

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on 08.07.2024

Pronounced on 12.07.2024

CRM(M) No. 152/2024

CrIM (392/2024)

CrIM 421/2024

Fayaz Ahmad Mir

.... Petitioner(s)

Through: Mr Shafaqat Nazir, Advocate with
Mr Zakaria Rafiqi, Advocate

v.

Nighat Nasreen

... Respondent(s)

Through: Mr Jahangir Iqbal Ganai, Sr. Advocate with
Mr Owais Dar, Advocate

CORAM:

Hon'ble Ms Justice Moksha Khajuria Kazmi, Judge

JUDGMENT

1. In this petition the petitioner herein has invoked the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973, for short CrPC, thereby seeking quashment of the order dated 24.02.2024 passed by court of learned Judicial Magistrate, 1st Class, (Sub Judge), Chadoora, in case titled as Nighat Nasreen versus Fayaz Ahmed Mir and others, in terms of which proceedings under Section 97 CrPC have been initiated against the petitioner/ father and the custody of the minor Ward of the parties has been taken from the petitioner and handed over to the respondent/mother.

Factual Matrix

2. The petitioner and respondent entered into wedlock in the year 2015. Out of the said wedlock, one male issue was begotten who all along remained under the care and protection of the petitioner due to serious medical condition of the respondent. It is stated that petitioner took all possible care of the respondent and during the days of ailment and hospitalization it was the petitioner alone, who bore expenses of a treatment

to the tune of lacs of rupees. It is stated that the father of the respondent who happens to be well known, public figure, snapped all matrimonial ties with the petitioner and the petitioner was constrained to shoulder the responsibility of his minor son by all means.

3. It is stated that while the minor son of the parties was in lawful custody and care of the petitioner, the respondent out of vengeance and ill advice, filed a false and frivolous application under Section 97 of CrPC before the court of learned Sub Judge/Judicial Magistrate 1st Class, Chadoora, and a direction was sought upon SHO Police Station, Chadoora, to recover the minor son of the parties from the alleged wrongful confinement of the petitioner. The court directed for production of the minor child and then handed over his custody to the respondent in terms of order dated 24.02.2024. The warrant for search of minor son of the parties came to be issued pursuant to which the concerned SHO took the lawful custody of the minor child from the petitioner. Thereafter, the learned Magistrate handed-over the custody of minor child to the respondent. Subsequent to the passing of the impugned order, some other orders have also been passed in the matter, which have the effect of confirming the custody of the minor child with the respondent.

4. The petitioner has assailed the impugned order dated 24.02.2024 on the ground that the proceedings initiated under Section 97 CrPC tantamount to abuse of the process of courts. It is also stated that Section 97 CrPC clearly states that search warrant in respect of a person who is alleged to have been confined can be issued only if the said act amounts to confinement as defined under law. It is stated that it is a settled law that the father is the natural guardian of the minor child, therefore, the custody of the minor child with the father can never be considered as wrongful confinement or something which may amount to an offence.

5. Learned counsel for the petitioner has relied upon the judgement passed by this court in case titled *Showkat Ahmad Mir vs Nighat begum* bearing *CRM (M) No. 240/2022* decided on *12th February, 2024*.

6. *Per contra*, learned Senior Counsel for the respondent has stated that on 23.02.2024, the respondent along with her minor son were on the way to meet some relatives/friends at Chadoora, and on reaching near the market, the petitioner, in a well planned conspiracy, snatched the minor child from

the respondent forcibly and illegally with the threat that in case the respondent approaches any forum, she will suffer dire consequences, including threat to her life and property. As such respondent was constrained to approach the court of learned Judicial Magistrate, Chadoora, by way of filing an application under Section 97, CrPC.

7. Learned senior counsel has relied upon judgment delivered by the Bombay High Court in case titled *Purushottam Wamanrao Thakur v. Warsha W/o Narendra Thakur and others* reported as *1992 CRILJ 1688*; and of this Court titled *Ayat Nabi v. UT of J&K and ors* bearing WP (CrI) No. 522/2022 decided on 10.08.2022.

8. Heard learned Counsels for the parties and perused the material on record.

9. In the instant case the welfare of the child is at peril. Custody battles are contested between former/ existing spouses over their children. However, in all such situations, the court's primary concern is and should be the welfare of the children, not the demands and arguments of once loving, but now estranged parents as they are frequently used as pawns in such situations, and their parents utilize them for their own gain, striking deals without taking into account the emotional, social, and mental issues that the children may be experiencing. In marital discord, children are the most vulnerable parties; the anguish they experience during and after judicial resolution of such dispute is immeasurable. Children are the ones who suffer the most as a result of family breakdowns. The well being of the child should always be the paramount consideration and not the right and wrongs done by the parents.

10. The learned senior counsel for the respondent has relied upon the judgment passed in case titled *Purushottam Wamanrao Thakur, And...vs Warsha W/o Narendra Thakur and others*, wherein, it is stated that the general principle and matters relating to custody of a minor is well settled and the paramount consideration is the welfare of the minor and not the legal rights of the contesting parties. The custody of a minor, who has not completed the age of five years, shall ordinarily be with the mother, as there is a strong presumption that mother's protection for children of tender age is indispensable.

