

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

CRM(M) No.240/2022

SHOWKAT AHMAD MIR ... PETITIONER(S)

Through: - Mr. Naveed Gul, Advocate.

Vs.

NIGHAT BEGUM ...RESPONDENT(S)

Through: - Mr. Rizwan-ul-Zaman, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

ORDER(ORAL)

12.02.2024

1) The petitioner has challenged order dated 20.06.2022 passed by Judicial Magistrate 1st Class, Sumbal, whereby, in an application filed by respondent against the petitioner under Section 97 of the Cr. P. C, search-cum-production warrant has been issued by the learned Magistrate in respect of minor son of the parties from the custody of the petitioner.

2) The facts leading to the filing of the instant petition are that the petitioner had entered into a wedlock with respondent in the year 2015 and out of the said wedlock, one male child, who was about five years old at the time of filing of this petition, was born. It appears that the

matrimonial relationship between the parties got strained, which resulted in filing of petition by respondent/wife against the petitioner/husband under the provisions of Protection of Women from Domestic Violence Act, a suit for restitution of conjugal rights by respondent against the petitioner and a criminal complaint by petitioner against the father and other relatives of the respondent.

3) The respondent/wife filed an application under Section 97 of the Cr. P. C before the learned Judicial Magistrate 1st Class, Sumbal, seeking production of minor son who was in custody of his father, the petitioner herein. The learned Magistrate, on the basis of aforesaid application, passed the impugned order directing SHO, P/S Noorbagh, Srinagar, to execute the search warrant and produce the minor son of the parties from the custody of his father i.e. the petitioner herein. It is this order which is under challenge by way of present petition.

4) The petitioner has challenged the impugned order, primarily, on the ground that he being father of the minor child is entitled to his custody and his custody cannot be termed as illegal or amounting to an offence. It has been further submitted that the minor son of the parties is regularly attending his school and that the petitioner is taking good care of his welfare but the learned Magistrate

has, on the basis of concocted and false allegations made by respondent in her application, passed the impugned order without application of mind. It has been further submitted that the petitioner had approached the learned Magistrate by way of an application for recalling of the impugned order but the same was not considered.

5) The respondent/wife has contested the petition by filing a reply to the same. In her reply, the respondent has stated that the petitioner has always treated her with disdain and has harassed her. It has been further submitted that the petitioner has refused and neglected to maintain the respondent and the minor child, as a result of which she was forced to file an application under the provisions of Protection of Women from Domestic Violence Act before the learned Magistrate. It has also been submitted that the respondent is interested in welfare of the minor child and that the petitioner is not taking good care of the minor child, who has been virtually confined by him after taking away his custody from the respondent. It has been further contended that keeping in view the age of the minor child, the respondent who happens to be his mother, is best suited to take care of his welfare.

6) I have heard learned counsel for the parties and perused record of the case.

7) The impugned order, as already stated, has been passed by the learned Magistrate by taking aid of the provisions contained in Section 97 of the Cr. P. C. In order to test the legality of the impugned order, it is necessary to have a look at the provisions contained in Section 97 of the Cr. P. C, which reads as under:

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.*

8) A perusal of the aforesaid provision reveals that a Magistrate of the first class is vested with power to issue a search warrant in respect of a person who is confined under such circumstances that his/her confinement amounts to an offence. 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.

9) Thus, two things are essential before a Magistrate can issue a search warrant under Section 97 of Cr. P. C; one is that a person should be confined and second is that

the confinement of such person should amount to an offence.

10) Adverting to the facts of the instant case, the respondent in her application before the learned Magistrate has alleged that the minor son of the parties is in custody of the father and she has apprehension that life of the minor son may be endangered. It has been also averred in the application that confinement of the minor son by the petitioner/father is with an intention to prevent him from love and affection of his mother, as a result of which he is going to suffer mentally and psychologically. On the basis of these assertions made by the respondent in her application, the learned Magistrate has, in the impugned order, observed that the child requires nourishment, care and protection of his mother for his welfare and that father cannot be a proper substitute to look after the child. It has also been observed that in the circumstances the confinement of the minor child amounts to an offence.

11) As is clear from the averments made in the application filed by the respondent and the observations made by the learned Magistrate in the impugned order, the primary concern of the mother as well as the learned Magistrate is the welfare of the minor child. So far as this

aspect of the matter is concerned, the same has to be taken into account by the Court while deciding a petition for custody of the minor child under the Guardians and Wards Act. In a proceeding under Section 97 of the Code of Criminal Procedure, the Magistrate has to ascertain from the material produced before him as to whether confinement of the child amounts to an offence. As already stated, the allegation of the respondent is that the minor child is in custody of the petitioner/father. The custody of a child with his father can, in no circumstances, be termed as illegal confinement amounting to an offence as the father happens to be the natural guardian of a minor child.

12) This Court in the case of **Shameem Ahmad vs. Ashiya Begum**, 2016 (3) JKJ 128, has, while dealing with a similar matter, held that father of minor children having their custody cannot be *per se* said to be an offence for which powers under Section 100 of J&K Cr. P. C (which is in *pari materia* with Section 97 of the Central Cr. P. C) could be invoked. While holding so, the Court relied upon the following observations of the Supreme Court in the case of **Ramesh vs. Laxmi Bai**, (1998) 9 SCC 266:

“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.”

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.

15) For the foregoing reasons, the petition is allowed and the impugned order passed by the learned Magistrate is set aside.

16) It is pertinent to mention here that during the pendency of this petition, as an interim measure, custody of the minor child was given to the respondent/mother. So far as the question regarding 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.

(Sanjay Dhar)
Judge

Srinagar,
12.02.2024
"Bhat Altaf, PS"

Whether the order is reportable: Yes/No

