

CRIMINAL WRIT PETITION NO. 617 OF 2016

VERSUS

Shri K.B.Autade, advocate for petitioner
Shri R.V.Dasalkar, A.P.P. for respondent no.6

DATED : 6th October, 2016

PER COURT :-

Respondent nos. 1 and 2 are the father-in-law and mother-in-law of the petitioner. Deceased Rahul was the husband of the petitioner and their marriage was solemnized in 2008 and out of the wedlock a child was born, whose custody appears to be the bone of contention in the present proceedings.

2. It appears that the petitioner and her husband entered into settlement in the matter of divorce proceedings and thereafter the husband of the present petitioner expired. Subsequent thereto, the petitioner filed first information report before the police alleging that custody of the child be given to the present petitioner, being biological mother. The police authorities informed the present petitioner to approach the Court for custody of a minor child.

3. As a consequence, present petitioner initiated proceedings being Criminal Application No. 139 of 2015 invoking Section 97 of the Code of Criminal Procedure against husband Rahul during his life time. It is informed that since said Rahul expired on 28.3.2015, the proceedings were disposed of as withdrawn.

4. Subsequent thereto, another proceedings being Criminal Miscellaneous Application No.187 of 2015 under Section 97 of the Code of Criminal

Procedure came to be filed against the respondents. On the said application, an order came to be passed by the learned Judicial Magistrate, First Class, Shrirampur directing the police officer of the concerned police station to conduct search of child Rudra Rahul Bairagi and produce him before the Court on 28.5.2015 at 11.00 a.m.

5. Feeling aggrieved, the present respondents preferred a Revision being Criminal Revision Application No. 19 of 2015 before the learned Additional Sessions Judge, Shrirampur, which came to be allowed vide detailed order, dated 13.7.2015. As such the present Writ Petition.

6. Learned counsel for the petitioner, while inviting my attention to the settlement arrived at between the petitioner and her husband Rahul, would urge that custody of child Rudra was given to the present petitioner and the respondents were permitted to meet the child. He would then submit

that in spite of the above fact, custody of the child is taken away by the grand parents i.e. respondent nos. 1 and 2. According to him, the petitioner, being a biological mother, is entitled for custody of minor child.

7. With the assistance of the learned counsel for the parties, I have perused the orders passed by both the Courts below.

8. No doubt, Section 97 of the Code of Criminal Procedure can be invoked, so as to order search for a person who is wrongfully confined. The issue is, whether custody of child Rudra, which admittedly is with the parents deceased of Rahul, the son of the petitioner, could be termed as wrongful confinement within the meaning of Section 97 of the Code of Criminal Procedure. The relationship between the petitioner and the respondents is not in dispute.

9. Apart from above, it is to be noted that

the provisions of Section 97 of the Code of Criminal Procedure for ordering search of a person who is wrongfully confined, could be invoked only if there are reasons to believe that such person, is confined under the circumstances, which amounts to an offence.

10. Having heard the learned counsel for the petitioner on the said issue, he is unable to demonstrate before this Court as to whether child Rudra was wrongfully confined and such confinement how would amount to offence by the respondents when child Rudra was with respondent nos. 1 and 2 in the capacity of grand parents. Apart from above, it is not in dispute that respondent nos. 1 and 2 are the grand parents of child Rudra, for whose search prayer under Section 97 of the Code of Criminal Procedure was made.

11. In my opinion, the order passed by the learned Additional Sessions Judge, Shrirampur reversing the order of the learned Judicial

Magistrate, First Class, Shrirampur is in tune with the scheme of Section 97 of the Code of Criminal Procedure, as Section 97 cannot be invoked for such a purpose, so as to defeat the object of the said Section.

12. Appropriate support can be drawn from the judgment of the Apex Court in the case of **Anjali Anil Rangarivs Anil Kripasagar Rangari**, reported in **Laws (SC)-1997-5-46**. The relevant portion from paras 2 and 3 thereof is worth referring : -

"2
The only question that needs to be considered in the context of the facts and circumstances of the present case is as to whether provisions of Section 97 Crpc could be invoked. It cannot be disputed that the mother is also a natural guardian under Section 6 of the Hindu Minority and Guardianship Act, 1956. If it is so, could it be said that the custody of the two minor children with the mother was illegal and they were under her wrongful confinement ? In the facts and circumstances of the case, we are unable to hold that the custody of the children with the mother was either unlawful or they were wrongfully confined by the mother at Delhi. If this be so the very basis of the impugned order cannot be sustained and

consequently the impugned order is required to be set aside. We accordingly do so.

3. The respondent father who is present in the Court along with two minor children is directed to hand over the custody of both the children to the petitioner mother."

Support also can be drawn from the judgment of the Apex Court in the case of **Ramesh vs Laxmi Bai (Smt)**, reported in **(1998) 10 SCC 266**. Para 4 thereof is worth referring : -

"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 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 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."

13. In my opinion, there is alternate remedy available to the present petitioner to claim custody of child Rudra. The custody of the child Rudra with the respondents, in the capacity of the grand parents, in any case, cannot be termed as illegal in absence of any prohibitory provisions to that effect being brought to my notice. No case for interference is made out. The Writ Petition, as such, fails and stands rejected.

14. It is made clear that the petitioner would be at liberty to take recourse to the alternate remedy by filing appropriate proceedings, which would be decided by the concerned Court without being influenced by the above observations.

(N.W.SAMBRE, J.)

dbm/crwp617.16