

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CRIMINAL APPLICATION (QUASHING) NO. 10949 of 2022****With****CRIMINAL MISC.APPLICATION (DIRECTION) NO. 1 of 2022****In R/SPECIAL CRIMINAL APPLICATION NO. 10949 of 2022****With****CRIMINAL MISC.APPLICATION (FOR VACATING INTERIM RELIEF) NO.****2 of 2022****In R/SPECIAL CRIMINAL APPLICATION NO. 10949 of 2022**

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SHAIFIYA VAJIUDDIN CONTRACTOR & ORS.**Versus****STATE OF GUJARAT & ANR.**

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Appearance:**FALGUNI D UPADHYAYA(2280) for the Applicant(s) No. 1,2,3****MR GG SOLANKI(5562) for the Applicant(s) No. 1,2,3****MR HITESH L GUPTA(3937) for the Respondent(s) No. 2****MR NAYAN L GUPTA(11798) for the Respondent(s) No. 2****MS CM SHAH, APP for the Respondent(s) No. 1**

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CORAM: HONOURABLE MR. JUSTICE ILESH J. VORA**Date : 23/02/2024****ORAL ORDER****Order in Cr.M.A.No.2/2022**

1. By this application, the applicant Tasnim Habib Presswala is seeking vacation of ad-interim relief granted by the Coordinate Bench of this Court by order dated 19.10.2022 passed in Special Criminal Application No.10949 of 2022. The said Special Criminal Application is being filed by the private opponents who are mother in law and sisters in law of the applicant herein.

2. Brief facts leading to file present application are that the marriage of the applicant with one Habib Presswala was solemnized on 28.07.2017 and out of the said wedlock, they

were blessed with twins on 27.02.2020, out of which, the son expired in a two days and the daughter Hussani was survived. The marriage life with Habib Presswala after the birth of the daughter was not happy. The husband Habib committed a suicide on 29.11.2021. When the applicant was in Iddat period at her mother's place, the custody of the daughter Hussani aged about two years and nine months took away by the opponents who are mother in law and unmarried sisters in law and thereafter, when applicant approached the opponents to handover the custody of the child, they restrained her in taking the possession and custody of the child.

3. An application was filed under Section 97 of the Code of Criminal Procedure, 1973 to have custody of minor daughter from the grand-mother. Upon receiving the notice from the Judicial Magistrate Court at Godhra, the opponents have opposed the said application by filing written objections. After hearing the parties, the learned Judicial Magistrate directed the opponent herein to handover custody of the child to the applicant herein. Aggrieved with the said order dated 09.09.2022 passed by the Trial Court, the opponents have preferred a revision application before the Sessions Court, Godhra and the same came to be dismissed.

4. Being aggrieved by the order of the Revisional Court as well as the Trial Court, the opponents herein have preferred Special Criminal Application No.10949 of 2022. At the time of admission of the matter, the following order dated 19.10.2022, was being passed by the Coordinate Bench of this Court, which reads thus:

“1) Heard learned advocate Mr. Jayrajsinh Chauhan with Mr.G.G. Solanki, learned advocate for the applicants and Ms. Ankita Goswami, learned advocate for Mr. Chinmay Gandhi, learned advocate appearing on behalf of the respondent No.2.

2) Mr. Chuahan, learned advocate, at the outset, submitted that the provisions of Section 97 of the Code of Criminal Procedure, 1973 came to be invoked by the respondent No.2 against the grand mother and two paternal aunts of the child.

3) Mr. Chauhan, learned advocate has pointed out that the Magistrate concerned, while passing the order dated 09.09.2022, has observed that the provisions of Section 97 of the Code cannot be invoked for the purpose of deciding the custody of the child.

4) Mr. Chauhan, learned advocate, further submitted that, a bare perusal of the Section 97 of the Code, would make it clear that the provisions of Section 97 of Code would be applicable, in case, when there is an illegal confinement. However, in the present case, the child is with grand mother, and thereby, the child cannot be said to be illegal confinement.

5) Ms. Ankita Goswami, learned advocate requested this Court grant some time to file reply.

6) Considering the aforesaid, let there shall be NOTICE returnable on 28.11.2022. Learned Additional Public Prosecutor appears and waives service of notice for and on behalf of the respondent-State.

7) *In the meantime, there shall be an ad-interim relief, in terms of para 11(C). Direct service is permitted.”*

5. After passing of the aforesaid order, the applicant herein moved an application being Criminal Misc. Application No.1 of 2022, for granting visitation rights to meet her daughter. After hearing the parties, vide order dated 05.01.2023, the applicant was granted visitation right to her daughter on every Sunday between 10:00 p.m. to 12:00 p.m.

6. The applicant herein despite the order to meet her daughter on every Sunday was not allowed to meet her daughter and on that ground, she filed the present application i.e. Criminal Misc. Application No.2 of 2022, to vacate the ad interim relief dated 19.10.2022.

7. Pending the said application No.2 of 2022, the applicant herein approached the Apex Court challenging the interim relief by preferring Special Leave to Appeal (Cri.) No.8677-8678 of 2023.

