

IN THE COURT OF
DISTRCT MOBILE MAGISTRATE TRAFFIC
SOPORE

CNR. NO JKBA060011382026 File No. 28/CRM

Date of Institution: 22-04-2026

Date Of Order 29-04-2026

In the Case of:-

Shameema Bano, Daughter of Ghulam Qadir Shagoo, Resident of
Doabgah Sopore, District Baramulla

●●●Applicant

Through Adv. Tajammul Islam vice Faisal Jan Anim

VERSUS

Fazil Ahmad Pampori, Son of Imtiyaz Ahmad Pampori, Resident of
Bemina Boat Colony JVC Srinagar

●●●Non-Applcant

Through Adv. Tawseef & Associates

CORAM: Usman Khurshid

(J.O Code: JK00320)

ORDER

Applicant present along with Ld. Counsel. Non-Applcant present along with Ld. Counsel & minor.

1. The present petition has been filed under Section 100 of the Bharatiya Nagarik Suraksha Sanhita, 2023, by the petitioner, who claims herself to be the divorced wife of the non-applcant. It is averred that the matrimonial relationship between the parties had not remained cordial and, consequently, the petitioner had been residing at her parental home along with the minor daughter, namely Humaira Jaan, aged about three years. It is further pleaded that after dissolution of marriage between the parties, the non-applcant, who is the father of the minor, allegedly forcefully took away the custody of the

child on 16.04.2026 from the custody of the petitioner and, since then, the minor is stated to be in his unlawful custody.

2. The petitioner has further asserted that the minor child has been wrongfully confined by the non-applicant and that such continued custody amounts to unlawful detention, adversely affecting the physical, emotional and mental well-being of the minor. It is also contended that the minor child is being deprived of the love, care, affection and attention of the petitioner-mother. On these assertions, the petitioner has prayed for issuance of a search warrant for tracing out the minor child and for restoration of her custody in favour of the petitioner.
3. This Court, considering the nature of the controversy involved and taking note of the fact that the non-applicant is the biological father of the minor child, deemed it appropriate, at the initial stage, to issue notice to the non-applicant and direct his appearance before the Court along with the minor child so as to rule out any allegation or apprehension of illegal confinement.
4. Pursuant thereto, the non-applicant appeared through learned counsel and also produced the minor before the Court on the previous date of hearing. Objections to the petition have also been filed wherein it is contended that the petitioner herself had voluntarily handed over the custody of the minor child to the non-applicant at the time of dissolution of marriage between the parties. It has further been averred that the provisions of Section 100 of the Bharatiya Nagarik Suraksha Sanhita, 2023, cannot be invoked against the father of a

minor child, as custody of a minor with his or her natural father cannot, under ordinary circumstances, be termed as illegal confinement or wrongful detention constituting an offence.

5. The non-applicant has further contended that the relief sought by the petitioner falls exclusively within the jurisdiction of the Court constituted under the Guardians and Wards Act and not within the scope of proceedings under Section 100 BNSS. It is also pleaded that the non-applicant, being the natural guardian of the minor child, is fully conscious of and attentive towards the welfare and upbringing of the child, who is stated to be regularly attending school. According to the non-applicant, the present petition has been instituted merely with an intention to harass him.

6. Along with the objections, the non-applicant has annexed a copy of the divorce deed executed between the parties on an unspecified date. In paragraph 3 thereof, it is recorded that the parties had agreed that the custody of the minor child shall remain with the husband, namely party No. 1. However, a perusal of the document reveals that the expressions “husband” and “party No. 1” appear to have been inserted subsequently by way of pen correction in the document.

7. During the course of arguments, learned counsel for the petitioner substantially reiterated the grounds urged in the petition. However, particular emphasis was laid upon the contention that the divorce deed relied upon by the non-applicant has been manipulated subsequently by inserting the name of the

non-applicant as the person entitled to retain custody of the minor child. It was argued that the relevant insertion appears to have been made by way of pen correction over a computer-typed document and, therefore, the same cannot be relied upon at this stage to defeat the claim of the petitioner.

8. Learned counsel for the petitioner further argued that the minor child is of tender age and, ordinarily, the welfare of such a child would be best served in the company and care of the mother. In support of the aforesaid submission, reliance has been placed upon the judgment of the Hon'ble High Court of Allahabad reported as *2020 SCC OnLine All 1945*, wherein, while dealing with a writ of habeas corpus filed by the mother seeking custody of a minor child, the Hon'ble Court observed that custody of a child of tender years, particularly below the age of five years, ordinarily ought to remain with the mother, unless exceptional circumstances exist showing that such custody would be detrimental to the welfare of the child. It was contended that no such exceptional circumstance has been demonstrated in the present matter so as to deprive the petitioner-mother of custody of the minor child.
9. Per contra, learned counsel for the non-applicant argued that custody of a minor child with the biological father can, under no circumstances, be termed as illegal confinement or wrongful detention so as to attract the provisions of Section 100 of the Bharatiya Nagarik Suraksha Sanhita, 2023. It was submitted that the non-applicant, being the natural guardian of the child, is legally entitled to retain custody of the minor and that the present proceedings are misconceived in law.

