

**In The High Court At Calcutta
Jalpaiguri Circuit Bench**

**Before:
The Hon'ble Justice Jay Sengupta**

C.R.R.97 of 2023

**Sonu Bhutra
Vs.
The State of West Bengal & Anr.**

For the Petitioner : Mr. Sourav Iyer, Adv

For the Opposite Party no.2 : Mr. Ranadeb Sen Gupta, Adv
Mr. Shiv Kumar Agarwal, Adv
Mr. Sudip Guha, Adv.

Heard on : 12th June, 2023

Judgment Dated : 12th June, 2023

Jay Sengupta, J.: This is an application challenging an order dated 10.04.23 passed by the Sub-Divisional Magistrate, Alipurduar in Petition No. 25 of 2023 under Section 97 of the Code of Criminal Procedure, thereby directing the Inspector-in-Charge, Kaliaganj Police Station to recover a child aged about 7 years from the house of the opposite party and to produce before this Court on the next date of hearing.

Learned Counsel appearing on behalf of the petitioner submits as follows. The petitioner is the wife of the opposite party no.2. The couple got married in 2014. Thereafter, a child was born to them. The minor

child started living with the petitioner. In 2021 a petition of mutual divorce under Section 13B of the Hindu Marriage Act was filed by the petitioner and the opposite party no.2. By an order dated 21.11.21 a decree of divorce was granted to the couple. There is no condition imposed in the said order about the custody of the minor child and the visitation rights. It is the petitioner who had been taking care of the minor child. In fact, the erstwhile husband/opposite party has only created troubles by initiating frivolous proceedings. Section 97 of the Code of Criminal Procedure cannot be used for deciding custody of a child.

Learned Counsel appearing on behalf of the opposite party submits as follows. In the affidavit filed by the petitioner-wife before the learned Civil Court in the proceeding for mutual divorce, she clearly undertook that the husband shall be entitled to meet minor daughter every month, preferably on the last Saturday or Sunday. Even this condition has not been complied with. That is why the petitioner was constrained to initiate appropriate proceedings. First, when he went to meet the child he was assaulted. This prompted the opposite party to lodge an FIR dated 04.04.23 under Sections 188,323,506 read with Section 34 of the I.P.C. The opposite party was also constrained to move an application under Section 97 of the Code to secure custody and visitation rights in respect of the minor child.

I have heard the submission of the learned Counsels appearing on behalf of the petitioner and the opposite party and have perused the revision petition.

It is settled position of law that as between spouses the transfer of custody of a minor child cannot ordinarily be decided by following the procedure laid down under Section 97 of the Code of Criminal Procedure. Reliance may be placed on the decision in of Ramesh Vs. Laxmi Bai (Smt.) reported at (1998) 9 SCC 266.

In spite of this, the Sub-Divisional Magistrate, Alipurduar erroneously directed the Inspector-in-Charge, Kaliaganj Police Station to recover the minor child. Such order cannot be sustained in the eye of law.

Furthermore, from the order passed in the suit for mutual divorce it does not appear that any condition was imposed on the wife as regards the visitation rights of the father. However, the application filed by the wife in the said proceeding did contain an undertaking.

Be that as it may, the custody of a minor child can best be decided between spouses under the Guardians and Wards Act.

In view of the above, the impugned order cannot be sustained and is, therefore, aside.

However, in the interest of justice, till such an order is passed by the appropriate forum, the petitioner shall allow the opposite party to meet their minor daughter once a month, preferably on the last Saturday or Sunday as would be mutually agreed between the parties. The visits will take place in the presence of the petitioner and the date and the place for the same shall be mutually agreed.

With these observations, the revisional application is disposed of.

Urgent Xerox certified copy of this order if applied for be supplied on priority basis.

(Jay Sengupta, J.)