

MHAH090024422022



**IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS,**  
**(COURT NO. 2) AT SANGAMNER, AHMADNAGAR**

**Cri. M. A. No. 710 of 2022**

**Vidya Prashant Nawale**

**...Applicant**

**VERSUS**

**Prashant Sambhaji Nawale**

**and Other 6.**

**...Opponents**

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Ld. Advocate for Applicant : Mrs. R. B. Joshi

Ld. Advocate for Opponents : Mr. A. D. Ghule  
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**ORDER BELOW EXHIBIT 01**

**(Passed on 04.01.2023)**

This is an application under section 97 of the Code of Criminal Procedure for issuance of search warrant for search of minor son of applicant who according to her is in custody of opponents.

**BRIEF FACTS OF THE APPLICATION**

**02.** Opponent No. 1 is husband, No. 2 is father-in-law, No. 3 is mother-in-law, No. 4 is brother-in-law of applicant and No. 5 is wife of No. 4. Opponents no. 6 and 7 are not persons related to opponents by blood, marriage or adoption; but they have good relations with opponents like close relatives. Applicant and opponent No. 1 got married on 09.05.2018. From their wedlock, son Avdhoot is born. Now, said Avdhoot is 3 years old. After marriage, there were always matrimonial disputes between applicant and Opponents. After few months of marriage opponents started ill treatment to applicant with intention to fulfill illegal demand of money. They asked her to earn money and subjected her to domestic violence.

**03.** Thereafter, on 09.09.2022 the opponent No. 1 went to applicant and requested her to send Avdhoot with him. He took Avdhoot with him; but till late night he not brought return Avdhoot to applicant. Therefore, she called opponent on phone. That time opponent told her that he took Avdhoot at Maldad. He will bring him in Court at the date of case. But on 13.09.2022 opponent not brought Avdhoot with him. On inquiry he told that Avdhoot is at home at Maldad. He asked applicant to go and to take Avdhoot with her. But when applicant went at house of opponent to bring Avdhoot, opponents No. 2 to 7 abused and beat her. Therefore, she lodged NCR 867/2022 against opponents

No. 3 to 5 at police station. Opponents have confined Avdhoot. His life and future is in danger in custody of opponents. Therefore, she filed present application to issue search warrant.

**04** Instead of issuing search warrant, this Court was issued notice to opponents. In response they appeared before Court and on next date opponent No. 1 filed his say to the application at Exh. 15.

**05.** He has denies all the allegations in toto, except marriage. He has strongly resisted the application on the ground that the reasons mentioned in the application are false and bogus. It is further contended that, after marriage, on 01.06.2018 opponent No. 1 took applicant at Dubai. Applicant never cohabited properly. She was attempted to commit suicide. She never looked after son Avdhoot properly. Therefore, opponent No. 1 sent Avdhoot in India with opponent No. 3. In September 2021 applicant came back in India. On 26.11.2021 mother of applicant died. After funeral applicant refused to go with opponent No. 1 at Dubai. Therefore, opponent alone went at Dubai. Applicant started to reside at Kamatwade Nashik. She works at Shaan cars Maruti Suzuki Arena, Satpur, Nashik. During her job hours she used to keep minor son at creche. Therefore, due to love and affection for child opponent came return in India.

**06.** After filing divorce petition Avdhoot fell ill. Applicant had no time to look after him. Therefore, she handed over his

custody to opponent No. 1. Till today medical treatment of Avdoot is going on in Nighute hospital. In marriage petition also she had filed application to direct opponent No. 1 to produce minor child Avdhoot before Court. In it she pleaded that on 10.08.2022 opponent took Avdhoot with him. Said application is also rejected. Applicant has also filed petition under D. V. Act. In it also she prayed for custody of Avdhoot. On 13.09.2022 after hearing in marriage petition applicant went at the house of opponent. Therefore, opponent lodged NCR against the applicant. Opponent No. 1 is father of the child Avdhoot. The child is residing happily and opponents No. 1 to 5 are providing necessary amenities to him. They had never confined Avdhoot. The allegations in the application are vague and false. Avdhoot is in custody of his father. Provisions of Section 97 do not attract to the facts of present case. Therefore, application is not tenable. Hence, the application needs to be dismissed.

**07.** Non-applicant no. 6 filed his say at Exh. 12 and submitted that he has no knowledge and concern with the matrimonial dispute between applicant and opponents. Applicant has falsely implicated him in present application. Hence, prayed to reject the application.

**08.** Perused application, say and documents filed alongwith it. I have also heard Mrs. Joshi the learned advocate for applicant and Mr. Ghule Ld. advocate for opponents at length.

**09.** Mrs. Joshi, learned advocate for the applicant has submitted that as a natural guardian applicant has every right to ask for search warrant by way of present application. She is entitled for custody of the child Avdhoot.

