

GAHC010185872022



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : Crl.Pet./934/2022**

MOHIDUL ISLAM  
S/O SORHAB ALI  
VILL- TARANGAPUR PART-I,  
P.O. AND P.S. CHAPAR  
DIST. DHUBRI, ASSAM,  
PIN-783371

VERSUS

THE STATE OF ASSAM AND ANR.  
REP. BY THE PP, ASSAM

2:HAMIDA KHATUN  
D/O ABDUL HAKIM  
VILL- SIMLABARI PART-II  
P.O. AND P.S. CHAPAR  
DIST. DHUBRI  
ASSAM  
PIN-78337

**Advocate for the Petitioner : MR. A T SARKAR**

**Advocate for the Respondent : PP, ASSAM**

**BEFORE**  
**HON'BLE MR. JUSTICE ROBIN PHUKAN**

**ORDER**

**22.02.2024**

Heard Mr. A.T. Sarkar, learned counsel for the petitioner and also heard Mr. P.S.

Lahkar, learned Additional Public Prosecutor, Assam, appearing for the State respondent No.1. None appears for the respondent No.2, though notice was served upon her.

2. In this petition under Section 482 Cr.P.C., the petitioner, namely, Mohidul Islam, has challenged the correctness or otherwise of the order dated 18.06.2022 passed by the learned Judicial Magistrate First Class, Bilasipara, in C.R. Case No.237/2022. It is to be noted here that vide impugned order dated 18.06.2022, the learned Court below, on the basis of a petition filed under Section 97 of the Cr.P.C. by the complainant of the said case, namely, Hamida Khatun, had issued search warrant for recovery of the baby of the complainant i.e. respondent No.2 of this case, from the house of the accused i.e. petitioner of the present petition and further directed to handover the minor child, namely, Mohin Islam to the respondent No.2 in presence of two witnesses on executing a bond of Rs.10,000/-.

3. The background facts leading to filing of the present petition is briefly stated as under:-

“The petitioner got married with the respondent No.2 about 7 years back as per Mohammedan Law and Customs and thereafter lived together as husband and wife and they were blessed with a child, namely, Mohin Islam, who at the relevant point of time was 2½ years old and after 7 years of marriage, the petitioner allegedly subjected the respondent No.2 to physical and mental torture on account of failing to fulfill the demand of dowry and on 08.02.2022, the petitioner allegedly drove out the respondent No.2 from the matrimonial home. And when the respondent No.2 went to bring her minor child back, then the petitioner refused to give the same and abused her with filthy language. Thereafter, the respondent No.2 instituted one proceeding, being C.R. Case No.237/2022 under Section 342 IPC along with a petition under Section 97 Cr.P.C. for issuing search warrant for recovery of her baby. Thereafter, hearing both the parties, the Court below has passed the impugned order dated 18.06.2022 by directing as aforesaid.”

4. Mr. Sarkar, learned counsel for the petitioner submits that pursuant to the said

order of the learned Court below, police executed the search warrant and recovered the baby and handed over to the respondent No.2 by executing a bond of Rs.10,000/-. Mr. Sarkar further submits that the petitioner is the father of the minor baby and he is a natural guardian of the baby and as such, search warrant under Section 97 Cr.P.C. could not have been issued by the learned Court below, as the said provision can be applied when there is reason to believe that a person is confined wrongfully and such confinement amounts to an offence. But, the petitioner here in this case is the natural guardian of the child, being his father and as such, no wrongful confinement was made out here in this case and as such, the impugned order, so passed by the learned Court below, suffers from manifest illegality. Secondly, Mr. Sarkar submits that in view of the provision of Section 7 and 8 of the Family Court Act, the learned Court below would not have entertained the petition under Section 97 of the Cr.P.C. To bolster his submission, Mr. Sarkar has referred to a decision of the Hon'ble Supreme Court in **Ramesh Vs. Laxmi Bai (Smt.)** reported in **(1998) 9 SCC 266**.

5. Mr. P.S. Lahkar, learned Additional Public Prosecutor, Assam, appearing for the State respondent No.1, on the other hand, submits that the respondent No.1 is only a formal party here. Further, Mr. Lahkar submits that since the petitioner is the natural guardian of the child, being his father, the question of wrongful confinement does not arise here in this case and the case law referred by Mr. Sarkar also supports the argument so advanced by Mr. Sarkar.

6. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the judgment of the Hon'ble Supreme Court in the case of **Ramesh** (supra).

7. In the aforementioned case, the Hon'ble Supreme Court, in paragraph 4 held as under:-

"4. From a perusal of the impugned order of the High court, it appears to us that though the points which should weigh with a court while determining the question of grant of custody of a minor child have been correctly detailed, the opinion of the High court that the

revisional court could have passed an order of custody in a petition seeking search warrants under Section 97 Criminal Procedure Code in the established facts of the case is untenable. Section 97 Criminal Procedure Code prima facie is not attracted to the facts and circumstances of the case when the child was living with his own father. Under the circumstances, we are of the opinion that the orders of the High court dated 17/7/1996 and that of the learned Additional Sessions Judge dated 9/7/1996 cannot be sustained and we accordingly set aside the orders and the directions given therein."

8. Having examined the impugned order dated 18.06.2022, in the light of the ratio laid down by the Hon'ble Supreme Court in the case of **Ramesh** (supra), this Court is of the view that the impugned order dated 18.06.2022 so passed by the learned Court below, failed withstand the legal scrutiny and accordingly, the same stands set aside and quashed.

9. It is further provided that the Officer-in-Charge of Chapar Police Station shall recover the minor child from the custody of the respondent No.2 and produce the same before the Court of learned Judicial Magistrate First Class, Bilasipara and on such production, the learned Court below shall pass necessary order in respect of the interim custody of the boy, in the light of the observation made herein above, till appropriate decision is taken by the Family Court in respect of guardianship of the child under applicable legal provisions.

10. In terms of above, this criminal petition stands disposed of.

**Sd/- Robin Phukan**  
**JUDGE**

**Comparing Assistant**