

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL MISC. PETITION NO. 257 OF 2015

Bhoj Singh, aged about 33 years, S/o Shri Shankar Singh Verma, Occup. Shiksha Karmi, Address Village : Amora, Police Station: Nandghat, Post Office: Sambalpur, Tehsil: Navagarh, District : Bemetara (C.G.)

... Petitioner

Versus

1. The State of Chhattisgarh, through the Secretary, Department of Home, Zero Point, New Mantralay, P.S. Mandir Hasaud, Naya Raipur (C.G.)
2. The Superintendent of Police, District: Bemetara (C.G.)
3. Sub Divisional Magistrate, Tehsil: Bemetara, District: Bemetara (C.G.)
4. Town Inspector, Police Station Nandghat, District: Bemetara (C.G.)
5. Station House Officer, Mahila Police Station Bemetara, District: Bemetara (C.G.)
6. Smt. Jageshwari, aged about 32 years, W/o Bhoj Singh, at present R/o in the House of Baratu, Village: Somnee, Post Office : Pandaur, Police Station: Utai, Tehsil: Patan, District: Durg (C.G.)

... Respondents

For Petitioner	:	Mr. Bharat Rajput, Advcoate.
For Respondents 1 to 5	:	Mr. V.A. Goverdhan, Panel Lawyer.
For Respondent 6	:	Mr. Punit Ruparel, Advocate.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

08/08/2016

1. The present petition under Section 482 CrPC has been preferred by the Petitioner challenging the order dated 30.8.2014 passed by the Sub Divisional Magistrate, Bemetara in Case No. 11 of 2014.
2. The Petitioner (husband) and Respondent No.6 (wife) were married in the year 2009 and a son was born from their wedlock on 12.4.2010. Soon thereafter the relations between the two got strained and it is said that the wife had left her matrimonial home and started living separately. Meanwhile, the husband had moved an application under Section 9 of the

Hindu Marriage Act for restitution of conjugal rights. Thereafter, the wife had filed an application under Section 97 CrPC before the Sub Divisional Magistrate for issuance of a search warrant and for production of the minor child, Deepanshu. Though the search warrant was issued on various dates but the same could not be executed, and the matter was fixed before the Sub Divisional Magistrate on 21.8.2014. Meanwhile, on 7.8.2014, a search was again conducted at the premises of the Petitioner (husband) and during the course of search, the child, Deepanshu, was found at the house of the Petitioner and Respondents No. 4 and 5 had forcefully removed the minor child from the house of the Petitioner and handed over his custody to Respondent No.6. Thereafter, vide order dated 30.8.2014 the Sub Divisional Magistrate, Bemetara, on an application filed by Respondent No.6 (wife), disposed of the said application under Section 97 CrPC seeking for interim custody of the minor child as not pressed, which is assailed in the present petition.

3. Shri Bharat Rajput, learned Counsel for the Petitioner, submits that in fact the action on the part of Respondents No. 4 and 5 in illegally entering into the premises of the Petitioner and taking away the custody of the child and handing it over to Respondent No.6 is bad in law as on the said date no search warrant was in their possession for conducting the search and therefore the proceeding carried out by Respondents No. 4 and 5 is bad in law. He further relies upon the judgment of the Supreme Court in **Ramesh Vs. Smt. Laxmi Bai, 1999 Cri.L.J. 5023**, and prays for the quashment of the entire action on the part of the Respondents firstly in conducting the search illegally and secondly in handing over the custody of the child to Respondent No.6 and further prays for a direction to the Respondents to hand over the custody of the child back to the Petitioner.

4. Shri V.A. Goverdhan, learned Counsel for the Respondent-State, submits that it is a case where in fact initially the Petitioner (husband) had filed a petition seeking for issuance of a writ of habeas corpus which got dismissed as not maintainable on 8.1.2015. That the Writ Court hearing the said petition of habeas corpus had held that the Petitioner (husband) was having the remedy available to him under the law for seeking of the custody of the child and with the said liberty the petition was dismissed. He further submits that appropriate remedy for the Petitioner (husband) was to move an appropriate application under the provisions of the Guardians and Wards Act and in the gives facts and circumstances of the case more particularly when the child admittedly as per the pleadings of the Petitioner (husband) himself is in the custody and possession of the mother i.e., Respondent No.6 herein, the present petition under Section 482 CrPC would not be maintainable.

5. Shri Punit Ruparel, learned Counsel for Respondent No.6, adopts the reply put forth by Shri V. A. Goverdhan, learned Counsel for the Respondent-State.

6. Having considered the facts and circumstances of the case, the admitted factual position in the instant case is that on the date, i.e., 7.8.2014, when allegedly Respondents No. 4 and 5 had conducted a search, the child was about 4½ years of age which by itself would clearly establish the fact that taking into consideration the age of the said minor child, Deepanshu, the Respondent No.6 (mother) would had been the natural guardian who would be entitled for the custody of the child. Even as on date the age of the child is less than 7 years and for all practical purposes even at this stage the natural guardian of the child would be the mother (Respondent No.6) herself. In that event, if the Petitioner (husband) wants the child to be placed under his custody and if it is the claim of the

Petitioner that he would be in a better position for the upbringing of the child, the appropriate remedy available to the Petitioner would be that of initiating appropriate proceeding under the Guardian and Wards Act.

7. Even the judgment in **Ramesh** (*supra*) which has been relied upon by the Counsel for the Petitioner, reflects that in the said case also the Supreme Court had left it for the Court having jurisdiction under the Guardian and Wards Act to pass appropriate orders in respect of the custody of the minor child.

8. In the instant case also for the given reasons and also in the light of the ratio laid down by the Supreme Court in **Ramesh** (*supra*), this Court is also of the opinion that appropriate remedy available for the Petitioner to take custody of the child would be that of an appropriate proceeding under the provisions of the Guardian and Wards Act.

9. With the aforesaid observations, the present petition stands dismissed. In case if such a proceeding is initiated by the Petitioner, the observations made in the present order shall have no bearing on the merits of that case.

Sd/-
(P. Sam Koshy)
Judge