**10.** Per contra, Mr. Ghule, the learned advocate for the opponents has submitted that, at present Avdhoot is in custody of his father, natural guardian. Therefore, he could not be said to be under any illegal confinement and therefore, the application for issuance of search warrant under section 97 of Code of Criminal Procedure is not tenable. Already interim application filed by applicant in marriage petition to hand over custody of the child is rejected. The remedy available to the applicant is to file proper proceeding before Civil Court for custody of child. Therefore, present application needs to be rejected.

**11.** Following point arises for my determination, I have recorded my finding and reasons thereon as under.

| <b>Sr.No.</b> | <b>POINT</b>                                                                                                  | <b>FINDINGS</b>          |
|---------------|---------------------------------------------------------------------------------------------------------------|--------------------------|
| 01.           | Whether applicant has made out case to invoke provisions under section 97 of the Code of Criminal Procedure ? | In Negative              |
| 02.           | What order?                                                                                                   | Application is rejected. |

**REASONS**

12. I have given thoughtful consideration to the arguments advanced by the learned advocates for applicant and opponents. I have also minutely gone through the averments in the application and say as well as the documents filed on record.

13. The relationship is undisputed fact. Both spouses are alleging the several instances of cruelty against each other. In fact, that controversy has no much more relevance with this application; but this undisputed controversy goes to show that, since 26.11.2021 applicant reside at her parental abode. As per her case, opponents have forcibly taken the custody of child Avdhoot from her.

14. In order to understand the scope and jurisdiction of the Magistrate under Section 97 of the Code of Criminal Procedure, it is necessary to reproduce the section 97 of Code of Criminal Procedure. That Section reads as under.

*'97. 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, who shall make such order as in the circumstances of the case seems proper.'*

15. A bare reading of this Section makes it clear that, there must be “reason to believe” or “circumstances” that the confinement amounts to an offence.

16. Keeping in mind, this legal position I shall now apply the principles enunciated above in order to find out whether there are sufficient grounds to hand over custody of minor child to applicant as prayed by her. I have given anxious consideration to material placed on record by the applicant and opponents.

17. After examination of the record it appears that there are counter submissions by both parties about custody of child. Applicant has submitted that on 09.09.2022, opponent No. 1 took child Avdhoot with him and not brought back to applicant as assured by him. On the contrary, opponents have submitted that, after filing marriage petition applicant has hand over custody of child to opponent No. 1 because she had no time look after him. She never resided at Pangari, Tal.- Sinnar. She does the job at Nashik at Shaan cars. She resides at Kamatwade, Nashik. Due to her job she has no time to look after the child. When child was with her, she used to keep him at Creche (Palnaghar). Also in marriage petition applicant had filed application to direct opponents to produce the child before Court. But after hearing

parties Hon'ble Court has rejected the application. In said application applicant pleaded that opponent took the child with him on 10.08.2022.

18. In the application, though there are allegations against the opponents that they have wrongfully confined child; but record shows that both NCR filed by both parties shows that they have leveled counter allegations against each other. In present application and application preferred in marriage petition applicant narrated different dates about taking custody of child by opponents. Therefore, actual situation is not clear that whether opponents take away child from custody of applicant as alleged or whether she handed over custody of child to opponents as per defence of opponents. Therefore, in this situation of counter allegations, except bare words of applicant there is no evidence on record to show that child was forcibly taken away by opponents from custody of applicant.

19. From the application it nowhere seems that child is wrongfully confined by opponents. In present application, applicant intended to seek custody of the minor child and hence moved present application praying for issuance of search warrant against opponents with a further prayer to hand over the custody of child to him. Taking away of child from mother by the father can not be said as wrongful confinement. When father being a natural guardian of child, he keeps child with him, it can not be said that child has wrongfully confined by the father or that such

confinement would amount to an offence.

20. Invocation of the provisions under section 97 of the Code of Criminal Procedure, just for securing the custody of the child from the other parent, would not be proper and legal. It is settled law that, the provisions of Section 97 of the Code of Criminal Procedure can be invoked only when it is asserted and established that the confinement of any person amounts to an offence. It is also settled position of law, that the said provision can not be used to take away the children from the lawful custody of his father. Therefore, under such circumstances search warrant can not be issued for the production of child.

21. The learned advocate for the applicant relied on the ratio given in the cases of,

1. *Ritika Sharan Vs. Mr. Sanjay Ghosh (Civil Appeal Nos. 3544-45 of 2020 arising out of SLP(C)Nos. 21049-21050 of 2019)*
2. *Mandip Kaur Vs. State of Punjab and Haryana (Cri. Writ Petition No. 8319 of 2020 decided on 10.05.2021)*
3. *Master Advait Sharma Vs. State of UP (Habeas Corpus Writ Petition No. 450 of 2020)*

22. In the case of *Ritika Sharan (Supra)* since inception the child was in custody of mother. Said matter was not under Section 97 of the Cr. P. C.; but both parties filed interim applications in matrimonial proceeding. Hon'ble Supreme Court had passed the order in said application in its inherent

jurisdiction under Article 142 of the Constitution.

