



1 MCRC-6323-2018
IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE PRAMOD KUMAR AGRAWAL
ON THE 17th OF SEPTEMBER, 2026
MISC. CRIMINAL CASE No. 6323 of 2018

Versus

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Appearance:

Ms. Ranno Rajak - Advocate for the petitioner.

Shri Wakeel Khan - Advocate for the respondents.
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ORDER

The present petition under Section 482 of Cr.P.C. has been filed by the petitioner challenging the order dated 08.12.2017 passed in CRR.No.73/2017 by the learned I Additional Sessions Judge, Ashta District Sehore (M.P.), affirming the order dated 11.07.2017 passed in Case No.112/2017 by Sub Division Magistrate, Ashta, District Sehore by which the application of petitioner filed under Section 97 of Cr.P.C. has been dismissed as not maintainable.

2. Learned counsel for the applicant submits that the petitioner is the grandmother of respondent No.2. The marriage between the petitioner's son and respondent No.1 was solemnized and out of their wedlock, respondent No.2 was born on 28.01.2011. It is submitted that respondent No.1 is presently residing with one L and has kept respondent No.2 in her custody. The petitioner had been bearing the educational expenses of



respondent No.2. It is further submitted that respondent No.1 and L subjected respondent No.2 to cruelty by assaulting him. When the petitioner's son came to know this fact and went to meet his son/respondent No.2, respondent No.1 did not allow him to meet the child. Consequently, the petitioner lodged a report at the concerned police station in this regard. Thereafter, the petitioner filed an application under Section 97 of the Cr.P.C. before the S.D.M., Ashta, District Sehore, seeking issuance of a search warrant and release of respondent No.2 from the custody of respondent No.1. The said application was dismissed by order dated 11.07.2017 as not maintainable. Aggrieved by the said order, the petitioner preferred Criminal Revision No.73/2017 before the Court of the I Additional Sessions Judge, Ashta, District Sehore, which was also dismissed by order dated 08.12.2017, affirming the order passed by the S.D.M., Ashta, District Sehore. Hence, the orders passed by S.D.M. as well as Revisional Court are bad in law and are liable deserved to be quashed.

3. Learned counsel for the respondents has opposed the said prayer and has submitted that respondent No.1 is the real mother of respondent No.2, who is natural and legal guardian of respondent No.2. Therefore, no search warrant can be issued for the recovery of a child from the custody of his natural and legal guardian. It is further submitted that by no stretch of imagination, it can be said that the respondent No.2 is in wrongful confinement of his mother/respondent No.1. He prayed for dismissal of this petition.

4. Heard learned counsel for the parties and perused the record.



5. From the perusal of the record, it is found that the respondent No.1 is the real mother of respondent No.2. There is nothing on record to suggest that the respondent No.2 is in wrongful confinement of respondent No.1.

6. This Court also finds that the very question of a Sub Divisional Magistrate issuing a search warrant for recovery of a child from his/her parent has been raised time and again by one of the parties to the marriage, and it is now trite that a child, who is in the legal custody of mother or father cannot be said to be in wrongful confinement. This aspect of the matter has been subject matter of various petitions in this Court, some of the decisions have also been placed on record by the learned counsel for the petitioners, and in the case of WP. No.20426/2023 dated 27.09.2023 in the case of *Lalit S/o Shri Kanhaiyalal Joshi vs. Sub Divisional Magistrate, Khargone and another* and W.P. No.17603/2020 dated 12/03/2021 in the case of *Jaya Chakravarti vs. State of M.P. and others*, the Coordinate Benches of this Court has relied upon various decisions of the Supreme Court including that of *Ramesh vs. Laxmibai reported as (1998) 9 SCC 266* to hold that Section 97 of Cr.P.C. cannot be invoked for recovery of a child from the custody of his/her parents. The relevant paras of the decision passed by this Court in the case of *Jaya Chakravarti* (supra) read as under:-

“10. Section 97 Cr.P.C gives power to the Magistrate to issue a search warrant if he has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence and upon search, if the person is found in the confinement shall be taken before the Magistrate who shall make such order as in the circumstances of the case seems proper. Section 98 Cr.P.C gives power to the Magistrate for the restoration of liberty of a woman or a female child under the age of 18 years



who is under abduction or unlawful detention and the female child under the age of 18 years to her husband, parent, guardian or other person having the lawful charge of such child, therefore, admittedly, in this case, the provision of section 98 Cr.P.C does not apply because it deals with a woman or female child below the age of 18 years and the respondents No.5 & 6 are male children. So far the power under section 97 Cr.P.C is concerned such power is liable to be exercised if the Magistrate has a reason to believe that any person is confined under such circumstances that confinement amounts to an offence. In the present case admittedly the respondents No.5 & 6 were living with the petitioner/mother who is a natural guardian, therefore, it cannot be termed as 'confinement' and the same is not an offence. In the present case, the Magistrate has not recorded its satisfaction that the respondents No.5 & 6 were in the confinement of the mother which amounts to an offence.

