

**HIGH COURT OF MADHYA PRADESH: BENCH AT  
INDORE**

**SINGLE BENCH: HON'BLE SHRI JUSTICE VIVEK RUSIA**

**WRIT PETITION No.17603/2020**

Petitioner : Jaya Chakravarti D/o Yashpal  
Chakravarti W/o Vikas Chakravarti

Versus

Respondents : State of M.P & others

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Shri Prateek Maheshwari, learned counsel for  
the petitioner.

Shri Valmik Sakargayen, learned  
Government Advocate for the  
respondents/State along with Sub Divisional  
Magistrate (In person) .

Shri A.K.Saxena, learned counsel for the  
respondent No.4 to 6.

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**O R D E R**

(Passed on 12.03.2021)

Petitioner has filed the present petition being aggrieved by the order dated 24.09.2020 passed by the Sub Divisional Magistrate in the exercise of the power under section 97,98 of the Cr.P.C whereby the custody of respondents No.5 & 6 have been handed over to respondent No.4.

The facts of the case in short are as under:

2. The marriage of petitioner and respondent No.4 solemnized in the year 2003 and the petitioner gave birth to twin sons i.e. respondents No.5 & 6 in the year 2005.

According to the petitioner, she has started living separately from her husband respondents No4 and since birth, respondents No.5 & 6 are living with her. Because of some matrimonial dispute with respondent No.4 petitioner has left the matrimonial house along with respondents No.5 & 6 and since then they have been brought up and educated by her. Although respondent No.4 used to visit and meet them the petitioner took entire liability for the betterment of future

3. Respondent No.4 approached the Sub Divisional Magistrate by way of an application under section 97 of the Cr.P.C seeking custody of respondents No.5 & 6. The Sub Divisional Magistrate without any authority has entertained the application and issued a search warrant of respondents nos. 5&6. In compliance of the search warrant, the police procured them from her house to produce respondents No.5 & 6 before Sub Divisional Magistrate. No notice was issued to the petitioner in the aforesaid case, after recording the statements of respondents No.5 & 6 and vide order dated 14.09.2020 permitted respondent No.4 to keep respondents nos. 5&6 with them, hence the present petition before this Court.

4. After notice the Sub Divisional Magistrate has filed the reply by submitting that respondent No.4 has applied under section 97 Cr.P.C, in which a search warrant was issued on 11.09.2020. In compliance of the said search warrant the police station Narsingharh has produced respondents No.5 & 6 in the Court and thereafter he took their statements in

which they have categorically stated and shown their willingness to go with respondent No.4, father. Upon the said statement respondent No.3 has passed the impugned order dated 14.09.2020, hence there is no illegality in it and the petition is liable to be dismissed.

**5.** Shri A.K.Saxena, learned counsel appearing on behalf of respondents No.4 to 6 has argued in support of the impugned action of Sub Divisional Magistrate by submitting that the respondents No.5 & 6 were being ill-treated by the petitioner, therefore, looking to the welfare of the children learned SDM has rightly handed over their custody to the respondent No.4. The power has rightly been exercised under section 97 Cr.P.C in which no interference is called for in a writ petition filed under Article 226 of the Constitution of India. It is further submitted that the paramount consideration of the Court should be the welfare of the children while deciding their custody and the respondents No.5 & 6 without any pressure has willingly deposed before the SDM that they are not interested in residing with the petitioner, hence no interference is called for and the petition is liable to be dismissed.

**6.** Facts of the case are not in dispute to the extent that the petitioner and respondent No.4 are husband and wife but they are living separately for the last so many years and after separation, respondents No.5 & 6 were living with the petitioner till the impugned order was passed by the SDM.

7. Respondent No.4 has filed an application under section 97 & 98 Cr.P.C alleging that he used to live with the petitioner in Champi Mohalla, Narsingharh and in the year 2011 after creating a dispute she took him alongwith respondents No.5 & 6 with her to Madhusoodangarh where they have started living on a rented house. The petitioner's behaviour remained cruel towards respondents No.4 to 6 and compelled him to leave the house. He has received a call from respondents No.5 & 6 that the petitioner is behaving cruelly with them and they do not want to live with her, hence they are searched by issuing a warrant. The Sub Divisional Magistrate has registered the application as case No.09/Criminal/97/98/2020 and issued a search warrant and in the execution of the said warrant, the police station Narsingharh took the respondents No.5 & 6 from the custody of the petitioner and produced them before the SDM. Respondent No.5 & 6 have recorded their statements that they are not willing to reside with the petitioner as she ill-treats them and they are willing to live with their father and accordingly learned Sub Divisional Magistrate vide order dated 14.09.2020 has handed over the custody of respondents No.5 & 6 to respondent No.4 in the exercise of power under section 98 of the Cr.P.C and also warned that in future if the petitioner creates any dispute in respect of custody of the respondents No.5 & 6 the respondent No.4 may report to the police station.

