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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO.1140 OF 2016

Mr. Prashant s/o Subhash Khairnar,
Age: 36 years, Occ: Service,
R/o. M-303, Swiss County,
Thergaon, Chinchwad, Pune. ..APPLICANT

VERSUS

1. The State of Maharashtra,
Through its Secretary,
Home Department, Mantralaya,
Mumbai – 32.
2. The Superintendent of Police,
Jalgaon.
3. The Senior Inspector of Police,
Ramanandnagar Police Station,
Jalgaon.
4. Darshana Prashant Khairnar,
Age: 30 years, Occ: Housewife,
Presently residing at
C/o-Sudhir s/o Pundalik Chavan,
Plot No. 46, Old Bhagwannagar,
Behind Girna Water Tank,
Jalgaon.
5. Mr. Sudhir s/o Pundalik Chavan,
Age: 56 years, Occ: Govt. Service,
R/o. Plot No. 46, Old Bhagwannagar,
Behind Girna Water Tank,
Jalgaon. ..RESPONDENTS

Mr Hemant Surve, Advocate for applicant;
Mr K.D. Mundhe, A.P.P. for respondent Nos.1 to 3;
Mr A.R. Syed, Advocate h/f Mr P.P. Chavan,
Advocate for respondent Nos. 4 and 5

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CORAM : N.W. SAMBRE, J.**DATE : 19th SEPTEMBER, 2016****ORDER :**

Present application is moved by the applicant-husband questioning the order dated 11th January, 2016 passed below Exhibit-1, on application under Section 97 of the Code of Criminal Procedure and order dated 14th January, 2016 passed below Exhibit-9 and above referred Exhibit-1. Exhibit-9 is an application moved by present applicant before learned Magistrate seeking custody of child of the applicant.

2. The facts as are necessary for deciding the present application are as under :-

The applicant, a software engineer, was married to respondent No. 4 on 9th March, 2009 at Nashik and were blessed with a son Chinmay on 25th May, 2010.

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3. The parties to the present proceedings were initially resided peacefully, however, in view of differences, respondent No. 4 – wife filed application under Section 97 of the Code of Criminal Procedure before learned Judicial Magistrate, First Class, Jalgaon being Criminal Misc. Application No. 30 of 2016 against the present applicant, praying therein directions to produce non applicant No.2 son Chinmay in the Court and custody be handed over to her. The said application came to be allowed by learned Judicial Magistrate, Jalgaon on 11th January, 2016 and directed the applicant to remain present before the Court along with child Chinmay.

4. Present applicant, as such, appeared before the Court on 14th January, 2016 and stated vide application Exhibit-9 that son Chinmay, pursuant to the order of the Court is produced and his custody be given to the present applicant.

5. Subsequent thereto, learned Judicial

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Magistrate, First Class, Jalgaon interacted with child Chinmay and after assessing his wish and observing his demeanor and having considered welfare of the child, given custody of the child to present respondent No. 4 – mother.

6. It is the case of the applicant that the relations between the applicant and respondent No. 4 were very much cordial and it is not in dispute that the present applicant is biological father of Chinmay. Mr. Surve, learned Counsel for the applicant would then urge that the applicant though honoured the orders of learned Magistrate, whereby Police Station, Jalgaon was directed to produce child as early as possible in the Court and the applicant shall also remain present pursuant to the said order. However, learned Magistrate has lost sight of the scope of Section 97 of the Code of Criminal Procedure. He would then add that son Chinmay was never confined wrongfully or otherwise and as such, the powers under Section 97 of the Code of Criminal Procedure ought not to have been

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invoked by learned Magistrate. He would then urge that merely because the mother complains that she apprehends that some thing will happen to the child, who is in the custody of father, the powers under Section 97 of the Code of Criminal Procedure cannot be taken recourse to. He would then urge that it is the wife, who left marital home voluntarily and in view thereof, Section 97 of the Code of Criminal Procedure is not available to such lady. In addition to above submissions, learned Counsel for the applicant Mr. Surve would rely upon the judgments of the Apex Court in the matter of **Anjali Anil Rangari vs Anil Kripasagar Rangari** reported in **LAWS (SC) -1997-5-46** decided on 9th May, 1997, **Ramesh vs Laxmi Bai (Smt)** reported in **1999 Cri.L.J. 5023, (1998) 9 SCC 266** so as to substantiate his above referred contentions.