**23.** In the case of *Mandip Kaur(Supra)* the child was born in Australia. Therefore, he was Australian citizen by birth. Mother appellant was residing in Australia. Respondent No. 4 started to live in India and not want to shift in Australia. Already dispute of custody of child was decided by Hon'ble family Court in Australia in favor of appellant mother. Instead of it respondent No. 4 brought the child in India.

**24.** In the case of *Master Advait Sharma (Supra)* the Hon'ble Allahabad High Court had directed in its Writ jurisdiction to respondent father to handover custody of minor child Advait to his mother. In present application, point for consideration is whether custody of minor with his father amounts to confinement i. e. an offence and whether facts warrants invocation of power under Section 97 of the Cr. P. C.

**25.** The learned advocate for the opponents relied on the ratio given in the cases of,

1. *K. Sarasu Vs. Sengodan (1981 Cri. L. J.NOC113(MAD))*
2. *Altaf Karimbhai Shaikh Vs. Rizwana Altaf Shaikh and Others (2007(1) B Cr. C. 138)*
3. *Himmat Kashinath Patil Vs. Mangala Shyamro Patil and Another (1993 Mh. L. J. 532)*
4. *Marotrao Shyamrao Pachare Vs. Usha Marotrao Pachare 2004 ALL MR (Cri.) 443 : [2004 (1) B. Cr. C.*

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5. ***Pramod V. Kamble Vs. Jyoti P. Kamble and Another***  
***(2012 (3) B. Cr. C. 632)***

26. In the case of ***K. Sarasu (Supra)*** it has been observed that, it is beyond the scope and jurisdiction of the Magistrate to assess the comparative merits and demerits of the claim of a father and mother or other person claiming the custody and to find out in whose custody the well being of the minor is protected.

27. In the case of ***Altaf Karimbhai Shaikh (Supra)***, it has been observed that, the provisions of Section 97 of the Code of Criminal Procedure can be invoked only when it is asserted and established that the confinement of any person amounts to an offence. Also the said provision can not be used to take away the children from the lawful custody of his father.

28. In the case of ***Himmat Patil (Supra)***, it has been observed that, for exercise of jurisdiction under Section 97 of the Cr. P.C., custody of the minor or its continuation should have an element of criminal liability and there should be allegations constituting an offence. In absence of allegations to show that continuation of custody of minor with would constitute an offence, resort to Section 97 is unwarranted.

29. In the case of ***Marotrao Pachare (Supra)***, it has been

observed that, The action under section 97 is to meet emergency. A reasonable belief by the Magistrate that the confinement of the person concerned amounts to an offence is sine-quo-non for the exercise of the jurisdiction under this section. Unless there is material before the Magistrate and the Magistrate believes that the confinement of the person concerned is an offence, the jurisdiction under Section 97 could not be exercised at all. Section 97 does not authorize the Magistrate to go into the disputed questions as to which of the claimants is entitled to custody of minor. Such questions will always have to be left to the Civil Courts empowered under the different statutes. It would be also beyond the scope and jurisdiction of the Magistrate to assess the comparative merits and demerits of the claim of a father and mother or other person claiming the custody and to find out in whose custody the well being of the minor is protected.

**30.** In the case of *Pramod V. Kambale (Supra)*, it has been held that, father's taking away his minor child and keeping the child with him would not amount to 'confining' the child i. e. offence. Invocation of the provision of Section 97 just for securing the custody of the child from the other parent would not be proper and legal.

**31.** These all prepositions of law relied by Ld. Advocate for opponent are the settled principles of law on the point of invocation of power under Section 97 of the Cr. P. C.

**32.** If the facts of present case are tested on the touchstone of the ratio given in the above cited cases it reveals that, ratio laid down in case of *Ritika Sharan (Supra)* *Mandip Kaur(Supra)* and *Master Advait Sharma (Supra)* are not helpful to applicant in the facts and circumstances of present application. But the ratio laid down in case of *K. Sarasu(Supra)*, *Altaf Karimbhai Shaikh (Supra)*, *Himmat Patil (Supra)*, *Marotrao Shyamrao Pachare (Supra)*, and *Pramod V. Kamble (Supra)* are squarely applicable to the facts of present case.

**33.** What emerges from aforesaid discussion is that, there is dispute between the spouses; but both are eager to have custody of the child with them. Thus, absolutely there is not reason to believe that, the custody of the child with his father would amount to an offence of wrongful confinement. Applicant may avail the remedy before Civil Court.

**34.** In the result, after taking into consideration this factual position on record with aforesaid legal position, I do not find merit in the contention raised by the learned advocate for applicant to issue search warrant. There is no material on record to proceed against opponents. I am of the considered view that, this is not a case to invoke the provision under section 97 of the Code of Criminal Procedure. In turn, I answer point No.1 in the negative and pass the following order to answer point No. 2.

**ORDER**

1. Application is rejected.

Place : Sangamner.  
Date : 04.01.2023

( P. D. Deore )  
Judicial Magistrate First Class,  
(Court No. 2), Sangamner