8. Upon hearing the counsels for the respective parties, on dated 29.08.2023, Apex Court while disposing the Special Leave to Appeal, has passed the following order:

“Heard learned counsel appearing for the parties.

2. Leave granted.

3. The present appeals are directed against the Orders dated 19-10-2022 and 21-02-2023 (hereinafter referred to as the

“Impugned Orders”) passed by the High Court of Gujarat at Ahmedabad in SCRA No.10949/2022 and CRLMAD No.1/2022.

The Impugned Orders, in effect, made an arrangement pertaining to visitation rights to the Appellant of her own minor daughter born out of her wedlock to the now-deceased son of the Respondent No.2. The minor girl is aged about 3 years.

4. The Appellant moved the Additional Chief Judicial Magistrate, Godhra (hereinafter referred to as the “ACJM”) under [Section 971](#) of the Code of Criminal Procedure, 1973 for a search warrant to get the minor girl before the Court in Crl. MA No.106/2022. The Respondent No.3 moved the Godhra District Court seeking appointment as the minor’s guardian under the [Guardians and Wards Act, 1890](#) through MA No.64/2021. On 09-09- 2022, the ACJM allowed Crl. MA No.106/2022, ordered the production of the minor girl and her handover to the Appellant. This order was the subject-matter of an appeal to the Sessions Court and thereafter, a Special Revision Application before the High Court. The High Court has passed interim orders dated 19-10-2022 and 21-02-2023. We are skipping reference to the complete

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. sequence of events in view of our eventual direction hereinafter.

5. The Appellant has filed for vacation of the interim stay against the custody granted to the Appellant. This stay vacation application is presently pending before the High Court. We have heard the learned counsel for the parties at length, but would not like to go into the merits of the matter at this stage, for the High Court is in seisin of the case, and only by way of interim arrangement, the orders impugned have come to be passed.

6. The grievance of the Appellant, basically, is that though there was a direction by the ACJM to produce the girl child, the order has been violated and the specific undertaking given by Respondent No.2 was violated by her (Respondent No.2). It was submitted that the High Court ought to have taken serious note of such disobedience, keeping in view the welfare of a girl aged hardly 3 years.

7. Learned counsel for Respondent No.2 made some submissions with regard to the conduct and history of the Appellant. Be that as it may, this Court need not record the same in detail, in view of the order we propose to pass, as also indicated hereinbefore.

8. Having given our anxious thought to the factual matrix and submissions canvassed, this Court, being conscious of the sensitivity of the matter and the need for promptitude in a decision with regard to the interim arrangement viz. its modification or continuation, deems it appropriate to request the High Court to take up the pending vacate stay application relating to the Impugned Orders expeditiously, preferably within 2 (two) weeks from the date of receipt of this order.

9. As the welfare of the minor girl child is of paramount importance, we are sure the High Court will do the needful, in accordance with law and mindful of the relevant precedents. We may only state that our request supra is to be construed in line with [Tirupati Balaji Developers \(P\) Ltd. v State of Bihar](#), (2004) 5 SCC 1.

10. The appeals are disposed of in the aforesaid terms. Costs made easy. The pending applications are also disposed of.

11. Needless to mention, upon the Appellant being aggrieved still, after the High Court decides the vacate stay application, she would be at liberty to move this Court.”

9. In the aforesaid facts and circumstances, learned counsel Mr.Hitesh L. Gupta appearing for the applicant herein, has submitted that the opponents took away the daughter of the applicant without any reason and detained her illegally and therefore, the applicant being a biological mother cannot be deprived of her right to have custody of the daughter. He would further urge that the principles in relation to the custody of the child are well settled and the paramount consideration of the Court in determining the question as to who should be given the custody of a minor child is the welfare of the child and not rights of the parties under the statute for the time being force or what parties say.

10. It has been contended by Mr.Gupta, learned counsel that the Trial Court as well as the Revisional Court have dealt with the issue of maintainability of the petition filed under Section 97 of the Code of Criminal Procedure, 1973 and considering the

welfare of the child, the opponents directed to handover the custody of the daughter and therefore, the applicant has not been able to get the fruits of the orders passed by the Courts below as there is an interim stay against the implementation and execution of the orders.

11. Opposing the prayer for vacation of the ad-interim relief, Mr.Jayraj Chauhan for Ms.Falguni Upadyaya, learned counsels has contended that opponents are grand mother and maternal aunts of the minor child. Since minor child was 13 days old, she is in care and custody of the opponents. The son of opponent no.1 i.e. husband of the applicant herein has committed suicide due to matrimonial discord and has expired on 29.11.2021 and therefore, under the guise of performing Iddat period, she had left the matrimonial home abandoning the minor child and therefore, there is no illegal confinement or wrongful confinement of the child. In such circumstances, the Trial Court could not have issued the directions to handover the custody of the child to the applicant herein as the petition under Section 97 of the Cr.P.C. itself is not maintainable and while interpreting the applicability of Section 97, Revisional Court has exceeded its jurisdiction while confirming the order of the Trial Court.

