IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 196 of 2022

An application under Section 401 of the Code of Criminal Procedure, 1973 against the order dated 26.10.2021 passed by learned S.D.M., Jajpur in Criminal Misc. Case No.1350 of 2021 and order dated 12.04.2022 passed by learned S.D.M., Jajpur in Criminal Misc. Case No. 725 of 2022

AFR **Amrita Ray ..... Petitioner**

-Versus-

State of Odisha and Others ..... Opp. Parties

Advocate(s) appeared in this case:-

For Petitioner : Mr. A.N. Pattanayak

For Opp. Party : Mr. Sangram Das,
Standing Counsel for Vigilance.

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT
7th February, 2023

SASHIKANTA MISHRA, J.

The petitioner is the wife of opposite party no.3. The opposite party no.2 is the child, who, it is

claimed, was taken away forcibly by her father-opposite party no.3 from the custody of the petitioner when she was 2 and ½ years old. The other opposite parties are family members of opposite party no.3. The petitioner filed an application under Section 97 of Cr.P.C. before the Sub-Divisional Magistrate, Jajpur vide Criminal Misc. Case No. 1305 of 2021 for issuance of search warrant. By order dated 30.09.2021, learned S.D.M. issued a search warrant directing the IIC of Jenapur Police Station to search the house of the opposite parties and to produce the child before the Court. Subsequently, by order dated 26.10.2021, learned S.D.M., held that the child is in the custody of its father with the intervention of IIC of Ponda Police Station, Goa and therefore, the question of illegal confinement does not arise as he is the natural father and legal guardian. Again, the petitioner filed an application being Criminal Misc. Case No. 725 of 2022. By order dated 12.04.2022, the learned S.D.M., Jajpur rejected the application by holding that the self same dispute had already been decided in the earlier case and therefore, the

proceeding initiated is *res judicata*. The above orders are impugned in the present revision.

2. Mr. A.N. Pattanayak, learned counsel appearing for the petitioner submits that there is no concept of *res judicata* in criminal jurisprudence. Secondly, the subsequent application was filed as it was for a different cause of action viz., danger to the life of the child. He further relies upon a judgment passed by this Court in the case of ***Keshaba Chandra Sahoo vs. State of Odisha and others*** reported in 2023(I) OLR 288 and the decision of the Bombay High Court in the case of ***Purushottam Wamanrao Thakur v. Warsha,*** reported in 1992 CriLJ 1688 in support of his contention. On such basis Mr. Pattanayak submits that learned Magistrate should have issued notice to the opposite parties in order to be satisfied whether keeping of the child by the father amounts to illegal confinement or not.

3. Per contra Mr. S.K. Mishra, learned Addl. Standing Counsel for the State has contended that the second application filed by the petitioner-wife is barred

under Section 362 of Cr.P.C.. He further submits that it is open to the petitioner to approach the competent court seeking custody of the child if she so desires, but such order cannot be passed in an application under Section 97 of Cr.P.C..

4. Undoubtedly, Section 362 of Cr.P.C. places a bar on a criminal court to review or alter its judgment/order after the same has been passed but then, it must also be kept in mind that the first application was filed in the year 2021 which was disposed of on 26.10.2021. The subsequent application was filed in the year 2022. If the averments of the subsequent application are read objectively, it would reveal a definite and specific cause of action crystallized under paragraphs- 5 and 6 thereof, which are extracted below:

> *"5) That the petitioner came to know from a reliable source, that her minor daughter Ahana Ray O.P. No.4 has been wrongfully confined by the O.P. No.1 in the house of O.P. No. 2 & 3 at Vill- Ghanapur (Dochhaki) under Paradeep Lock Police Station which amounts to an offence.*
>
> *6) That the petitioner has reason to believe that the life of her minor daughter (O.P. No.4) is not safe in the hands of the O.P. No. 1, 2 and 3, and they may eliminate her at any time."*

Thus, the alleged confinement of the child as per the first application cannot be treated as a one-off incident so that the order passed by learned SDM on 26.10.2021 would be treated as a bar for invoking the provision under Section 97 of Cr.P.C. for all times to come. Such an interpretation would militate against the very legislative intent behind enacting the relevant provision.

