

17.06.2026

Sl. No.03.

D/L.

Mithun.

Ct.No.29.

CRR 5179 of 2024

Firoja Khatun & Ors.

Vs.

The State of West Bengal & Anr.

Mr. Bhivashan Bhattacharya,
Mr. Priyam Misra,
Mr. S. Chanda,
Ms. Ankita Misra,
Mr. Poonnug Roy

...for the petitioners

Mr. Mrityunjoy Chatterjee,
Mr. Manas Das,
Ms. Suchismita Chakraborty,
Mr. Arindam Paoli,
Ms. Afsana Khan,
Mrs. Debarnab Adhikary

...for opposite party no.2

The petitioners herein are aggrieved by the impugned order dated 06.08.2024 passed by learned Sub Divisional Magistrate, Sadar, Malda in Case No.352/P/2023. By the impugned order, learned Court below while disposing an application filed under Section 97 of the Code of Criminal Procedure has directed opposite party Firoja Khatun, the mother of the child to hand over the 5 years old child to Sk.Abdullah, father of the child within 7 days.

Being aggrieved by the aforesaid order, learned Counsel for the petitioners submits that Section 97 Cr.P.C. empowers a Magistrate to issue a search warrant only when he has reason to believe that a person is confined under such circumstances that the confinement amounts to an offence. Therefore, two essential conditions must co-exist in such cases which are comprising of (i)

confinement of a person and (ii) such confinement must amount to an offence. In the present case, the minor child was residing with his biological mother. Custody of a minor child by his own mother can never be termed as wrongful confinement or an offence under the criminal law. Therefore, the very foundation of Section 97 of the Cr.P.C. is completely absent.

He further argued learned Court below failed to appreciate that a lawful guardian's custody cannot be equated with criminal confinement. He further submits that under the General Law, mother is a preferred natural guardian of a child of tender years. He further submits that in all such cases, the welfare of the child should be the paramount consideration and, as such, custody of a child of about 6 years with the biological mother can never be unlawful, that can give rise of any criminal action.

He further drawn my attention to the procedural irregularity committed by the Court below and submits that the provision only authorises the Magistrate to issue a search warrant to produce the child before the Magistrate and after examining the circumstances he is required to pass appropriate order thereafter. But in the present case, learned Magistrate did not issue a search warrant nor did he ask to produce the child before the Court. He did not conduct any enquiry but directly ordered the child to hand over to the custody of the biological father relying on police report. Therefore, even going by the impugned order, it appears that the Court below has clearly violated the principles of natural justice.

He further submits that proper remedy if any in such cases would be before the Civil Court or Family Court where the opposite party has already initiated a proceeding under the Guardians and Wards Act, and, therefore, the instant proceeding is not sustainable in view of the fact that the opposite party had tried to criminalise a civil dispute. In this context, learned Counsel for the petitioners has relied upon following judgments of this High Court and the Supreme Court ***Sonu Bhutra Vs. State of West Bengal & Anr.*** reported in ***2023 SCC OnLine Cal 1501 (being CRR 97 of 2023)***, ***Ramesh Vs. Laxmi Bai*** reported in ***(1998) 9 SCC 266*** and ***Anjali Anil Rangari Vs. Anil Kripasagar Rangari & Ors.*** reported in ***(1997) 10 SCC 342***. Therefore, he submits that the order impugned is liable to be set aside.

Mr. Chatterjee, learned Counsel appearing on behalf of opposite party submits that the order impugned does not call for interference by this Court. However, he leaves the prayer made by the petitioner to the discretion of the Court.

I have considered submissions made by both the parties. Needless to say that Section 97 is a provision to be invoked in case of emergency. The expression *“has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence”* clearly suggests that the Magistrate has to satisfy himself that there exists materials to induce him to believe that the person is confined in such circumstances as to make the confinement amount to offence. The satisfaction contemplated under the section is to be recorded on the basis of available

materials, though it does not cast any obligation to Magistrate to hold a detailed enquiry or to record such findings as are necessary for adjudication.

Mother's custody of minor child aged about six years cannot be said to be illegal and therefore provisions of Section 97 Cr.P.C. are not attracted. The act of detention must be an offence to attract Section 97. However if the issue is about welfare of child, that is to be decided by Civil Court and not by criminal proceeding.

In the instant case factum of wrongful confinement on illegal custody has not been shown even prima facie and therefore proceeding under Section 97 is not appropriate from the facts and circumstances of the case specially when the child was in custody of biological mother. Relying upon a decision of **Ramesh Vs. Laxmi Bai** reported in **(1998) 9 SCC 266** a Coordinate Bench of this High Court in **Sonu Bhutra Vs. State of West Bengal & Anr.** reported in **2023 SCC OnLine Cal 1501** held that it is settled law that as between spouses the transfer of custody of a minor child cannot ordinarily be decided by following the procedure laid down under Section 97 Cr.P.C.

During the course of argument Mr. Chatterjee submits that a proceeding under Section 25 of the Guardians and Wards Act is pending before District Judge, Malda being Misc. Case No.723 of 2026.

In view of aforesaid facts and circumstances of the case, I find that without following the principles of natural justice and also the settled principle of law, the impugned order passed by the

Court below suffers from perversity and, therefore, liable to be set aside.

In view of above, CRR 5179 of 2024 is allowed.

The impugned order dated 06.08.2024 passed by learned Sub Divisional Magistrate, Sadar, Malda is hereby set aside. However, this order will not prevent the parties to agitate all the points and to seek their appropriate remedy before the pending Civil case being Misc. Case No.723 of 2026. It is expressly made clear that this order be not construed to mean that the custody of the child with the petitioner/mother is finally decided on merit by this Court. The order is confined to the proceeding initiated under Section 97 Cr.P.C. The proceeding already initiated under Section 25 of the Guardians and Wards Act shall be decided on its own merits, uninfluenced by the observation made herein by this Court.

Parties to act on a server copy of this order duly collected from the official website of the Hon'ble High Court, Calcutta.

(Dr. Ajoy Kumar Mukherjee, J.)