11. With the changing times, the parenting has also changed. It's the responsibility of the parents to instill in their children the morals, ethics, a sense of right and wrong, respect for others and an understanding of correct principles that help them to succeed in life. Gone are the days when it was only the responsibility of mother to nurture and take care of the minor children and the father used to be only responsible for financial support to the family. Nowadays, generally both the parents are working, they devote almost same time, provide financial support, care, & love to their children and share equal responsibility towards welfare of their children. Parents are potentially the most influential individuals in children's lives. It would not thus be proper to state that for a minor child only mother is important. The fact is that the love, care, affection and support of father in child's life is of equal importance in boosting the development of the child.

12. In this case custody of a minor has become 'tug of war', it is the child who is bearing the brunt of unprecedented and unwelcome situations arisen out of egoistic approach of his parents. The petitioner has challenged the process issued by the court of Judicial Magistrate Chadoora, whereby proceedings under Section 97 CrPC have been initiated against him and custody of the minor Ward has been handed over to the respondent/mother. Section 97 Cr.P.C, for facility of reference is reproduced herein, 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 confinement amounts to an offence, he may issue a search warrant, and the person to whom such 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.”

13. In terms of the Section 97 CrPC, if the Magistrate of first class has a reason to believe that any person is confined under such circumstances that confinement amounts to an offence, the Magistrate can issue search warrant and can direct production of the confined person before him. After the production of confined person before the Magistrate, an order, as is deemed proper by the Magistrate in the circumstances, has to be passed.

14. There is a twin requirement which is essential under Section 97 of CrPC, one is that a person should be confined and second is that the such confinement should amount to an offence.

15. The impugned order has been passed by Sub Judge/Judicial Magistrate, Chadoora, on 24.02.2024. The operative portion of the order impugned, being relevant, is taken note of hereunder:-

“Therefore exercising powers under section 97 Cr.P.C, I deem it proper to issue search warrant for the search of alleged confinee namely Dayim Dayyan (aged 03 years). The S.H.O Police Station Chadoora is directed to produce the alleged confinee before the Court without any delay after the search is made. Let the matter comes up for further proceedings at 4:00 Pm today i.e. on 24.02.2024.”

16. This court has perused the digitized record of Sub Judge/Judicial Magistrate Chadoora, and its shocking that though the proceedings had again to be initiated at 4 PM on 24.02.2024, but the digitized record sent by the learned Magistrate with proper index and pagination did not contain any order passed after 4 PM on 24.02.2024. The case was again listed on 26.02.2024 when both parents were present and it is recorded that the minor child had refused to go to the petitioner, meaning thereby, that neither the proceedings were initiated at 4 Pm on 24.02.2024 nor any formal order was passed for handing over the minor son to the respondent.

The learned counsel for the petitioner though has not pleaded this ground in his petition but has vehemently argued that the learned Sub Judge/Judicial Magistrate, Chadoora, has exceeded his jurisdiction, thereby accommodating the respondent without passing any formal order. The record has further strengthened the contention raised by the petitioner. The Magistrate has to be reasonably satisfied that the victim has actually been unlawfully confined. As to whether the custody of a child with one of the parent can be termed as wrongful confinement or not, is no more *res integra* and has been settled by this court as well as by the Supreme Court. The Apex Court in case titled *Anjali Anil Rangari vs. Anil Kripasagar Rangari*

and others (1997) 10 SCC 342. Paragraph no. 3 being relevant is taken note of hereunder:-

“3. The only question that needs to be considered in the context of the facts and circumstances of the present case is as to whether provisions of Section 97, Cr.P.C., could be invoked. It cannot be disputed that the mother is also a natural guardian under Section 6 of the Hindu minority and Guardianship Act, 1956. If it is so, could be it said that the custody of the two minor children with the mother was illegal and they were under her wrongful confinement? In the facts and circumstances of the case, we are unable to hold that the custody of the children with the mother was either unlawful or they were wrongfully confined by the mother at Delhi. If this be so the very basis of the impugned order cannot be sustained and consequently the impugned order is required to be set aside. We accordingly do so.”

17. This Court in case titled **Showkat Ahmad Mir v. Nighat Begum** bearing **CRM(M) No. 240/2022** decided on 12.02.2024 has also held as under:

“13. From the foregoing analysis for law on the subject, it is clear that unless it is shown from the material on record that confinement of a person is illegal in nature and it amounts to an offence, a Magistrate cannot exercise his powers under Section 97 of the Cr.P.C and issue a search warrant for production of such person.”

14. The custody of a minor child with his father can in no circumstances be termed as illegal amounting to an offence. Therefore, it was not open to the learned Magistrate to pass the impugned order directing production of the minor child. The said order is, therefore, unsustainable in law.”

