

PRAMOD V. KAMBLE VS. JYOTI P. KAMBLE & ANR.

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This case “Pramod V. Kamble Vs. Jyoti P. Kamble & Anr.” (2012 SCC OnLine Bom 1004) was before Justice A.M. Thipsay and was being heard in Bombay High Court. The advocate for the Petitioner is Mr. Vilas Kolekar and the advocate for Respondent is Mr. Amit Karande. This case was decided on July 20, 2012.

FACTS

The petitioner, in this case, is the husband of the respondent. The petitioner and the respondent reside at their matrimonial home in Palus after marriage. Afterward, a marital dispute arose between them, and the wife, the respondent, started to live at her parent’s home separately. In the month of October 2011, an application was filed before JMFC- Malshiras by the respondent under Section 97 of CrPC¹ alleging that the petitioner or the husband had taken away Rahul, who is the son of both petitioner and respondent, from the respondent’s house to the petitioner’s residence in Palus. The respondent further said in the application that when she contacted the husband, he requested that she bring a significant sum of money from her parent’s house and give it to him in exchange for getting Rahul back.

After viewing all the facts and the application alleged by the respondent, the Magistrate issued a notice to the applicant instead of issuing a search warrant. Both the petitioner and the respondent, along with their child Rahul, brought before the Magistrate, and both parties' statements were recorded. According to the Magistrate, for Section 97 of CrPC to apply, the “confinement” had to be of a character that would constitute an offense, thereby rejecting the application.

Respondent has moved to the sessions court in Revision challenging the order passed by the Magistrate. The learned Judge, hearing the Revision, granted a search under Section 97 of CrPC and set aside the order passed by the Magistrate. The learned Judge ordered the search warrant for the search of the child Rahul from his father’s residence or anywhere he is found and to be

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¹ Section 97 of the Code of Criminal Procedure, 1973: - Search for person wrongfully confined.

produced in the court to handover him over to his mother's custody. By aggrieved by the judgment of the Sessions court, the father approaches the Bombay High Court to seek justice.

ARGUMENT

Petitioner Augment:

The petitioner argued that there was no occasion for exercising the power under section 97 of CrPC. According to the petitioner, the conditions which were necessary for exercising the power were absent in the case. According to him, the respondent's allegation that the child – Rahul was forcefully taken by the petitioner to his residence. The learned counsel for the father has brought attention to the judgment in the case of "*Vishal Jivan Jogure v. Smt. Megha Vishal Jogure*"², in which this Court ruled that, in order to use powers under Section 97 of the Code, it must be claimed and established before the Magistrate, notwithstanding the fact that, on the face of it, the accused is guilty. Any individual imprisoned under these circumstances commits a crime. The Court in the following case made the following observation:

*"By no stretch of imagination custody of the children with the real father by itself can amount to an offence. Something more had to be alleged and established to support that position."*³

The petitioner also placed forward the case of "*Anil S/o Baburao Angalwar Vs. St. Cyuthia Bernard Samuel W/o Anil Baburao Angalwar*"⁴ where a similar question was raised before the court that whether a child taken away by the father from his mother's custody would amount to confinement under section 97 or not and the court ruled out that "*taking away of a child by the father from the mother of the child and detaining him in the father's custody does not amount to confinement and consequently under the said circumstances search warrant could not be issued for the production of the child.*"⁵

Respondent Argument:

The respondent argued that the petitioner had forcefully taken the child away from his mother and alleged that he constantly demanded money to release the child to the mother's custody. The respondent also argued that in the case of "*Purushottam Wamanrao Thakur v. Warsha W/o*

² (2005) 4 Mah LJ 54

³ *Ibid*

⁴ 2007 ALL MR. (Cri) 1611

⁵ *Ibid*

*Narendra Thakur*⁶, the court had granted section 97 of CrPC for finding the cause of why the child was taken away by the father from the mother's custody. The respondent, on the facts of the above case, wanted a speedy and fair judgment.