10. In support of the aforesaid submissions, learned counsel for the non-applicant placed reliance upon the judgment of the Hon'ble High Court of Jammu & Kashmir and Ladakh in *Fayaz Ahmad Mir vs. Nighat Nasreen*, CRM(M) No. 152/2024, wherein the Hon'ble High Court, while dealing with proceedings arising out of a petition under Section 97 Cr.P.C. (now Section 100 BNSS) filed before the Court of learned Judicial Magistrate 1st Class, by the mother against the father of a minor child, observed that in matters concerning custody disputes, the paramount consideration of the Court is and ought to be the welfare of the child, who remains the most vulnerable party in such disputes. The Hon'ble High Court further observed in the aforesaid judgment that, with changing societal conditions and evolving parental responsibilities, it would not be appropriate to presume that only the mother can provide proper care and welfare to the child, as both parents equally share responsibilities towards upbringing and welfare of the minor. The Hon'ble Court further held that custody of a minor child with the father cannot ordinarily be termed as illegal confinement amounting to an offence and reiterated that the father is recognized as a natural guardian of the minor child. While declining interference in proceedings under Section 97 Cr.P.C., the Hon'ble High Court left it open to the parties to approach the competent Court under the Guardians and Wards Act for adjudication of permanent custody rights of the minor child.

Heard and considered.

11. In light of the rival submissions advanced by learned counsel for the parties, the material placed on record, and the legal position emerging from the

judgments relied upon by both sides, the principal issue that arises for consideration before this Court is:

“Whether the custody of the minor child, namely Humaira Jaan, with the non-applicant father, in the facts and circumstances of the present case, can be construed as wrongful confinement or illegal detention so as to warrant exercise of jurisdiction under Section 100 of the Bharatiya Nagarik Suraksha Sanhita, 2023, or whether the dispute essentially pertains to custodial and guardianship rights requiring adjudication by the competent Court under the Guardians and Wards Act?”

12. Before advert to the factual matrix of the present case, it would be appropriate to delineate the scope and contours of jurisdiction exercisable under Section 100 of the Bharatiya Nagarik Suraksha Sanhita, 2023. The said provision substantially corresponds to erstwhile Section 97 of the Code of Criminal Procedure and empowers a Magistrate to issue a search warrant where there exists reason to believe that any person is confined under such circumstances that such confinement amounts to an offence. The legislative object behind the provision is essentially remedial and emergent in character, namely, to secure immediate rescue in cases involving unlawful or criminal confinement. The provision was never intended to operate as a substitute for regular guardianship or custody proceedings involving adjudication of inter se parental rights.

13. The jurisdiction under Section 100 BNSS is, therefore, conditioned upon the existence of two foundational requirements: firstly, that the person concerned is under confinement; and secondly, that such confinement prima facie

amounts to an offence in law. Mere custody or care of a minor child by one parent, absent allegations disclosing criminality, coercion, trafficking, abuse, or circumstances endangering the life or liberty of the child, would not automatically attract the jurisdiction of the Magistrate under the aforesaid provision.

14. In this regard, reference may also be made to Section 127 of the Bharatiya Nyaya Sanhita, 2023, which defines wrongful confinement as wrongful restraint of a person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits. The procedural mechanism under Section 100 BNSS is intrinsically linked with the existence of such substantive criminal wrong. Consequently, unless the custody complained of discloses ingredients amounting to criminal confinement or detention, invocation of Section 100 BNSS would remain legally impermissible.

15. The Hon'ble High Court of Jammu & Kashmir and Ladakh, while dealing with the analogous provision contained in Section 97 Cr.P.C., has repeatedly cautioned against conversion of criminal process into a mechanism for resolution of ordinary parental custody disputes. In *Fayaz Ahmad Mir* (supra), the Hon'ble High Court, while quashing an order passed by the learned Magistrate directing transfer of custody of a minor child from the father to the mother under Section 97 Cr.P.C., observed that the provision is essentially a rescue mechanism intended for cases of illegal confinement amounting to an offence and cannot be employed as a short-cut substitute for guardianship proceedings. The Hon'ble High Court further observed that custody of a minor child with the biological father, who is a natural guardian in law, cannot

ordinarily be termed as illegal confinement or wrongful detention merely because the other parent claims better custodial entitlement.

16. The Hon'ble High Court in the aforesaid judgment further emphasized that with changing societal conditions and evolving notions of parenting, it would not be legally proper to presume that only the mother is capable of ensuring welfare of the child. It was observed that love, care and affection of both parents are equally important for the emotional and psychological development of the child and that courts must guard against permitting children to become instruments in matrimonial discord or "tug of war" between estranged spouses.

