

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

CRIM. WRIT PETITION NO.848 OF 2019

1. Wamanrao s/o Narayanrao Shingare
Age : 60 Yrs., Occ. Agril.,
R/o : Khamgaon, Tq. &
Dist. Osmanabad.
2. Vaibhav s/o Wamanrao Shingare
Age : 35 Yrs., Occ. Agril.,
R/o : Khamgaon, Tq. &
Dist. Osmanabad. **PETITIONERS**

VERSUS

1. State of Maharashtra
2. Varsha w/o Bhausahab Shingare
Age : 28 Yrs., Occ. Household,
R/o : Khamgaon, at presented
C/o Ramesh s/o Janardhan Khot
Baba Nagar, Tandulwadi Road,
Kallam, Tal. Kallam, Dist.
Osmanabad. **RESPONDENTS**

...

Mr.S.B.Choudhari, Advocate for Petitioners
Mr.S.W.Munde, A.P.P. for R-1.
Mr. N.B.Jadhav, Advocate for R-2.

...

CORAM : V.L.ACHLIYA,J.
JUDGMENT RESERVED ON : 22/08/2019
JUDGMENT PRONOUNCED ON : 06/03/2020

...

JUDGMENT:

1. By this petition filed under Articles 226 and 227

of Constitution of India, the petitioners have challenged the order dated 06/05/2019 passed in Criminal Revision Application No. 11/2019 by Additional Sessions Judge, Osmanabad.

2. Heard learned counsel for petitioners, learned A.P.P. and learned counsel representing respondent No. 2. Perused the impugned order.

3. Before advertng to deal with the submissions advanced, it is useful to refer few facts leading to filing of this petition. The petitioners and respondent No. 2 are closely related with each other. Respondent No. 2 is the daughter-in-law of petitioner No. 1. The petitioner No. 2 is the brother-in-law of respondent No. 2. On 29/09/2015 respondent No. 2 married to Bhausahab, son of petitioner No. 1. They blessed with a daughter named Swara.

4. On 26/02/2019 the respondent No. 2 filed

application in the Court of Chief Judicial Magistrate, Osmanabad seeking issuance of search warrant as contemplated u/s 97 of Code of Criminal Procedure. It is alleged that her husband is serving at Pune and she is residing at her in-laws house at village Khamgaon. On 14/02/2019 at mid night she was driven out of her matrimonial house along with her daughter Swara. She contacted her uncle who took her to village Tadvla. On next day when she was standing on bus stop of village Tadvla to go to her parents' house and her daughter Swara was playing nearby to her, two persons who came on motorcycle took away her daughter Swara. The persons who witnessed those persons gave description of those persons, which was resembling to features of petitioners. She informed the incident to her maternal uncle. He sent two persons to village Khamgaon in search of her daughter. They reported that they heard the voice of weeping of girl child from the house of petitioners. She expressed doubt

against petitioners and further expressed her apprehension of threat to life of her daughter and prayed for issuance of search warrant.

5. The petitioners appeared before learned Chief Judicial Magistrate and resisted the application filed by respondent No. 2. They denied the entire allegations made against them. It is contended that the story as put-forth in the application is false and concocted. It is contended that due to ill health the respondent No.2 was not taking care of her child. She has stopped feeding her daughter. Due to this reason the mother-in-law of respondent No. 2 was taking care of her daughter. She become very affectionate to her grand parents and use to sleep with them. The respondent No. 2 did not like the closeness and affection between her daughter and her in-laws. On 14/02/2019 the respondent No. 2 left the house without intimation. She left house without taking Swara with her. In stead of taking legal

recourse to secure custody of her child from husband, she filed false proceeding by cooking false and concocted story of taking away her daughter on 14/02/2019 from bus stop at village Tadvla.

6. Learned Chief Judicial Magistrate after hearing both the sides pleased to pass order dated 26/02/2019 to issue search warrant and directed the Officer in-charge of concerned police station to conduct the search and produce the girl child before Court on 12/04/2019. Being aggrieved the petitioners preferred Revision Petition before the Sessions Court at Osmanabad. By the impugned Judgment and Order dated 06/05/2019, learned Additional Sessions Judge, Osmanabad rejected the petition filed by petitioners and directed the petitioners to produce the girl child before the Court on 10/05/2019. The parties were directed to appear before the learned Chief Judicial Magistrate on 10/05/2019 and further directed the learned

Magistrate to decide the application on merit. Aggrieved by the said order, the petitioners have preferred this petition under Articles 226 and 227 of Constitution of India.

7. The parties were referred for mediation. Since there was no resolution of dispute by way of mediation, the petition is taken up for final disposal with the consent of learned counsel for parties.

8. Heard the learned counsel for parties and A.P.P. representing respondent No. 1/State Govt. Perused the impugned orders.

9. In brief, it is the contention of learned counsel for petitioners that the application filed u/s 97 of Cr.P.C. at the instance of respondent No. 2 is nothing but an attempt to circumvent the provisions of law and procedure prescribed under law to secure the custody of a child. By creating false and concocted

story of child being taken away and confined, preferred application u/s 97 of Cr.P.C. It is pointed out that as per the facts pleaded in the application filed u/s 97 of Cr.P.C., the alleged incident claimed to be taken place on 14/02/2019 that too during the day time and at busy place like bus stop of village Tadvalla. The respondent No. 2 though pleaded that her daughter was playing nearby to her but not seen the persons. She claimed that some of the persons provided description of those persons and on that basis she suspected that the petitioners had taken her daughter. It is submitted that although such a serious incident of abduction and kidnapping claimed to have taken place but respondent No. 2 has lodged no complaint in respect of incident dated 14/02/2019 till 26/02/2019 and thereafter. After the period of more than 12 days of alleged incident, the application seeking search warrant came to be filed before learned Chief Judicial Magistrate by cooking false and concocted story of kidnapping and detention of her

daughter. It is contended that on the face of record, the story as put-forth by respondent No. 2 inspires no confidence and can not be believed.

