

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

CRIMINAL WRIT PETITION NO.550 OF 2022

- 1) Akash Sunil Pawar,
Age-28 years Occu:Service,
R/o- At Post-Nandri,
Taluka-Amalner, District-Jalgaon,
- 2) Kalpana Sunil Pawar,
Age-55 years Occu:Household,
R/o- At Post-Nandri,
Taluka-Amalner, District-Jalgaon,
- 3) Mahesh Sunil Pawar,
Age-26 years Occu:Labour,
R/o- At Post-Nandri,
Taluka-Amalner, District-Jalgaon,
- 4) Mitesh Akash Pawar,
Age-19 Months, Under Natural
Guardianship of Father,
Akash Sunil Pawar (Petitioner No.1)
R/o- At Post-Nandri,
Taluka-Amalner, District-Jalgaon.

...PETITIONERS

VERSUS

Ganga Akash Pawar,
Age-22 years, Occu:Labour,
R/o: C/o- Akkabai Mangal Paradhi,
At Post-Adhawad (Pardhiwada),
Tq-Chopda, District-Jalgaon.

...RESPONDENT

...
Mr.Virendra V. Jahagirdar Advocate for Petitioners.
Mr.Rahil R. Kazi Advocate for Respondent.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE : 17th JUNE, 2022

ORDER :

1. The petitioners want to invoke the constitutional powers of this Court under Article 227 of the Constitution of India to challenge the order passed by learned Judicial Magistrate First Class, Chopda, District-Jalgaon below Exhibit-7 in P.W.D.V. Application No.70 of 2021 dated 10th February 2022 thereby allowing the application to the extent of temporary custody of the child to be given to the respondent-wife and also challenging the Judgment and order in P.W.D.V.A. Appeal No.4 of 2022 by learned Additional Sessions Judge, Amalner, District-Jalgaon dated 6th April 2022 thereby rejecting the said appeal filed by present petitioners.

2. Heard Mr. Jahagirdar, learned Advocate for the petitioners and Mr. Kazi, learned Advocate for the respondent.

3. It has been vehemently submitted on behalf of the petitioners that respondent-wife had earlier filed Criminal Misc. Application No.275 of 2021 under Section 97 of the Code of Criminal Procedure before the learned Judicial Magistrate First Class, Amalner, District-Jalgaon seeking custody of the child, however that came to be rejected on 21st October 2021. Thereafter, respondent-wife filed P.W.D.V. Application No.70 of 2021 under Sections 18, 19, 20 and 22 of the Protection of Women from Domestic Violence Act (for short "PWDV Act") for various reliefs. In the said application, she filed application at Exhibit-7 under Section 21 of the PWDV Act for getting custody of the child who was 11 months old. It was pointed out to the learned Magistrate that the respondent-wife had approached the learned Judicial Magistrate First Class, Amalner under Section 97 of the Code of Criminal Procedure and at that time the said application was rejected, yet application Exhibit-7 under Section 21 of the PWDV Act was allowed. The said fact was not considered by the learned Additional Sessions Judge also and the appeal has been rejected. Now, the position is that the present petitioner No.2, who is grand-mother of the child, has taken away the child and she is missing. The photocopy of General Diary Details with Amalner Police Station dated 5th June 2022

would show that petitioner No.2 is missing since 21st May 2022 along with the child. Petitioner No.1 is father of the child and he is the guardian of the minor son. It cannot be said that the custody of the said child should be taken away from the petitioners and be given to the respondent. The orders passed by the Courts below deserve to be set aside.

4. Per contra, the learned Advocate appearing for the respondent-wife has supported the reasons given by both the Courts below and he has also relied on the affidavit-in-reply filed by the respondent, which is nothing but the replica of the contentions in the application.

5. At the outset, it is to be noted that the fact is not disputed that respondent and petitioner No.1 got married on 18th November 2019 and they have a child which was then aged 11 months. According to respondent-wife she was having custody of the child and the present petitioners had forcibly taken away the child. Unfortunately, it appears that application under Section 97 of the Code of Criminal Procedure was rejected by the learned Judicial Magistrate First Class, Amalner on 21st October 2021, which was for seeking custody of 11 months old child by the

mother. Thereafter, it appears that the proceedings under P.W.D.V. Act were filed by the respondent-wife, in which she made application under Section 21 of the said Act, at Exhibit-7, which is for the temporary custody of the child. The criterias which are required to be considered for an application under Section 97 of the Code of Criminal Procedure are different from the criterias to be considered while dealing with an application under Section 21 of the P.W.D.V. Act. It is also to be noted that the respondent - original aggrieved person had not suppressed the fact that her application under Section 97 of the Code of Criminal Procedure was rejected by the learned Magistrate. Rather, the learned Magistrate while rejecting that application, had directed both the parties to approach proper forum. It was specifically stated in the Application Exhibit-7 that the child was still a sucking child and cannot stay without the mother. That application was resisted by the present petitioners by filing say and after hearing both the sides the learned Magistrate had allowed the said application in respect of temporary custody by order dated 10th February 2022. The respondents therein – present petitioners, were directed to produce the child before the Court on 16th February 2022 for giving his temporary custody to the applicant therein and the visitation rights were given to

respondent No.1 therein to meet the child. That order was challenged in PWDVA Appeal No.4 of 2022 and the said appeal has been rejected. By the time the appeal was decided, the child had become 1½ years old. In the said order, the appellants therein i.e. present petitioners were directed to produce the child before the trial Court on 8th April 2022 and handover custody of the same to respondent-wife. That order was not obeyed by the present petitioners.

6. It will not be out of place to mention here that when the matter was on Board before this Court on 27th April 2022, this Court directed petitioner No.1 to obey the order of the learned Additional Sessions Judge in respect of handing over the custody of the child within a week. That order also has not been obeyed by petitioner No.1 and now it is stated that petitioner No.2 went missing along with the child since 21st May 2022. At the cost of repetition it is observed that, when the matter was on Board on 27th April 2022 and petitioner No.1 was expected to comply with the said order within a week, he has not come forward to give any explanation as to why he has not complied with the said order. If petitioner No.1 would have complied with the said order, the alleged incident, of his mother going missing along with the

child on 21st May 2022, would not have occurred. The possibility of creation of such situation to avoid implementation of the order cannot be ruled out. When the child is a sucking child and below age of five years, then the mother is the natural guardian of the child. The child needs care and protection of the mother in the initial days and therefore the orders were rightly passed. With some ulterior motive, it appears that the petitioners do not want to obey the orders of the Court. Under such circumstance, constitutional powers of this Court cannot be exercised in favour of the petitioners and the Writ Petition deserves to be dismissed.

7. Accordingly, the Writ Petition stands dismissed.

[SMT. VIBHA KANKANWADI , J.]