

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.430 OF 2023

Mr. Nikhil Vinayak Bajpai & Anr. .. Petitioners
v/s.
Khushi Mukesh Thakker & Anr. .. Respondents

....

Mr. D.G. Dhanure, a/w. Ms. Jyoti Dhanure and Mr. Swapnil Dhage,
for the Petitioners.

Mr. K.T. Babu, i/b. Adv. Kshilpa Singh, for Respondent No.1.

Mr. M.G. Patil, APP, for Respondent State.

....

CORAM: R.G. AVACHAT, J.

DATE : 31 JANUARY 2023.

P.C:-

Heard.

2. The challenge in this petition is to the order dated 5 December 2022 passed by learned Magistrate, 34th Court, Vikhroli, in CC No.1269/Misc./2022 and order dated 13 January 2023, passed by learned Additional Sessions Judge, Bombay, in Criminal Revision Application No.1038 of 2022. Respondent No.1-Khushi married Petitioner No.1-Nikhil in March 2020. The couple is blessed with a son, born on 5 July 2021. The Petitioner-Nikhil is a practising

Advocate. It appears that there is a matrimonial discord. The Petitioner-Nikhil went to U.K. for further education. Respondent-wife, along with her child, started residing at her parents' house.

3. The challenge in this writ petition is mainly to the order issued by learned Metropolitan Magistrate under Section 97 of the Code of Criminal Procedure. The Petitioner-husband took exception to the said order by filing revision application before Additional Sessions Judge. He has, however, been unsuccessful therein.

4. Learned Advocate for the Petitioners would submit that the Petitioner, being a father, is a natural guardian of the child. The Petitioner-husband had visited the house of his in-laws. Wife was away at her work place. The child was found in malnutrition state. The Petitioner, being the father, therefore, took his own child with him for better care and protection. Learned Advocate took this Court to Section 97 of the Code of Criminal Procedure. He also relied on a host of authorities as under:

- (i) Pramod V. Kamble vs. Jyoti P. Kamble and Anr.¹
- (ii) Vishal Jivan Jogure vs. Smt. Megha Vishal Jogure and Anr.²
- (iii) Marotrao s/o Shamrao Pachare & others vs. Usha Marotrao Pachare.³

1 2012(5) AIR Bom R 878

2 2005(4) Mh.L.J. 54

3 2004(1) Mh.L.J. 253

- (iv) Ramesh vs. Laxmi Bail (Smt).⁴
- (v) Yudhistir Mohanand vs. Dalimba Mohanand.⁵
- (vi) Lalit Prakash Sharma vs. State of Haryana & Another.⁶
- (vii) Jayashree Rahul Bairagi vs. Vitthaldas Narsinghdas Bairagi.⁷

to submit that Section 97 Cr.P.C. has no application in relation to matters of custody of a child. According to learned Advocate, for issuance of search warrant under Section 97 Cr.P.C. confinement should amount to an offence. Custody of a child by his father would, by no stretch of imagination, could be termed to be wrongful confinement of the child. According to learned Advocate, the revisional court passed the order, but the copy thereof has not yet been supplied.

5. Considered the submissions advanced. Perused the authorities relied on. Section 97 Cr.P.C. 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

4 (1998) 9 Supreme Court Cases 266

5 1990 Cri.L.J. 1085

6 Cri. Revision No.739 of 2015 dated 22 December 2015, High Court of Punjab & Haryana At Chandigarh.

7 Cri. W.P. No.617 of 2016 dated 6 October 2016, Aurangabad Bench.

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.”

There can be no dispute over what has been submitted by learned Advocate for the Petitioners.

Admittedly, all is not well between the Petitioner-Nikhil and his wife Khushi (Respondent). Both of them have, therefore, been residing away from each other. The couple is blessed with a child of little over 1 and half years. Admittedly, the child was in the custody of the mother, Respondent-wife. It needs no mention that custody of a child below five years of age has generally to be with the mother. This Court is very much conscious of a fact that this is not a civil proceedings. The Petitioner-Nikhil is, admittedly, a practising Advocate. On the given day, he went to the house of his parents-in-law, with whom the Respondent-wife has been residing. The Petitioner-Nikhil went there along with two others. The Respondent-wife was away at her work place. The child was, as such, at that time, was in physical custody of its grand parents. Needless to mention, for all practical purposes, the child was in the custody of its mother. The Petitioner-Nikhil took away the child with him. The Petitioner-Nikhil, being an Advocate, was expected of approaching the courts of law to have custody of his child. Instead thereof, he went to the house of his

parents-in-law and removed the child from the custody of its mother. The act of the Petitioner, although of father, is unjustified. Learned Magistrate was, therefore, justified in issuing a search warrant in terms of Section 97 of the Code of Criminal Procedure. The revisional court did commit no mistake in upholding the Magistrate's order. In the peculiar facts and circumstances of the case, this Court finds no reason even to issue notice to the Respondent-wife.

6. The petition, thus, has no merit. The same is, therefore, dismissed. Request of learned Advocate for stay of this order for two weeks is stated to be rejected.

(R.G. AVACHAT, J.)