18. The Apex Court in case titled *Ramesh vs Laxmi Bai (Smt)*, reported as *1998 (9) SCC 266* has also laid down the same principle. The paragraph 4 being relevant is taken note of as under:

“4. From a perusal of the impugned order of the High Court, it appears to us that though the points which should weigh with a court while determining the question of grant of custody of a minor child have been correctly detailed, the opinion of the High Court that the revisional court could have passed an order of custody in a petition seeking search warrants under Section 97 CrPC in the established facts of the case is untenable. Section 97 CrPC prima facie is not attracted to the facts and circumstances of the case when the child was living with his own father. Under the circumstances, we are of the opinion that the orders of the High Court dated 17-7-1996 and that of the learned Additional Sessions Judge dated 9-7-1996 cannot be sustained and we accordingly set aside the orders and the directions given therein.”

19. The father has been held as the natural guardian of the minor child, as such, in no circumstances, minor staying with father can be termed as illegal confinement amounting to an offence.

20. In view of above, the petition is allowed and the impugned order dated 24.02.2024 and further proceedings initiated by learned Court of Sub Judge/ Judicial Magistrate Chadoora, are quashed.

21. Since the custody of the child is with the respondent/ mother, therefore, it will not be proper to disturb the custody of the child at this point of time. As far as question with respect to the permanent custody of the minor child is concerned, the parties are at liberty to approach the competent court under Guardians and wards Act for appropriate orders.

22. Before parting with the file it needs to be stated herein that the instant petition was reserved after hearing learned counsel for the parties on 08.07.2024. The learned counsel for the petitioner at the time of making submissions had vehemently contended that the learned Judicial Magistrate,

Chadoora has handed over the custody of the minor to his mother without passing any order to that effect as such neither any rebuttal could be made to this submission by the other side at that point of time nor was there any document in the entire record to negate such contention. Moreover, the learned counsel for the petitioner had by way of CM No. 421/2024 placed on record all documents except the order dated 24.02.2024 (passed at the official residence). He had argued that he had applied for the certified copies of all orders passed but no order was provided to him on 24.02.2024. In response, the learned senior counsel was requested to look into the record & he was also shocked to see that no such order was passed as per digitized record. Learned senior counsel for the respondent furnished certified copy of an order dated 24.02.2024 in the open court on 10.07.2024 when the judgment in the matter was ready to be announced, however, the copy of the order is taken on record. The perusal of the certified copy of the order dated 24.02.2024 produced by the learned senior counsel, reveals that the matter has been taken up for consideration by the learned Magistrate at 7:40 pm in the evening on 24.02.2024 at his official residence and the custody of the child was handed over to the respondent/mother. It is astonishing to note that the scanned record submitted by the learned Judicial Magistrate in respect of the case in hand nowhere contains the order dated 24.02.2024 passed after 4 pm produced by the learned senior counsel although the said digitized record of the original file is sent and duly signed by the same Magistrate with proper index and pagination.

23. The non-availability of the order purportedly passed by the learned Magistrate at his official residence in the evening hours, in the scanned record as submitted to this Court, is not only incomprehensible but shocking too as it gives rise to many reasonable apprehensions. It cannot be *ipso facto* believed that the order has been inadvertently skipped while sending the record to this Court as the learned Magistrate cannot be believed to be so ignorant to understand the importance of the certified copy of the order produced by the learned senior counsel. The copy of the order would reveal that the applicant (an Advocate whose name is not clearly reflected) has applied for the certified copy of the order on 09.07.2024 and it has been issued in his favour on 10.07.2024 i.e., after the judgment in the instant petition was reserved by this Court. It is a digitized record of the original file

not the photostat copy of file, as such there was no occasion that the same could have been skipped or missed out from the record. It does not also transpire as to why the order dated 24.02.2024 passed at 7:30 pm was not sent to this Court and what were the compelling circumstances which forced the Magistrate to pass an order at his official residence at 7:30 pm in absence of the other side that too without affording them any opportunity of being heard.

24. Be that as it may, since the order produced by the learned senior counsel is not part of the record sent by the learned Magistrate himself and the same having been furnished after the judgment was dictated, the same does not require to be taken into account, more particularly, for the reason that it has given rise to certain reasonable apprehensions. This Court cannot lose sight of the fact that the order did not form part of the record, which was sent to this Court, before the learned counsel for the parties made their respective submissions, which included the one about the custody of the child having been given to the respondent-mother by the learned Magistrate without passing any order to that effect, therefore, in order to protect the sanctity of the court orders it would be quite expedient that the matter is enquired into so that not only the veracity of the order is ascertained but the apprehensions of whatever kind are also set at rest.

25. In the circumstances, Registrar Vigilance, High Court of J&K and Ladakh, Srinagar, is directed to enquire into the matter and submit his report within a period of four weeks from today, to Hon'ble the Chief Justice for appropriate orders.

26. Registry shall send a copy of this judgment to Registrar Vigilance, High Court of J&K and Ladakh, Srinagar for compliance.

27. Disposed of on the above lines.

(Moksha Khajuria Kazmi)
Judge

Srinagar
12.07.2024
Mohammad Yaseen Dar, PS

Whether the judgment is reportable:

Yes/No