17. Similar principles have also been reiterated in *Showkat Ahmad Mir vs. Nighat Begum* CRM (M) No. 240/2022 and *Rehana Kouser vs. Altaf Ahmad*, 2019 SCC OnLine J&K 646 wherein the Hon'ble High Court underscored that when the child is residing with a natural guardian, the essential ingredients of "wrongful confinement" are ordinarily absent and the proper remedy lies before the competent Court under the Guardians and Wards Act, which alone possesses jurisdiction to undertake a detailed welfare-oriented inquiry relating to permanent custody, visitation and guardianship rights.

18. The distinction between criminal rescue jurisdiction and welfare-oriented custody adjudication is of considerable significance. Proceedings under Section 100 BNSS are summary and emergent in nature, whereas proceedings under the Guardians and Wards Act involve a comprehensive inquiry into the

welfare of the child, emotional stability, educational environment, financial capability, parental conduct and long-term developmental interests of the minor. Such an exercise cannot appropriately be undertaken within the limited confines of proceedings under Section 100 BNSS.

19.Reverting to the facts of the present case, the petitioner has alleged that the non-applicant forcefully took custody of the minor child after dissolution of marriage and that the child is under unlawful confinement. The non-applicant, on the other hand, has asserted that the custody of the child had voluntarily been handed over to him at the time of dissolution of marriage and that he, being the biological father and natural guardian, is lawfully taking care of the child.

20.It is true that the petitioner has questioned the authenticity of the custody clause appearing in the divorce deed by contending that certain words therein appear to have been inserted subsequently by pen correction over a typed document. Prima facie, this Court also notices that the expressions “husband” and “party No. 1” appearing in paragraph 3 of the said document appear to have been incorporated through subsequent correction. However, even if such contention of the petitioner is assumed to be correct for the purposes of the present proceedings, the same would merely create a disputed question regarding consensual custodial arrangement between the parties. Such disputed factual aspects cannot, by themselves, convert the custody of the child with the biological father into an act of criminal confinement attracting jurisdiction under Section 100 BNSS.

21.This Court also deems it relevant to notice that pursuant to notice issued by this Court, the non-applicant appeared before the Court along with the minor child. There is nothing on record to indicate that the child has been concealed, subjected to abuse, exposed to danger, deprived of basic necessities, or kept under circumstances endangering her physical safety or mental well-being so as to invoke the extraordinary rescue jurisdiction contemplated under Section 100 BNSS. On the contrary, the non-applicant has specifically asserted that the child is regularly attending school and is being looked after properly.

22.Learned counsel for the petitioner has placed reliance upon the judgment of the Hon'ble Allahabad High Court reported as *2020 SCC OnLine All 1945* to contend that custody of a child of tender years ordinarily ought to remain with the mother. There can be no quarrel with the settled proposition that welfare of a child of tender age is ordinarily considered best served in maternal care, subject to facts and circumstances of each case. However, the said principle pertains essentially to determination of custody rights on the touchstone of welfare jurisdiction and not to the limited jurisdiction exercisable under Section 100 BNSS.

23.It also deserves notice that the minor child in the present case is presently around three years of age and is not a breastfeeding infant requiring immediate maternal nursing care in the strict sense. More importantly, the present proceedings are not intended to conclusively determine permanent custody rights between the parties. The issue before this Court is confined to whether the custody of the child with the father can be termed so patently illegal or criminal as to justify exercise of extraordinary jurisdiction under Section 100

BNSS. In the considered opinion of this Court, the answer to the aforesaid issue has to be in the negative.

24. This Court is conscious of the fact that disputes relating to custody of minor children are emotionally charged and deeply sensitive in nature. Nevertheless, criminal process cannot be permitted to become an instrument for securing de facto custody orders in disputes essentially civil and welfare-oriented in character. The welfare and long-term interests of the minor child can only be appropriately adjudicated upon by the competent Court exercising jurisdiction under the Guardians and Wards Act after conducting a comprehensive inquiry into all relevant attending circumstances.

25. Having regard to the aforesaid discussion, this Court is of the considered opinion that custody of the minor child with the non-applicant father, in the facts and circumstances obtaining in the present matter, cannot be construed as wrongful confinement or illegal detention amounting to an offence so as to warrant exercise of jurisdiction under Section 100 of the Bharatiya Nagarik Suraksha Sanhita, 2023. The present petition, therefore, does not merit interference by this Court.

26. Accordingly, the petition is dismissed. Custody of the minor child shall remain undisturbed for the present. However, it is clarified that dismissal of the present petition shall not preclude either of the parties from approaching the competent Court under the Guardians and Wards Act or any other appropriate

forum for adjudication of custody, visitation or guardianship rights of the minor child strictly in accordance with law.

27. After due compilation, the petition shall be consigned to record room.

Announced

29.04.2026

(Raies)

DMMT Sopore