7. Per Contra, learned Counsel for respondent Nos. 4 and 5 would submit that the powers under Section 97 of the Code of Criminal Procedure were invoked only for the purpose of production of the

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child and as such, learned Magistrate has rightly exercised powers under Section 97 of the Code of Criminal Procedure directing the present applicant to remain present and also to Ramanandnagar Police Station, Jalgaon to produce the child. He would then then urge that present applicant himself sought custody of the child vide Exhibit-9, an application on 14th January, 2016. According to him, the custody was handed over to mother pursuant to interaction with the child by learned Magistrate and after observing his demeanor and it is only after considering wish of the child, the order impugned came to be passed. Learned Counsel would then invite my attention to the contents of the application Exhibit-15, moved by the present applicant and the fact that respondent No. 4 has initiated proceedings pursuant to the provisions of 12, 17, 18, 19, 20, 21, 22 and 23 of the Protection of Women from Domestic Violence Act, 2005. According to him, in the said application, specific prayer is made for grant of interim and final custody to present respondent No. 4 pursuant to the

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provisions of Section 21 of the Domestic Violence Act. He would then urge that the parties will be bound by the order as will be passed by learned Magistrate pursuant to the provisions of Section 21 of the Domestic Violence Act. He would then submit that child Chinmay is already undertaking his education at Jalgaon while staying with his grant parents and mother and as such, it will be inappropriate to disturb the present position as is existing today.

8. Having bestowed my thoughts to the submission made, it is required to be noted that the provisions of Section 97 of the Code of Criminal Procedure cannot be taken recourse to for the purpose of securing the custody of minor child from his biological father, particularly when the relationship is not in dispute. It is then required to be noted that the Apex Court in the above cited judgments has already taken a view that the custody of the child either of biological parents cannot be termed as illegal, particularly

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if any of them tries to invoke provisions of Section 97 of the Code of Criminal Procedure. Paragraph-4 of the judgment in the matter of **Ramesh** (supra) is worth referring to, which reads thus :

"4. From a perusal of the impugned order of the High Court, it appears to us that though the points which would 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 CrPC in the established facts of the case is untenable. Section 97 CrPC 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 cannot be sustained and we accordingly set aside the orders and the directions given therein."

9. In this back ground, in my opinion, what could be observed from the factual matrix of the

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present case is, minor child was directed to be produced before the Court and both parents thereafter claimed custody of the child. Learned Magistrate, while dealing with the said prayer of respective biological parents, has directed handing over interim custody to respondent No. 4 mother after interacting with the child and observing his demeanor and wish.

10. It is then to be noted that the initiation of the proceedings under Domestic Violence Act is not in dispute. It is also not in dispute that respondent No. 4 in the said application has made prayer pursuant to the provisions of Section 21 of the Domestic Violence Act for permanent custody of child Chinmay and has also moved application seeking interim custody. Since June 2016 the said matter is pending before learned Magistrate and in spite of the fact that present applicant is put to the notice during last hearing before this Court, present applicant has not filed his appearance. The copy of the main application and interim

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application is also annexed with reply, which is received by the applicant, still the applicant has not appeared before learned Magistrate in the said proceedings, which speaks about his intention delaying the said proceedings.

11. Be that as it may, in the factual scenario, the fact remains that child is with the mother at Jalgaon and is already taking his education. Learned Magistrate, after interacting with the child considered his wish and observed his demeanor and granted interim custody to mother. There is also proceedings for custody pending before learned Magistrate under the provisions of Domestic Violence Act. In this back ground, in my opinion, it will be inappropriate to disturb the present position qua custody of the child as is prayed by present applicant through present application. Rather it will be appropriate to direct the parties to wait till outcome of the application Exhibit-7 moved in Criminal Misc. Application No. 17 of 2016 under the provisions of

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Sections 12, 17, 18, 19, 20, 21, 22 and 23 of the Domestic Violence Act on the file of learned Child Judicial Magistrate, Jalgaon. Said Chief Judicial Magistrate is directed to decide the interim application Exhibit-7 moved under the provisions of Section 23 of the Domestic Violence Act, particularly in relation to interim custody of the child expeditiously.

12. With the above observations, present application stands disposed of.

(N.W. SAMBRE, J.)

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