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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 267 OF 2018

Rohit Suresh Kulthe
VS.

..Petitioner

The State of Maharashtra and ors.

..Respondents

Mr. Anand Kumar, for the Petitioner.

Mr. Priyal G. Sarda, for Respondents No. 4 to 6.

Ms. Anamika Malhotra, APP for the State.

CORAM : M. S. KARNIK, J.

DATE : AUGUST 7, 2023

P.C. :

- 1.** Heard learned counsel for the petitioner.
- 2.** In this petition, order dated 27/10/2017 passed by the revisional Court is under challenge. The application was preferred by the petitioner before the trial Court under section 97 of the Code of Criminal Procedure, 1973 ('CrPC', for short). The petitioner is the father of minor child-Palav. The petitioner married Prajakta on 24/11/2013. The child named Palav was born out of the wedlock on 03/04/2015. In an unfortunate incident which took place on 08/10/2016, Prajakta had to be taken to the hospital after she consumed water from a pot which made her ill. Prajakta died on

10/10/2016. Prajakta's parents filed a complaint with Dehuroad Police Station against the petitioner under sections 498, 304B, 354, 323, 504, 506 read with 34 of Indian Penal Code, 1860. According to the learned counsel for the petitioner, the complaint is falsely instituted.

3. The issue in the present petition is regarding the applicability of section 97 of CrPC. It is contended by learned counsel for the petitioner that Palav was in his lawful custody at the time of arrest of the petitioner in 2016. While the petitioner was in judicial confinement, the custody of minor child Palav was handed over by the investigating officer to the aunt of minor child Palav, who is the respondent no. 4 herein. The respondent no. 4, in-turn handed over the custody of 'Palav' to the petitioner's in-laws i.e. Prajakta's parents-respondents no. 5 and 6.

4. Learned counsel for the petitioner submitted that this is a fit case where the Courts below should have invoked section 97 and handed over the custody of Palav to the petitioner. Drawing my attention to section 97 of CrPC, learned counsel submitted that respondents no. 5 & 6 had no authority to take such forcible custody of Palav, and as this amounts to an offence, it was therefore the

Courts below should have handed over custody of minor child Palav to the petitioner. Learned counsel submitted that the petitioner, being a father is a natural guardian of the child and therefore the Courts below erred in observing that the petitioner must resort to civil remedies for seeking custody of 'Palav'. My attention is invited by learned counsel to the provisions of section 6 of the Hindu Minority and Guardianship Act, 1956 to contend that the petitioner who is a natural guardian must get the custody.

5. I have heard learned counsel appearing for respondents no. 5 & 6 and learned APP. I have perused the order passed by the Courts below.

6. The petitioner is being prosecuted in criminal proceedings for the offence mentioned hereinbefore. While the petitioner was in judicial confinement, the minor child Palav was handed over to deceased Prajakta's parents. Since 2016, the child is with Prajakta's parents i.e. his grandparents. The application under section 97 of the CrPC was filed by the petitioner in 2017. Section 97 of CrPC reads thus :

“97. Search for persons wrongfully confined-- If any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class has reason to believe that any person is 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; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.”

7. The Courts below have come to the conclusion that they have no reasons to believe that confinement of the minor child under the circumstances which have been mentioned in the proceedings amounts to an offence and therefore refrained from issuing any directions under section 97 of CrPC. The revisional Court has observed that the appropriate course for the petitioner is to approach the competent civil Court seeking appropriate reliefs. In paragraphs 17 to 20, the revisional Court has observed thus:

“17] On going through the keen observations of the facts of the cited judicial precedents it appears that, it is applicable to the present case. However, he placed his reliance on the following judicial precedent in the case of **Sakharam Chimanappa Waghmare Vs Bhagirathibai Kishanrao Raut reported in 2013 ALL MR (Cri) 2024** .Their lordship have observed that

Criminal PC. (1973), S.97-Application for custody of minor child-Mother of child expired in accident, custody taken by respondent sister of mother-in-law of petitioner -No evidence to show that respondent forcibly taken the minor child from the house of petitioner-S.97 comes into play only if a person is confined and such confinement amounts to an offence-No such situation emerged-Order does not call for interference (Para 4).

18] On going through the keen observations of the cited

judicial precedent it is applicable to the case in hand. The action under section 97 is to meet emergency. A reasonable belief by the Magistrate that the confinement of the person concerned amounts to an offence is sine qua non for the exercise of the jurisdiction under this section unless there is a material before the Magistrate and the Magistrate believes that the confinement of the person concerned is an offence. The jurisdiction under section 97 could not be exercised at all. Section 97 does not authorize the Magistrate to go into the disputed portion as to which of the claimants is entitled to custody of a minor. Such a question will always have to be left to the Civil Courts empowered under the different statutes. It would be also beyond the scope of the JMFC to assess the comparative merits and demerits of the claim of the father and mother or other person claiming the custody and to find out in whose custody the well being of the minor is being protected. The question whether welfare of the child demands their custody to be with mother or father is a matter to be decided in a Civil Court that cannot be gone into in a proceeding under section 97 of Cr.PC.

19] Use of expression 'reason to believe' makes the legislative intention very clear that unless the Magistrate has reason to believe that the person is confined in such circumstances that confinement itself amounts to an offence, issue of a search of warrant under the section is without jurisdiction. The expression "reason to believe" implies belief arrived at judicially after application of judicial mind on consideration of available material with sense of responsibility and that of mind without ignoring as far as possible the other side of the controversy. In the absence of material which prima facie shows that confinement amounts to an offence, action under section 97 would be improper.

20] Since 25/10/2016 the minor "Pallav" is in the custody of his grand parents lie, parents of the deceased Prajakta, The petitioner has filed the present petition on 12/5/2017. The minor has lived with grand parents and as per the copy of photographs it appears that he has admitted in nursery school and they are taking the care property, If the applicant wants the custody, he may knock the door of Civil court by filing petition under section 6 of the guardian and wards Act. So the application filed by the petitioner under section 97 is not come within the ambit of the said section of Cr.PC. I therefore answer point no. 1 in the negative."

8. I find no reason to take a view different than the one taken by the revisional Court. The custody of the minor child Palav is with his maternal grandparents. In his capacity as a natural guardian, the petitioner can always resort to appropriate remedies seeking custody. In any such proceedings filed, the competent Court is bound to consider the request for custody/visitation rights in accordance with law. The consideration shall obviously be without being influenced by any observations made by the Courts below or by this Court.

9. From the facts and circumstances on record, I find that the circumstances are not such that the conclusion could be drawn that confinement of minor child Palav amounts to offence for issuance of appropriate directions under section 97 of CrPC. The approach of the Courts below cannot be said to be perverse or contrary to the law.

10. The petition is dismissed.

(M. S. KARNIK, J.)