ANALYSIS & JUDGEMENT

The Hon'ble judge had analyzed all three cases that have been put forward by the parties. The judge claimed that there has been no decision of any High Court or the Apex Court in these types of cases. The case stated by the respondent was due to the fact that the father took away the child from the mother's custody and brought him to his father's custody which is the custody of the child's grandparents. This is the only reason for which the court had ordered Section 97 of CrPC and for producing the child in the court for handing him to his mother's custody.⁷ The authorities do not seem to be in agreement on the applicability of Section 97 of the Code where the dispute is principally over custody of a minor child. In the judge's judgment, using Section 97 provisions only to secure custody of the kid from the other parent would be improper and illegal. This, he believes, is not what the section implies. The judge also viewed that the Learned Magistrate had passed an appropriate order but, in the revision, the Learned Judge of the Session court did not consider whether the Magistrate's suspicion of the mother's account of the child being suddenly taken away from her by the father was unreasonable or without substance. The Learned Additional Sessions Judge overlooked the fact that a Civil Court might handle the matter of child custody more efficiently. The mother did not want to pursue criminal charges for the alleged attack and abduction of the child, in which case the facts would have been probed by the investigating agency, but rather wanted custody of the child under Section 97. As a consequence, the mother did not want the allegations against her to be investigated, nor did she want a Civil Court to consider the issue of child custody. The Learned Additional Sessions Judge failed to see the significance of this and judge whether, in this context, the Magistrate's doubt of the mother's narrative, which he expressed soberly in his order, could be regarded erroneous or unreasonable. The Judge in this order states that the action done by the Learned Judge of the sessions court acted insensibly and did not access the facts stated by the mother. The Judge had set aside the order passed by the Additional Judge of the sessions court and the petitioner was allowed to have the child in his custody.

⁶ (1993) 3 Bom CR 587

⁷ *Supra* Note 6

CRITICAL ANALYSIS

A similar case occurred where Guwahati High Court Judge J. Rumi Kumari Phukan passed a judgement:

The couple got married, and their daughter was born around three years old. After giving birth to her daughter, the respondent had physical problems for which she sought treatment in several locations. The Hon'ble Court acknowledged that the parties had split up, with the respondent residing with her father. In the same home, the father and daughter lived. In January 2019, while the respondent was hospitalized, she urged the petitioner to bring her child to see her. The petitioner thereupon initiated action. However, the respondent returned to the petitioner's house the next day to pick up the daughter. She argued that she was the kid's natural guardian under Section 6 of the Hindu Minority Act in a second petition submitted under Section 97 of CrPC and that the court should grant her custody of the child. The trial court granted the girl's custody to the respondent. The Sessions Judge's amendment to the earlier ruling was sustained. The petitioner incensed, started the current petition.

According to the high court, the clause of Section 97 of CrPC must be used to determine whether the petitioner had the child illegally imprisoned. The respondent was said to have improperly placed the kid in the petitioner's care since 2017 due to her poor health and the circumstances mentioned above. It could never be viewed as captivity under these circumstances. It was said that the respondent/wife was granted custody of the kid following Section 97 of the CrPC after the learned court treated the issue as one involving child custody. Section 25 of the Guardian and Wards Act provides that the issue of child custody may not be resolved in a petition under Section 97 of CrPC. The court needs only consider whether there was any unlawful detention of a person throughout the action when issuing such an order. There is no evidence of unjust detention against the petitioner, the child's father, or the natural guardian, as was previously indicated.⁸

CONCLUSION

The verdict that the Bombay High Court handed down is reasonable and appropriate. The Learned Session Court's judge behaved impetuously, and the court did not investigate whether

⁸ SCC Online Blog, <https://www.sconline.com/blog/post/2019/07/23/gau-hc-ordering-custody-of-child-to-be-given-to-mother-is-beyond-jurisdiction-of-s-97-crpc-order-to-be-confined-to-finding-of-wrongful-confinement/>, (Accessed on 25th January 2024)

the mother was telling the truth or not before making their decision. It was also evident that the mother did not file a complaint with the police department, and if the mother had filed a complaint, the relevant authorities would have conducted a complete investigation. The mother of the kid might have the father of the child fraudulently implicated in a case in the hopes that the judge would find him guilty and sentence him to jail time. Her anger could further explain the mother's desire for the father to spend time in jail. There is perhaps more than one explanation for why the mother did not report or register a complaint with the police. The petitioner had cited two cases that show that a father has similar rights as the mother for keeping the child in their custody, and it would be inappropriate for Section 97 of CrPC to be applied here except in some cases. The petitioner had presented adequate evidence that section 97 of CrPC is not applicable to the search warrant for the wrongful confinement of the father through two different cases.