12. Mr.Chauhan, learned counsel has submitted that for getting the custody of the child, the remedy is to file a petition under the Guardians and Wards Act, 1890. When there is no any offence committed by the opponents and there is no case of illegal confinement of the child, the application under Section 97 of the Cr.P.C. is not maintainable as the Court is having no

jurisdiction in relation to the custody matter of the child.

13. Mr.Chauhan, learned counsel has submitted that the applicant mother is Bangladeshi citizen and her passport is not renewed and she is illegally residing in India and therefore, likelihood of her deportation is not ruled out.

14. Lastly, Mr.Chauhan has submitted that considering the issue of law as canvassed hereinabove, there are all chances of succeeding the main petition and therefore, at this stage, no case is made out or circumstances exists for vacating the stay.

15. Having regard to the peculiar facts and circumstances of present case, this Court is of the considered view that when the application under Section 97 of the Code of Criminal Procedure, 1973 filed by the applicant, the age of the minor was two years and nine months. The Courts-below have mainly considered the welfare of the child and rights of the parties are kept open to raise the custody issue by filing appropriate application under the Guardians and Wards Act. It needs to be noted that before filing of the application under Section 97, the opponents herein had filed an application under Section 9 of the Guardians and Wards Act and the same was registered as guardian application no.64 of 2021 before the District Court, Godhra. The said application was filed on 15.12.2021 and the same was withdrawn on 16.03.2022. The opponents have not placed on record all the pages of application before this Court. They have only produced the first page and last page of the application. The other pages which are necessary for adjudication of this

application have not been produced. In the main petition, the opponents have not pleaded and/or mentioned the filing of the said application. In such circumstances, this Court is of the view that opponents by suppressing the material facts in relation to the material pages of the application have obtained the ex-parte ad interim relief and on this ground, this Court is of view that the ex-parte ad interim stay deserves to be vacated.

16. The opponents herein, before the Trial Court, have opposed the application filed under Section 97 of the Cr. P. C., by filing written objections at Exhs.7 and 10. The objections Exh.7 filed by the opponent no.2 Sahenaz Presswala, wherein she has specifically pleaded that due to sad demise of her brother, they have restrained the applicant to take the custody of the minor daughter. *Prima facie*, it appears that the opponents having no right to keep the custody of the minor against the will and wish of the mother applicant. The parties are governed by the Muslim Personal Law which says that the mother is entitled to the custody of the female child until she has attained puberty. In such circumstances, considering the tender age of minor and the right of the mother, as discussed, she cannot be deprived of her right to have custody simply because she does not have citizen of India. It is on record that on long term Visa, she is settled in India and since last 38 years and more, she is residing in India. In such circumstances, the paramount consideration is the welfare of minor child and not the legal right to be considered of the particular party. The term "welfare of the minor child" has wide connotation which includes the upbringing of the child, education, proper shelter, love and affection of the mother,

positive environment of life and other so many factors having bearing on the day to day life of the minor. The law related the custody of the child is fairly well settled. In case of **Nil Ratan Kundu Vs. Abhijit (2008 (9) SCC 413)**, the Supreme Court while dealing with the custody of the child has observed that the cases cannot be decided solely by interpreting legal provisions as it is a human problem and is required to be solved with human touch. It is further observed that a Court while dealing with the custody cases is neither bound by statutes nor by strict rules of evidence or procedure nor by precedence. In another case i.e. **Tejasvani Gaud Vs. Shekhar Jagdish (2019 (7) SCC 42)**, wherein the father was the only natural guardian alive and due to illness of the parents, the child was taken care of by the parties. The Apex Court after considering the peculiar facts, held that the father being the natural guardian is entitled to the custody of the child and the appellants have no legal right to the custody of the child and further held that the paramount consideration is the welfare of the child not the rights of the parents under the statutes for the time being in force. Thus, therefore, *prima faice* this Court is of the view that better welfare of the minor would be with the natural mother applicant, who is not declared unfit to retain the custody of the child. Keeping in view the welfare of the child and after consideration of peculiar facts and circumstances of present case, pending this litigation, she cannot deprive to have custody of the minor daughter on technical ground of maintainability of the petition filed under Section 97 of the Code of Criminal Procedure, 1973.

17. For the reasons recorded and considering the peculiar facts

and circumstances of present case, present application is **allowed**. The ad-interim relief staying the operation and execution of the impugned orders dated 09.09.2022 and 23.09.2022 passed by the Courts-below stands vacated.

18. The issue of maintainability of the petition filed under Section 97 and other issues raised in the petition are kept open. The observations made hereinabove are tentative in nature and confined to the adjudication to the present application.

19. The opponents are directed to handover the custody of the child to the applicant, within **two days** from the date of this order, failing which, the concerned jurisdictional police station is directed to comply with the order passed by this Court as well as the Trial Court concerned.

Order in SCR.A.No.10949/2022 with Cr.M.A.No.1/2022

List the main matter i.e. SCR.A.No.10949 of 2022 for final hearing on 04.04.2024.

Direct Service is permitted.

(ILESH J. VORA,J)

Rakesh