10. It is contended that the application filed by respondent No. 2 make out no case to invoke powers u/s 97 of Cr.P.C. In order to exercise the powers u/s 97 of Cr.P.C., it is incumbent upon persons approaching Magistrate to satisfy that there is prima facie case of confinement of a person which amounts to an offence. It is submitted that presence of girl child Swara with her father and in-laws itself rules out the commission of offence of confinement of child. The girl child being in the custody of her father, who is one of the natural guardian and the petitioners are the members of his family they are legally entitled to keep the child with them and can not said to have illegally detained the girl child of respondent No. 2. It is submitted that in stead of adopting the remedy available under law to secure the custody of child, the

respondent No. 2 has filed application u/s 97 of Cr.P.C. Learned counsel for petitioners has referred and relied upon the decision of this Court in the case of *Vishal Jivan Jogure V/s Smt. Megha Vishal Jogure and another reported in 2005 ALL MR (Cri.) 1874* in support of the proposition that search warrant can not be issued by the Magistrate merely because the mother make complaint of apprehension of danger to her child who is in custody of her father and family members.

11. On the other hand, learned counsel for respondent No. 2 supported the order passed by Courts below. It is submitted that the orders passed by Courts below are well within the purview of law and suffers from no illegality, perversity and jurisdictional error so as to call for exercise of powers under Articles 226 and 227 of Constitution of India. It is submitted that the petition filed by petitioners has rendered infructuous. It is submitted that

pursuant to the order passed by revisional Court and implementation of orders passed by Magistrate, the girl child was produced before the Court of Chief Judicial Magistrate. Learned Chief Judicial Magistrate directed to hand over the custody of girl child to respondent No. 2. Accordingly the custody of girl child has been received by respondent No. 2. The girl child is now in the custody of her mother, who is her natural guardian. In that view, the petition filed by petitioners become infructuous and urged to dismiss the same.

12. On due consideration of submissions advanced, I am of the view that in the facts and circumstances of the case, no order as contemplated u/s 97 of Cr.P.C. deserves to have been passed. The alleged incident in respect of girl child claimed to have taken place on 14/02/2019. No complaint in respect of incident lodged till filing of application u/s 97 of Cr.P.C. and even thereafter. The application seeking

issuance of search warrant u/s 97 of Cr.P.C. presented on 26/02/2019 i.e. after 12 days of alleged incident that too against her father-in-law and brother-in-law. In natural course, the complaint ought to have been lodged at the instance of respondent No. 2 immediately after the incident. If really such incident would taken place the complaint must have been lodged by respondent No. 2. Filing of proceeding after 12 days of alleged incident and to secure search warrant against her in-laws itself raises serious doubt as to truthfulness of story as put-forth by respondent No. 2.

13. In order to invoke powers u/s 97 of Cr.P.C., it is necessary on the part of persons approaching Magistrate to prima facie establish that confinement of any such person amounts to an offence. The application filed by respondent No. 2 itself spell out that respondent No. 2 fully aware as to whereabouts of her daughter. She has mentioned that her child is

with her in-laws. The apprehension expressed as to the danger to the life of her daughter itself not sufficient to issue search warrant against her in-laws. It appears from record that there is matrimonial dispute between respondent No. 2 and her husband. In order to secure the custody of child, the respondent No. 2 has adopted the short-cut method by filing application u/s 97 of Cr.P.C. The presence of child with her father and in-laws can not be treated as an act of illegal confinement. The powers u/s 97 of Cr.P.C. can not be resorted to secure custody of child on account of matrimonial discord between husband and wife. In the case of ***Vishal Jivan Jogure V/s Smt. Megha Vishal Jogure and another*** [supra], this Court based upon identical facts held as under.

" 6. The question of invoking power under section 97 of the Code, as mentioned earlier, is available only if it is asserted and is established before the Magistrate, prima facie though, that confinement of any person in the circumstances amounts to an offence. By no stretch of imagination, custody of the children with the real father by itself can amount to an offence. Something more has to be alleged

and established to support that position. No such allegation is forthcoming in the application, as has been filed. Viewed in this perspective, the Magistrate could not have assumed jurisdiction to issue search warrant in such fact situation, as the basic requirement of section 97 of the Code is not fulfilled. This is not to say that the Respondent No.1, who is the natural guardian of the children, being mother, has no other remedy in law to secure the custody of the said children. We are presently concerned with the question whether search warrants can be issued by the Magistrate merely because the mother complains that she apprehends that something will happen to the children, who are in custody of their father.

14. Thus, the orders passed by Courts below are not sustainable in law. In normal course such orders to be set aside. However, as it is brought to the notice of Court that the order passed by Courts below are already implemented and the custody of child has been handed over to respondent No. 2 who is a mother and natural guardian of the child, the petition filed by petitioners become infructuous. In that view, the petition deserves to be disposed of as infructuous. Accordingly, the petition is disposed of as infructuous.

However, it is made clear that giving custody of child to respondent No. 2 in implementation of orders of Courts below would not come in the way of father of girl child to file appropriate proceeding to secure the custody of his child. Needless to observe that if such proceedings are filed, same shall be decided on its merit. All questions left open for the respective parties to be raised before appropriate Court.

The petition is disposed of as infructuous.

[V.L.ACHLIYA]
JUDGE

KNP