

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

50 CRIMINAL WRIT PETITION NO.1320 OF 2021

**KHAWAJA GANI PINJARI AND OTHERS
VERSUS
RIZWANA KHAWAJA PINJARI**

Mr. Zafar M. Pathan, Advocate for the petitioners
Mrs. Sunita G. Sonwane, Advocate for the respondent

CORAM : KISHORE C. SANT, J.

DATE : 13th MARCH, 2023

P C.

1. Heard the learned advocate for the parties. The matter is taken up finally with the consent of the parties.

2. The petitioners have moved this petition against the order passed in Criminal Revision No.62/2021 by the learned Sessions Judge dated 27-10-2021 by which the order passed below Exh. No.1 in Criminal M. A. No. 694/2021 by the learned JMFC, Ahmednagar under Section 97 is confirmed with modification giving visiting right to the petitioners. The learned JMFC, Ahmednagar had allowed the proceeding under section

97 of the Cr. P. C. and directed present petitioners to hand over the custody of the children to their mother who is respondent in this petition. The learned Sessions Judge while modifying the order granted access to the petitioners to see the children.

3. The petitioner's main ground is that when the children are in custody of the father it cannot be said to be an offence. He relies upon the following judgments: *reported in 2005 (4) Mh.L.J. in the case of Vishal Jivan Jogure Vs Smt. Megha Vishal Jogure and another; 2012 (4) Mh.L.J. (Cri) 558 in the case of Pramod V. Kamble Vs Jyoti Kamble and others; reported in 2007 (1) Mh.L.J. (Cri) 1131 in the case of Anil Baburao Angalwar Vs Cynthia Bernard Samuel W/o. Anil Baburao Angalwar and others.* In all these judgments it is held that children with the father cannot be said to be an offence.

4. By reading of section 97 of the Cr. P. C. the court has held that search warrant can be issued in such cases where the custody or confinement would amounting to an offence. This

court finds that in this view of the matter no proceeding under Section 97 was maintainable at the instance of the respondent. Second aspect that needs to be considered is that now elder child is of 8 years and younger child is of 5 years. At this age disturbing the custody under section 97 proceeding would not be proper exercise of jurisdiction. The parties are always free to approach the proper court for custody of children.

5. This court finds that thus in this case both the courts below have failed to appreciate that in the present case Section 97 was not maintainable and have entertained the proceeding pending before them. This court finds that impugned order deserves to be quashed and set aside. This court finds that though the proceedings under section 97 are already quashed and set aside, it would be in the interest of children that respondent shall have access till the parties decide the custody. It is open for the parties to approach the competent court. Hence, following order:

(4)

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ORDER

- a] The Criminal Writ Petition is allowed.

- b] Impugned judgment and order dated 27-10-2021 passed by the learned Sessions Judge, Ahmednagar in Criminal Revision No.62/2021 is quashed and set aside.

- c] The respondent will have access to the children every week on Sunday for at least three hours.

[KISHORE C. SANT, J.]

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