')

 for recovery of her minor daughter aged about 8 and half years (now about 10 years). That application under Section 97 of the Cr.P.C. was allowed by the impugned order. In such circumstances, this application has been preferred.

Now, the petitioner has contended that the said case under Section 342/344 of the Indian Penal Code is not maintainable against the husband and others for recovery of the child of the husband. It is also contended that a civil proceeding under the Guardians and Wards Act is pending and so, the appropriate proceeding has been lodged and this criminal case should be quashed.

Upon hearing the learned Counsel for the parties and on going through the materials-on-record, I find that as per allegation made in the complaint case being Complaint Case No.833 of 2011, the daughter of the opposite party No.2 was being maintained by the mother for her care, education, normal teaching, etc. and she was taking all steps for admission to a school in Calcutta. The child is minor. The husband with the help of others snatched the daughter of the opposite party No.2 forcibly on January 20, 2011 and the said daughter had been confined and so, the said complaint case was lodged.

Mr. Avishek Sinha, learned Counsel appearing on behalf of the petitioner has referred to the decisions of B. Suresh Yadav v. Sharifa Bee and Anr. reported in (2009)1 Supreme Court Cases(Cri)282 particularly paragraph No.s 13 and 14, All Cargo Movers(I)Pvt. Ltd. and Ors. v. Dhanesh Badarmal Jain and Anr. reported in 2007(7)Supreme 334 particularly paragraph No.16 and Ramesh v. Laxmi Bai(Smt.) reported in 1998 Supreme Court Cases(Cri)999 and thus, he submits that the child, aged about 9 years, living with the father - Section 97 is not attracted. It is also submitted that the criminal proceeding should not be encouraged when it is found to be mala fide or otherwise an abuse of the process of the Court.

On the other hand, Mr. R.S. Chattopadhyay, learned Counsel appearing on behalf of the opposite party No.2 has referred to the decision of Purushottam Wamanrao Thakur and Ors. v. Warsha w/o Narendra Thakur and Ors. reported in 1992 CRI.L.J.1688 and thus, he submits that when the father(husband) removing children (Aged 5 and 2) from mother's (wife) residence - failure of husband (father) to return them to mother's house - husband lodging children in his father's (paternal) house - amounts to wrongful confinement - issue of search warrant justified.

Having considered the above submissions, I am of the view that the decision of Purushottam Wamanrao Thakur (supra) is very much applicable in the instant case as per allegation raised in the complaint. In the case of Ramesh (supra) it has also been held that the opinion to the effect section 97 would not be applicable for issuance of search warrant against the father of a child of 9 years of age, shall not be construed as any expression of opinion on merits of controversy regarding custody of the child which is pending adjudication in an application filed under the Guardians and Wards Act, 1890. In the instant case, having considered the nature of the dispute, it cannot be stated that the criminal proceeding under Section 342/344 of the Indian Penal Code cannot be stated as an abuse of the process of the Court. It cannot be stated that no case has been made out in the petition of complaint.

On the basis of the evidence on solemn affirmation, the learned Trial Judge took cognizance of the case and issued process under Section 97 of the Cr.P.C. for recovery of the minor daughter. I do not find that the impugned order suffers from irregularity, impropriety or incorrectness. The proceeding under the provisions of Guardians and Wards Act, 1890, has not been disposed of as yet and Section 97 is a procedure for speedy recovery of the child if it is found that a child or a person has been wrongly confined. In the instant case, as per petition/complaint, the said daughter of the opposite party No.2 had been snatched away by the husband and others, from her custody. So long, the issue is not resolved by a Civil Court, the wife is competent to take recourse to recovery under Section 97 of the Cr.P.C. for immediate custody of the child. So, I do not find any irregularity or impropriety in the impugned order. This application is, therefore, devoid of merits. Accordingly,

the application is dismissed.

Considering the circumstance, there will be no order as to costs.

Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocate for the parties on their usual undertaking.

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