

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

CRIMINAL WRIT PETITION NO.438/2017

Jayshree Pravin Bhadane
Age 35 years, Occu-household
R/o C/o S.M.Bagul, 15,
Z.P.Colony, Deopur,Dhule

.. PETITIONER

Versus

1]Pravin Vishram Bhadane
Age 46 years, Occ-Business

2]Ku. Himani Pravin Bhadane
age 12 years, Occ-education.

3]Ku.Mayuri Pravin Bhadane
age 09 years, Occu – education.

R.2 and R.3 are minor
u/g R-1. Father
Respondent No.1 and 3 R/o 6B,
Gandhi Nagar, Dhule Road
Nandurbar Taluka & District
Nandurbar.

4]The State of Maharashtra.

[Copy to respondent No.4 be
served through the Asst.Public
Prosecutor, Bombay High Court
bench at Aurangabad].

RESPONDENTS

Mr.P.S.Paranjape, Advocate for Petitioner
Mr.K.C.Sant h/f R.S.Wani, Advocate for Respondents no.1 to 3.
Mr.A.R.Kale,APP for Respondent No.4 State.

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CORAM : MANGESH S. PATIL,J.**DATE : 05/07/2018****ORAL JUDGMENT :**

Rule. Rule is made returnable forthwith. With the consent of both sides, the matter is heard finally at the stage of admission.

2] This is a typical instance regarding plight of minor daughters when their parents are busy in resorting to the provisions of Section 97 of the Code of Criminal Procedure claiming their custody, rather than resorting to the suitable and appropriate remedy provided under the Guardian and Wards Act.

3] The facts leading to the filing of this Writ Petition may be summarised as under :

The petitioner and her husband-respondent no.1 got separated. The girls were apparently in the custody of the petitioner. He therefore filed a proceeding under Section 97 of the Code of Criminal Procedure before the learned Judicial Magistrate, First Class, bearing Criminal Application No.141/2016. The learned Judicial Magistrate rejected the application by order dated 10/5/2016. Faced with the situation

he preferred Criminal Revision Application No.9/2016 but even that was dismissed.

According to the petitioner, while the girls were still in her custody, by deceit the respondent no.1 kidnapped them when they had gone to school. Again, the petitioner resorted to the same remedy and filed an application under Section 97 of the Code of Criminal Procedure in the Court of Judicial Magistrate, First Class. Obviously, the application was rejected by the learned Magistrate holding that the powers under Section 97 of the Cr.P.C. cannot be invoked to claim custody of the minor daughters who were in the custody of their natural guardian and father-the respondent no.1. The petitioner then challenged that order in Criminal Revision No.85/2016 which was rejected by the learned Additional Sessions Judge by order dated 3/11/2016. Hence this Writ Petition.

4] The learned advocate for the petitioner vehemently submits that though the respondent no.1 is the natural guardian being the father of the daughters, he has not obtained their custody by resorting to any legal remedy. Rather having failed to secure any order, he has resorted to deceit and has literally kidnapped the daughters and has confined them to his house. His such conduct is sufficient enough to be described as unlawful confinement and the petitioner has rightly resorted to Section 97 of the Cr.P.C. According to the advocate, the learned Magistrate as well as the learned Additional Sessions Judge has overlooked

such a backdrop in which the girls were taken away by the respondent no.1 and the fact situation certainly warranted a direction under Section 97 of the Cr.P.C.

5] The learned advocate for respondent no.1 strongly opposes the application. He submits that since the respondent no.1 is the father and natural guardian of the girls, his custody cannot be termed as a confinement for the girls or can even be said to be a wrongful restraint. He would further point out that the girls themselves have written to the Police disclosing that they were willingly staying with their father. In any event, the remedy of Section 97 of the Cr.P.C. to claim custody of the minor daughters is not available. If at all the petitioner wants custody of the girls she should have resorted to appropriate proceedings under the Guardian and Wards Act. Therefore, irrespective of the fact situation being pointed out by the petitioner and the allegations being levelled by her about he having taken away daughters by resorting to deceit, no fault can be found with the orders passed by the two Courts below in refusing to invoke the powers of Section 97 of the Cr.P.C.

6] Without going into factual aspects as regards the circumstances in which the custody of the daughters changed the hands, which is out of the purview of the writ jurisdiction being a pure question of fact, it is sufficient to remember that the remedy of Section 97 of the Cr.P.C. is absolutely not capable of being invoked in the peculiar facts and circumstances of the

matter.

7] There is no dispute about the fact that the respondent no.1 is the father of the daughters. He himself had also resorted to the same remedy under Section 97 of the Cr.P.C. to claim custody but had failed to do so for the right reasons. It seems that without taking any clue from it, the petitioner has also resorted to the same recourse by resorting to Section 97 of the Cr.P.C. when the girls are in the natural custody of their father. Suffice for the purpose to refer to the catena of cases, referred to by the learned advocate for respondents 1 to 3 in the cases of Ramesh V/s. Laxmi Bai (Smt.) (1998) 9 SCC 266, Pramod V. Kamble V/s Jyoti P. Kamble and Anr; 2012 (5) AIR Bom R 878, and Altaf S/o Karimbhai Shaikh V/s Rizwana W/o Altaf Shaikh and another; 2007 (1) B.Cr.C.138, specifically laying down that in such a situation the remedy of Section 97 of the Cr.P.C. is not available and the parents have to avail the remedy in Civil law to claim the custody.

8] Perusal of the impugned orders would clearly show that the learned Magistrate as well as the learned Additional Sessions Judge were alive to the law and have rightly refused to invoke that provision to budge to the request of the petitioner.

9] True it is that the welfare of the children should be the paramount consideration. However, whether in a fact situation the custody of the daughters should be with either the petitioner

or the respondent no.1 can only be ascertained in an appropriate proceeding at an appropriate stage. There being nothing on the record to examine that aspect of the matter, it would be apposite for the petitioner to invoke suitable remedy.

10] The Petition does not hold any merit and is liable to be dismissed.

11] The Writ Petition is dismissed.

12] The Rule is discharged.

(MANGESH S. PATIL,J.)

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