

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRR No. 825 of 2015**

1. Smt. Soni Kashyap @ Lalli Kashyap W/o Pawan Kashyap Aged About 32 Years R/o Near Kumharpara School, Infornt Of Mahamaya Lodge, Karbala Road, Thana City Kotwli, Tahsil & Distt. Bilaspur Chhattisgarh

---- Applicant**Versus**

1. Pawan Kashyap @ Soni S/o Late Krishna Kumar Kashyap Aged About 39 Years R/o Near Tuteja Furniture, Telipara, Thana City Kotwali, Distt. Bilaspur Chhattisgarh

---- Respondent

For Applicant	:	Shri Parag Kotecha, Advocate
For Respondent	:	Shri Dharmesh Shrivastava, Advocate

Hon'ble Shri Justice Chandra Bhushan Bajpai
Order On Board

15/02/2016

1. Heard on admission.
2. Brief facts required for adjudication of the instant Cr. Revision are that the applicant and the respondent are husband and wife. Out of their wedlock, a son and a daughter now, who are aged about 7 years and 5 years, have born. On 7.1.2015, the applicant had filed an application before the City Magistrate (Executive Magistrate), Bilaspur (CG) unders 97 and 98 Cr.P.C. wherein she prayed that the respondent is not taking care for School education of both the children and also he was beating the applicant and the applicant anyhow arranged for the School fee and deposited the same. It is alleged that the respondent is in a habit of consuming liquor. The applicant wants to keep the son and daughter with her and she is under suspicion that the respondent may send the son and daughter at a place where it will be difficult for her to trace them, if no timely action is taken. By

filing the said application, the applicant prayed that a search warrant be issued for the search of the son and daughter and also they be given in her custody. The concerned City Magistrate has registered the case as Case No.165/2015 and initiated the proceedings on 9.1.2015. The applicant informed the Court that as the respondent has abused and also assaulted her, therefore, she is living in the house of her father. On 24.2.2015, the learned City Magistrate has issued the search warrant. Thereafter, again on 27.2.2015 search warrant was issued. The respondent has preferred Cr. Revision No.46/2015 as an application under Sections 97 & 98 Cr.P.C. is accepted and search warrant is issued against him. The revisional Court vide order dated 31.7.2015 held that as per admitted facts, age of the girl is above 5 years and age of the son is above 7 years. Also held in para 9 & 10 that there is no reason for believing that both the children are confined with the respondent. Hence, the revisional Court allowed the revision and set aside the order dated 24.2.2015 for issuance of search warrant. The revisional Court further directed that the applicant may meet her minor children everyday evening for an hour. Against the said order the applicant preferred the instant Cr. Revision wherein it is submitted that the order passed by the revisional Court is illegal, contrary to the facts and against the well settled law. Paramount consideration of the children before passing an order had to be considered. The revisional Court has exercised the power under Section 482 of Cr.P.C. hence, the order is without authority and liable to be set aside. Both the children require their mother's care and good atmosphere. The respondent had taken the forceful custody and when the applicant went to meet her children the respondent did not allow her to meet them, locked the door and humiliate the applicant and her parents. Without considering the matter properly, the revisional Court has passed the order. Evidence and contention of the applicant has been straightaway rejected, hence, it is prayed that as the order of the Magistrate is not revisable,

hence, the order dated 31.7.2015 be set aside and order dated 24.2.2015 be restored in the interest of justice.

3. Learned counsel for the respondent has vehemently opposed the contention of learned counsel for the applicant.

4. Heard counsel for the parties.

5. It is submitted on behalf of the applicant that the grounds taken in the instant Cr. Revision have not been considered by the Court below. The facts are not properly considered. Paramount welfare of the children is not seen. Issuance of a search warrant is an interlocutory order, hence, against the said order revision is not maintainable. The revisional Court has not locus to pass such an order. Counsel for the applicant placed reliance on **1988 CRI.L.J.230 (Zahirul Hassan Vs. State of Uttar Pradesh)** wherein, the Single Bench of Allahabad High Court in a complaint of a child aged about 1½ years forcibly taken away by the husband on an application moved under Section 97 Cr.P.C. despite the order to handover the minor child to the custody of mother. As per Mohammedan Law, mother is the natural guardian of a child till 7 years of age, therefore, the husband is required to comply with the order of the trial Court for delivery of custody of the child to his wife.

6. It is submitted on behalf of the applicant that the above cited case law is applicable to the facts of the present case and also as the order is an interlocutory order, the same cannot be interfered with by the revisional court.

7. For the purposes of appreciation regarding the arguments advanced in this behalf, the instant Cr. Revision and the documents annexed are perused.

8. So far as the revisional jurisdiction of this Court is concerned, same is under the provisions of Section 397 read with Section 401 Cr.P.C. in addition to it, this Court under Section 482 Cr.P.C. exercising the inherent jurisdiction makes an order to secure the ends of justice. As per settled law as provided in the Hindu Minority & Guardianship Act, 1956, Section 6 (a), in case of a boy or an unmarried girl, the natural guardian is the father, and after him, the mother; with a proviso that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

9. In the instant case, as per para 9 of the order passed by the revisional Court, it goes to show that the son is more than 7 years and daughter is more than 5 years of age. With this, the said proviso regarding the custody of the minor below age of 5 years ordinarily is not applicable. So far as provisions of section 97 & 98 Cr.P.C. are concerned, they are for the search of persons wrongfully confined and also enables the power to compel restoration of an abducted females. From very outset, i.e. order dated 7.1.2015 of the City Magistrate on the basis of application it does not reflect that both the wards are not either wrongfully confined or abducted female generally. Also the said Cr. Revision No.46/2015 dated 31.7.2015 were heard bi-party. No evidence has been adduced regarding the age of both the children as they are below 5 years and nothing has been adduced regarding wrongful confinement or the abduction regarding alleged wards.

10. In the considered view of this Court, as this Court may examine any order passed by the sub-ordinate Court regarding its purity, legality and impropriety under Section 482 Cr.P.C, from perusal of the entire material I do not see any reason for the City Magistrate to issue a search warrant. So far as cited case law is concerned, it is a case of Muslim minor under the Mohammedan Law. Male child till the age of 7 years, mother is the natural guardian. Also in the said cited case law there is an allegation regarding

forcibly taking away of the child from her mother. In the present case, as the applicant failed to demonstrate that the respondent forcibly taken away both the children or confined or abducted. In the considered view of this Court, the case law cited is of no help for the applicant.

11. On due consideration, without examining the authority of the Sessions Judge to proceed with the hearing of a Cr. Revision this Court is of the considered view that the City Magistrate has committed illegality or impropriety for the issuance of search warrant against the respondent. With this, I am not inclined to grant any relief to the applicant as prayed for.

12. Consequently, the instant Cr. Revision is dismissed at the motion stage itself.

Sd/

(Chandra Bhushan Bajpai)

Judge