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HIGH COURT OF CHHATTISGARH, BILASPUR**WPC No. 2068 of 2014**

- Sonam Devi, W/o Shri Sanjay Choudhary, Aged about 25 years, R/o Sultan Ganj, Gopal Road, Post & Police Station Sultan Ganj, Distt. Bhagalpur (Bihar)

---- Petitioner

Versus

1. State of Chhattisgarh, Through The Secretary, Department of Home Mahanadi Bhawan, Mantralaya, Naya Raipur, Chhattisgarh
2. Collector Ambikapur, District Surguja, Chhattisgarh
3. Sub Divisional Magistrate, Ambikapur, District Surguja, Chhattisgarh
4. Station House Officer, Police Station Gandhi Nagar, Ambikapur, Distt. Surguja, Chhattisgarh
5. Smt. Sarayu Devi, W/o Shri Parmanand Jaiswal, Aged About 60 years
6. Vibhuti Jaiswal S/o Shri Parmanand Jaiswal, Aged about 34 years.
7. Smt. Pallavi Jaiswal, W/o Shri Vibhuti Jaiswal, Aged About 27 years

Respondents No.5 to 7 above all by Caste Kalwar (Jaiswal), R/o Muhalla Patpariya, Kanya Parisar Road, Near Government Primary School, Police Station Gandhi Nagar, Ambikapur, Distt. Surguja, Chhattisgarh.

---- Respondents

For Petitioner : Shri Mateen Siddiqui, Advocate.
 For Respondent No.1 to 4 : Shri Adhiraj Surana, Deputy Govt. Advocate.
 For Respondent No.5 to 7 : Shri CJK Rao, Advocate.

Hon'ble Shri Justice Prashant Kumar Mishra**Order On Board****24/03/2015**

1. The petitioner, mother of child Anmol Jaiswal, is before this Court assailing the order passed by the Sub Divisional Magistrate,

Ambikapur handing over custody of the child to respondent No.5 in purported exercise of powers under Section 97 of the CrPC.

2. The petitioner was married with Ashok (since deceased) on 30.6.2007. Son Anmol, presently aged less than 7 years, was born from the wedlock on 14.4.2008. Ashok died at Kedarpur, Ambikapur on 29.10.2011. The petitioner, a young widow aged about 25 years, decided to remarry with Sanjay Choudhary. Respondents No.5 to 7 moved an application before the Sub Divisional Magistrate, Ambikapur under Section 97 of the CrPC seeking search warrant, releasing boy Anmol from the captivity of his mother i.e. the petitioner and handing over his custody to them. In course of enquiry on the said application, the Magistrate found that the petitioner's husband has not legally divorced from his previous wife and has two children from his first marriage and on this basis, he concluded that it will be for the benefit of the child if he remains in the custody of his grandmother and uncle, the respondents No.5 & 6 respectively.
3. Learned counsel for the petitioner would submit that the custody of minor by parents can never be treated as wrongful confinement, therefore, at the very inception, the Magistrate had no jurisdiction to issue search warrant and thereafter handover custody of boy to a person who is not the natural guardian in terms of Section 5 of the Hindu Adoptions and Maintenance Act.
4. Per contra, learned counsel for respondents No.5 to 7 would submit that in proceeding of this nature, the paramount consideration would

be the welfare of the child, therefore, the Magistrate having given primacy to such aspect of the matter, the impugned order is in accordance with law and the same may not be interfered with.

5. Section 97 of the CrPC is reproduced hereunder for ready reference:-

“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.”

6. A reading of the above provision would manifest that jurisdiction of the Magistrate is attracted only when he has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence. Since parents' possession of the child cannot, under ordinary circumstances, amount to an offence or wrongful confinement, jurisdiction under Section 97 CrPC was not available to the Magistrate for exercising powers against the child. The Magistrate having summoned the minor has gone a step ahead to withdraw his custody from the company of his mother and then to handover to grandmother and uncle.

7. In considered opinion of this Court, in the name of welfare of the child, the Magistrate cannot be permitted to usurp the jurisdiction in the manner so as to permit him to handover custody of minor to one of the contesting claimants. It is more so when decision on such issue can be raised in the manner provided under the Hindu Adoptions and Maintenance Act or the Guardian and Wards Act for which procedure has been laid down under the Family Courts Act. If the Magistrate is permitted to exercise such power, the relevant provision of law would be rendered nugatory.

8. In **Ramesh Vs. Laxmi Bai (Smt)**¹, the following has been held:-

“4. From a perusal of the impugned order of the High Court, it appears to us that though the points which should weigh with a court while determining the question of grant of custody of a minor child have been correctly detailed, the opinion of the High Court that the revisional court could have passed an order of custody in a petition seeking search warrants under Section 97 CrPC in the established facts of the case is untenable. Section 97 CrPC prima facie is not attracted to the facts and circumstances of the case when the child was living with his own father. Under the circumstances, we are of the opinion that the orders of the High Court dated 17-7-1996 and that of the learned Additional Sessions Judge dated 9-7-1996 cannot be sustained and we accordingly set aside the orders and the directions given therein.”

(Emphasis supplied)

9. In **Jaishree Tiwari Vs. State of Rajasthan & Another** {Criminal Misc. Petition No.1377/2012, decided on 23.7.2012}, the Rajasthan High Court has also taken similar view.

¹ (1998) 9 SCC 266

10. In view of the above, the impugned order is set aside. The parties would be at liberty to seek appropriate remedy for seeking the custody of the child. Respondents No.5 to 7 shall handover custody of the child back to his mother i.e. the petitioner within a period of 2 months.

J U D G E

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HEADLINES

SDM has no jurisdiction u/s 97 CrPC to withdraw custody of the child from his mother and handover the custody to grandmother.