11. The Apex Court in the case of Ramesh vs. Laxmi Bai reported in (1998) 9 SCC 266 has held that section 97 of the Cr.P.C does not attract in the case when the child was living with his own father. In the case of Tejaswini Gaud & others vs. Shekhar Jagdish Prasad Tewari & others reported in (2019) 7 SCC 42 the Apex Court has held that in the child custody matter the ordinary remedy lies wholly under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be. In the cases arising out of the proceeding under the Guardian and Wards Act, the jurisdiction of the Court is determined by whether the minor ordinarily resides within the area in which the Court exercises the jurisdiction and the welfare of the child. Even in the writ of habeas corpus where the Court is of the view that a detailed enquiry is required the Court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil Court. This Court in the case of Pushpa Ramesh Kumar Patwa vs. Ramesh Kumar Badri Prasad reported in 2000 (3) MPLJ 268 has held that in the exercise of power under section 97 of the Code the Magistrate cannot issue a direction for production of a child from the custody of the father and direct that the child shall be in the custody of the mother because the custody of the child with the father does not amount to wrongful confinement thereby no offence is committed attracting the provision of section 97 of the Cr.p.C. The High Court of Calcutta in the case of Lily Manna vs. State of West Bengal and others reported in 2008 Cri.LJ 625 has held that sine qua non of application of section 97 Cr.p.C is



that there has to be, prima facie, finding that the person has been in wrongful confinement and that wrongful confinement must amount to an offence. The High Court of Rajasthan in the case of Jaishree Tiwari vs. State of Rajasthan & others reported in 2013 CriLJ 610 has held that the Executive Magistrate has no power under section 97 to wrest custody of the child from its natural guardian. Admittedly, when the child was in the custody of the minor there was no reason to believe that he was under wrongful confinement and as such issuance of the search warrant was itself uncalled for and accordingly the order of the Magistrate was set aside being an illegal, perverse and absolutely abuse of process of Court.”

7. Whereas, in the case of **Lalit S/o Kanhaiyalal Joshi** (supra), which is a short order, this Court has passed the following order:-

*“In the instant petition, a challenge has been made to the order dated 24.7.2023 passed by respondent No.1-SDM, Khargone whereby he has directed custody of the child with the respondent No.2 under the provisions of section 97 of the Cr.P.C.. 2. Counsel for the petitioner submits that petitioner is father of the child and the SDM has no jurisdiction to pass an order of custody of the child under section 97 Cr.P.C.. In support of his submission, he has placed reliance on the judgment passed by the Apex Court in the case of **Ramesh Vs. Laxmibai (1998) 9 SCC 266** wherein it has been held that power under section 97 cannot be invoked in respect of the child living with his father and order of transfer is not tenable. He also relied upon the judgment passed by this Court in the matter of **Pushpa Vs. Ramesh Kumar, 2000(3) MPLJ 268**. 3. Counsel for respondents could not support the order impugned in view of settled law by the Apex Court and this Court in the above mentioned cases that SDM cannot pass an order for custody of the child under section 97 Cr.P.C.. 4. In view of aforesaid, the impugned order dated 24.7.2023 is quashed. However, liberty is granted to the respondent No.2 to seek custody of the child in accordance with the provisions of Guardian and Wards Act. With the aforesaid, the petition is allowed and disposed off.”*

8. Admittedly, the minor child/respondent No.2 is residing with his mother/respondent No.1. There is no material on record to show that the



respondent No.1/mother has been declared incompetent or otherwise dis-entitled to have the custody of the minor child by any Competent Court. There is also no order passed by any Competent Court directing that the custody of the minor child/respondent No.2 shall not remain with the mother. The mere allegation that the conduct or character of the mother is not proper, by itself, cannot lead to the conclusion that the minor child is in wrongful confinement within the meaning of Section 97 of the Cr.P.C.

9. Thus, in the facts and circumstances of the case, learned S.D.M. committed no error in declining to invoke the provisions of Section 97 of the Cr.P.C. Learned Additional Sessions Judge has also rightly affirmed the said order. Consequently, no case for interference in the exercise of inherent jurisdiction under Section 482 of the Cr.P.C. is made out.

9. Accordingly, present petition stands dismissed.

(PRAMOD KUMAR AGRAWAL)
JUDGE

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