**8.** The only issue which requires consideration in this petition is as to whether the Magistrate is having power under sections 97 & 98 of the Cr.P.C to pass an order in respect of custody of the children or to decide the dispute in respect of custody of the children between the father and mother?

**9.** It is also not in dispute that since birth the respondents No.5 & 6 were living with the petitioner and respondent No.4 and when they parted in the year 2011 twin children were only aged about 6 years and they have started living with their mother i.e. petitioner. Till the day of the passing of the impugned order, they were brought up and educated by the present petitioner. The petitioner has filed various photographs of different times and age groups of respondents No.5 & 6 in which they are seen along with the petitioner/mother. The petitioner has also filed the mark sheets, certificates and other documents to show that they studied at Madhusoodangarh, district Guna. The petitioner has also worked as a Teacher in Radha Convent School. All of a sudden the respondent No.4 has filed an application under section 97 & 98 Cr.P.C alleging that the petitioner is ill-treating respondents No.5 & 6 and they are kept under confinement.

**10.** Section 97 Cr.P.C gives power to the Magistrate to issue a search warrant if he has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence and upon search, if the

person is found in the confinement shall be taken before the Magistrate who shall make such order as in the circumstances of the case seems proper. Section 98 Cr.P.C gives power to the Magistrate for the restoration of liberty of a woman or a female child under the age of 18 years who is under abduction or unlawful detention and the female child under the age of 18 years to her husband, parent, guardian or other person having the lawful charge of such child, therefore, admittedly, in this case, the provision of section 98 Cr.P.C does not apply because it deals with a woman or female child below the age of 18 years and the respondents No.5 & 6 are male children. So far the power under section 97 Cr.P.C is concerned such power is liable to be exercised if the Magistrate has a reason to believe that any person is confined under such circumstances **that confinement amounts to an offence**. In the present case admittedly the respondents No.5 & 6 were living with the petitioner/mother who is a natural guardian, therefore, it cannot be termed as 'confinement' and the same is not an offence. In the present case, the Magistrate has not recorded its satisfaction that the respondents No.5 & 6 were in the confinement of the mother which amounts to an offence.

**11.** The Apex Court in the case of **Ramesh vs. Laxmi Bai** reported in **(1998) 9 SCC 266** has held that section 97 of the Cr.P.C does not attract in the case when the child was living with his own father. In the case of **Tejaswini Gaud & others vs. Shekhar Jagdish Prasad Tewari & others**

reported in **(2019) 7 SCC 42** the Apex Court has held that in the child custody matter the ordinary remedy lies wholly under the Hindu Minority and Guardianship Act or the Guardians and Wards Act, as the case may be. In the cases arising out of the proceeding under the Guardian and Wards Act, the jurisdiction of the Court is determined by whether the minor ordinarily resides within the area in which the Court exercises the jurisdiction and the welfare of the child. Even in the writ of *habeas corpus* where the Court is of the view that a detailed enquiry is required the Court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil Court. This Court in the case of **Pushpa Ramesh Kumar Patwa vs. Ramesh Kumar Badri Prasad** reported in **2000 (3) MPLJ 268** has held that in the exercise of power under section 97 of the Code the Magistrate cannot issue a direction for production of a child from the custody of the father and direct that the child shall be in the custody of the mother because the custody of the child with the father does not amount to wrongful confinement thereby no offence is committed attracting the provision of section 97 of the Cr.p.C. The High Court of Calcutta in the case of **Lily Manna vs. State of West Bengal and others** reported in **2008 Cri.LJ 625** has held that *sine qua non* of application of section 97 Cr.p.C is that there has to be, prima facie, finding that the person has been in wrongful confinement and that wrongful confinement must amount to an offence. The High Court of

Rajasthan in the case of **Jaishree Tiwari vs. State of Rajasthan & others reported in 2013 CriLJ 610** has held that the Executive Magistrate has no power under section 97 to wrest custody of the child from its natural guardian. Admittedly, when the child was in the custody of the minor there was no reason to believe that he was under wrongful confinement and as such issuance of the search warrant was itself uncalled for and accordingly the order of the Magistrate was set aside being an illegal, perverse and absolutely abuse of process of Court.

