

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

CRIMINAL WRIT PETITION NO. 1450 OF 2022

Vishal Jagdishlal Jaiswal

.. Petitioner

Versus

The State of Maharashtra and another

.. Respondents

Mr. Aditya N. Sikchi, Advocate for the Petitioner.

Mr. P. N. Kutti, APP for Respondent No. 1.

Mr. S. S. Gangakhedkar, Advocate for Respondent No. 2.

CORAM : KISHORE C. SANT, J.

DATED : 17th FEBRUARY, 2023.

P C. :-

. This petition is by father of the child and husband of respondent No. 2 challenging an order passed in the criminal revision application whereby his revision is dismissed. The revision application was filed challenging the order passed by the learned J.M.F.C., Hingoli thereby issuing search warrant and directing P.I., Hingoli to search minor son Aryan and to produce him before the Court.

2. The proceeding was initiated by respondent-wife under Section 97 of the Code of Criminal Procedure (for short "Cr.P.C.") alleging that the custody of minor son Aryan is illegally with the petitioner and on that without hearing the warrant was issued by order dated 29.08.2022.

3. It is a matter of record that, the custody at present is with the petitioner. In the revision, the petitioner raised various grounds by relying upon the judgments wherein, it is now well settled that recourse under Section 97 of the Cr. P. C. cannot be taken when the child is allegedly in custody in one of the parents and remedy lies under the Hindu Adoptions and Maintenance Act. However, the learned Additional Sessions Judge, Hingoli by order dated 04.10.2022 dismissed the revision application. On this, the petitioner has approached this Court.

4. It is submitted that, Section 97 of the Cr. P. C. is only for the purpose of issuing search warrant where it is found that or the Magistrate of the first class has reason to believe that any person is illegally confined under such circumstances that the confinement amounts to an offence, he may issue a search- warrant, and the person to whom such warrant is directed may search for the person so confined. Thus, when the child is with the father, it cannot be said that he is under confinement and therefore remedy under Section 97 of the Cr.P.C. is not available for seeking custody of child from the parents since the confinement does not amount to an offence.

5. Learned advocate for respondent No. 2 vehemently opposes the petition saying that the child is only of four years of age. The mother is

entitled to the custody of the child below five years and therefore, the learned Additional Sessions Court has rightly passed an order and prays for dismissal of the petition.

6. In view of this, this Court finds that the petitioner has made out a case to allow the petition.

7. In view of the above discussion, the criminal writ petition deserves to be allowed and the same is allowed in terms of prayer clauses (A) and (B). The respondent No. 2 can avail remedy available under the law.

8. Needless to say that, the observations are only for the purpose of this petition. The wife is entitled to avail the remedy as available under law.

9. The criminal writ petition stands disposed off.

(KISHORE C. SANT, J.)

P.S.B.