5. If the Court ultimately holds that keeping of the child in the manner alleged in the subsequent application, in fact amounts to illegal confinement, then the same cannot be restricted to any particular date. Therefore, in particular, looking at the statutory intent behind enactment of Section 97 of Cr.P.C. it can be safely held that in the peculiar facts and circumstances of the present case, the filing of the subsequent application cannot be treated as barred by law. Moreover, as has been argued by Mr. Pattanayak, there is no concept of *res judicata* in criminal jurisprudence. From the facts narrated hereinbefore, it is evident that there is dispute between the petitioner and her husband and that their 2

and ½ years child (at the relevant time) was alleged taken away forcibly by opposite party no.3 and the petitioner was not allowed to meet her child. Further, the child is said to be kept confined to a room and there is also some danger to its life. Now, whether the allegation as above is correct and/or whether this would amount to wrongful confinement of the child would depend on the facts and circumstances of the case but it would suffice to say that if the allegations leveled by the petitioner are accepted on their face value, the possibility of such offence having been/being committed cannot entirely be ruled out. Reference to Section 340 of IPC would be apposite at this stage which reads as follows:

> *"**340. Wrongful confinement**.—Whoever wrongfully restrains any person in such a manner as to prevent that person from proceedings beyond certain circumscribing limits, is said "wrongfully to confine" that person."*

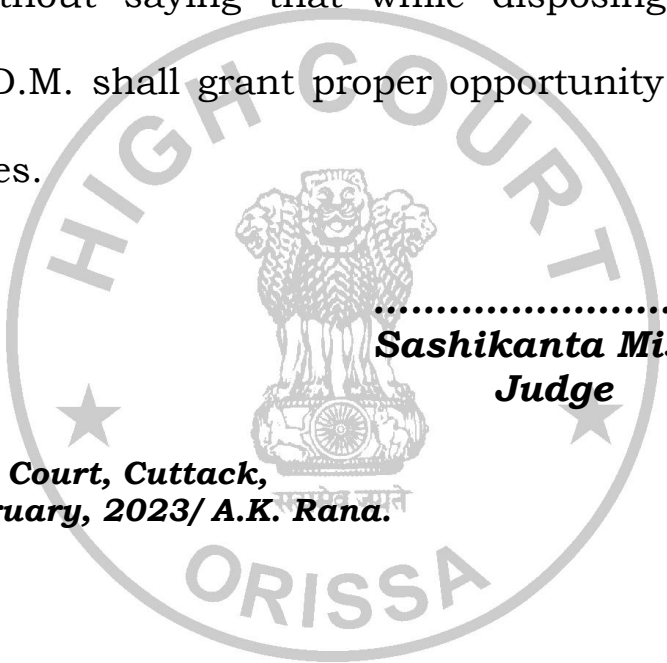
It all depends on the facts and circumstances of the case. To such extent therefore, this Court is of the considered view that the second application filed under Section 97 of Cr.P.C. by the petitioner was maintainable.

6. Another aspect needs consideration. In the case of ***Keshaba Sahoo*** (supra), this Court after analyzing the provision of Section 97 of Cr.P.C. and by relying 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) held that when the dispute is between close relations it would be proper for the Magistrate to hear both sides before forming an opinion as to whether the confinement amounts to illegal confinement or not. It is emphasized that it is not so much a proceeding to decide the question of custody of the child but one in which the welfare of the child also has to be seen in view of its age being below 5 years. Obviously, the child would not be in a position to determine its own welfare. Learned SDM appears to have been swayed away by his previous order whereby he held that the question of illegal confinement does not arise since the child is with its natural father and legal guardian. Given the specific allegations made in the subsequent application, it cannot straight away be said

that the child is safe and sound being with its father. Learned SDM appears to have lost sight of the legislative intent of Section 97 of Cr.P.C. completely. True, some kind of arrangement regarding its custody appears to have been made at the instance of the IIC of Ponda P.S., Goa, but that was long time ago. What exactly is the situation viz-a-viz the child now, is the question that should have been considered by learned SDM instead of mechanically referring to the said arrangement. Thus, at least a preliminary enquiry ought to have been made by learned SDM in the matter for recording his subjective satisfaction as regards the veracity of the allegations relating to confinement of the child.

7. Having regard to the above as also the nature of allegations made by the petitioner, this Court is of the considered view that learned S.D.M. ought to have at least issued notice to the husband and his family members before taking a final decision regarding the nature of confinement of the child.

8. In such view of the matter, the revision is allowed. The impugned order is set aside. The matter is remitted to learned S.D.M., Jajpur to consider the petition under Section 97 of Cr.P.C. afresh by issuing notice to the petitioner-husband and his family members. The case shall be finally disposed of within a period of four weeks. It goes without saying that while disposing the case, learned S.D.M. shall grant proper opportunity of hearing to both sides.



.....
Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 7th February, 2023/ A.K. Rana.