12. Although this Court vide order dated 09.03.2021 has directed the Registrar (Judicial) to interact with the respondents No.5 & 6 personally and submit its report in a closed envelope. The OSD/Registrar has interacted with respondents No.5 & 6 on 09.03.2021 and gave its report to the effect that respondents No.5 & 6 who are 16 years of age want to reside along with their father. The report dated 9.3.21 is reproduced below:

Date: 09.03.2021

In compliance of order of Hon'ble Court, Respondent No.5-Ankit @ Ansh Chakravarti s/o Vikas Chakravarti and Respondent No.6-Aabhas @ Vansh Chakravarti s/o Vikas Chakravarti are brought before me.

I have personally interacted with respondent No.5 -Ankit @ Ansh Chakravarti and Respondent No.6-Aabhas @ Vansh Chakravarti, who are twins. Upon interaction with both of them, they have categorically stated that they do not want to live along with their mother, as their mother used to ill treat with them and with their father. They have stated that presently they are residing with their father Vikas at Narsingharh and both of them are pursuing their studies at Narsingharh. Both



of them have also stated that their father is taking very good care of them, hence, they wish to stay along with their father.

State of No.5-Ankit @ Ansh Chakravarti and Respondent No.6-Aabhas @ Vansh Chakravarti were also recorded.

Interaction with No.5-Ankit @ Ansh Chakravarti s/o Vikas Chakravarti and Respondent No.6-Aabhas @ Vansh Chakravarti s/o Vikas Chakravarti and from their statement it reveals that both the twins do not want to reside along with their mother and are presently residing with their father happily. They also allege ill treatment with them by their mother. It does not appear that both twins are under any kind of influence with their father.

Respondent No.5-Ankit @ Ansh Chakravarti and Respondent No.6 Aabhas @ Vansh Chakravarti, who are 16 years old wants to reside along with their father.

Report along with statement of Respondent No.5-Ankit @ Ansh Chakravarti and Respondent No.6-Aabhas @ Vansh Chakravarti be kept in sealed envelope and put up before Hon'ble Court for kind perusal.

OSD/Registrar

**13.** Respondents No.5 & 6 are aged 16 years, therefore, they are in a position to give their choice as to with whom they want to live. They recorded their statement before the Magistrate as well as before the Registrar of this Court that they are willing to live with their father. So far the allegation against the mother i.e. petitioner is concerned same is very vague in nature. No specific instances have been quoted in their statements about ill-treatment by the petitioner. Some times mother become very strict towards their children than the father, therefore, the Children's liking develops towards the father but that does not mean that the mother ill-treats her children or becomes their enemy. The children spend most

of the time with their mother, therefore, some times does not like the control and strictness of the mother and by no stretch of the imagination, it cannot be termed as an offence that can be led to illegal confinement. It appears that respondents No.5 & 6 were not liking the strictness of the mother, therefore, they have shown their willingness to reside with the father. Since they are aged about 16 years, therefore, it would not be proper to pressurize them to live either with mother or father but so far the order of the Magistrate is concerned it is *per se* illegal and without jurisdiction. Sub Divisional Magistrate has wrongly exercised his power under section 97 Cr.P.C that too without following the principle of natural justice. Sub Divisional Magistrate did not issue a notice to the petitioner and called the children through police and recorded their statement behind the back of the petitioner without there being any cross-examination etc. and passed the order. Respondents No.5 & 6 are minors as per the definition of child under section 2(12) of the Juvenile Justice (Care & Protection of Children) Act, 2015. The Sub Divisional Magistrate has directed the police to produce them before the Court by way of a search warrant without considering that such process may affect their mind, it is nothing but insensitive conduct on the part of the Sub Divisional Magistrate, therefore, the order dated 24.09.2020 passed by the Sub Divisional Magistrate is hereby quashed. Respondent No.4 is directed not to force respondents No.5 & 6 to live with him. They are free to live with their mother.

**14.** As the result, the petition is allowed with a cost of Rs.25,000/- payable by respondent No.4 to the petitioner. The Sub Divisional Magistrate is directed not to behave in this manner in future.

**(VIVEK RUSIA)  
JUDGE**

**hk/**

