

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 510 OF 2023

Manish S/o Dashrath Rathe,
Age : 39 Years, Occu.: Business,
R/o Kumbharpura, Opp. Dolly Tailors,
Jagannath Road, Bhavsar Chowk,
Gandhi Baug, Nagpur.

...Petitioner

VERSUS

1. Jayshri w/o Manish Rathe,
Age : 34 years, Occu. Household,
C/o Mangesh Bhaskar Pardeshi,
R/o Old Post Galli, Warangaon,
Tq. Bhusawal, Dist. Jalgaon.
2. Shalesha Manish Rathe,
Age : 3 years, Occu. Nil,
3. Shloka Manish Rathe,
Age : 3 years, Occu. Nil.

The respondent no.2 and 3
under the guardian of the petitioner.

...Respondents

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Advocate for Petitioner : Mr. Gangakhedkar Shailendra S.
Advocate for Respondents : Mr. Patil Sandesh R.

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CORAM : KISHORE C. SANT, J.
DATE : 3rd MAY 2023.

Oral Judgment :

Heard both the parties.

1. Rule.
2. Rule made returnable forthwith by consent of the parties.
3. The challenge in this petition is to the order dated 7th /9th January, 2022 passed by the learned Judicial Magistrate First Class, Bhusawal on an application filed by respondent no.1/wife of the petitioner under Section 97 of the Code of Criminal Procedure, issuing search warrant for respondent no.2 and 3, who are twin daughters of the petitioner and respondent no.1. It is alleged that respondent no.1 was driven out of the home in November, 2021 and since then she is residing at her parents' house alongwith her daughters. It is alleged that on 01.01.2023, the petitioner under the pretext of meeting his daughters, had been to the house of parents of respondent no.1. From there, he took daughters and did not return back to her. It is for this reason, application under Section 97 of Cr.P.C. was filed. The learned J.M.F.C. passed order issuing notice to petitioner asking as to why search warrant not be allowed against him.

4. The learned Advocate for the petitioner submits that by now it is well established that provision of Section 97 of Cr.P.C. cannot be used for seeking custody of the minors, when there are custody of the parents and same cannot be termed to be illegal or wrongful custody. He relied upon the judgment in the case of **Purushottam Wamanrao Thakur and Another Vs. Warsha w/o Narendra Thakur and Others**, reported in 1993 (3) Bom.C.R. 587. Wherein it is held that the mother is entitled to have the custody of the child till the child is below 5 years of age being Guardian. It is further held that in such circumstances, Section 97 proceeding would not be maintainable.

. He further relied upon the judgment in the case of **Marotrao Shamrao Pachare and Others Vs. Usha Marotrao Pachare**, reported in 2005(Supp.) Bom.C.R. (Cri.) 82. Wherein again this Court has held that the action under Section 97 is to meet emergency. The confinement of the person concerned amounts to an offence is *sine qua non* for the exercise of the jurisdiction under this Section and power under Section 97 can be invoked.

5. The learned Advocate for the petitioner further points the order

dated 17.02.2023 passed by this Court in Writ Petition No.1450/2022. Wherein, this Court also held that Section 97 of the Cr.P.C. is only for the purpose of issuing search warrant where it is found or the Magistrate of the first class has reason to believe that any person is illegally confined and only in such cases, warrant can be issued.

6. The learned Advocate for the respondents vehemently opposed the petition stating that the learned Magistrate, Bhusawal has rightly passed the order.

7. Considering the above, this Court finds that in this case also since the custody is with the father and the same cannot be said to be illegal or would be an offence. Therefore invoking of power under Section 97 of Cr.P.C. is not proper. In view of this, this Court finds that the petition deserves to be allowed. Hence the following order.

ORDER

- (i) The Writ Petition is allowed.
- (ii) Rule is made absolute in terms of prayer clause 'C' and 'D'.

(iii) The other remedies are open to respondent no.1/wife.

(iv) With this, the petition is disposed off.

[KISHORE C. SANT, J.]

Najeb.