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**HIGH COURT OF CHHATTISGARH, BILASPUR****Cr.M.P. No. 698 of 2017****Order Reserved on 11.07.2017****Order Delivered on 27.07.2017**

Pratibha Lillariya W/o Sailesh Lillariya, Aged About 35 Years R/o Through Ishwar Lal Yadu/ Prashansha Yadu, Dindyal Housing Board Colony Kairinbhata, House No. 110 1st Floor Tehsil & District Rajnandgaon Chhattisgarh

**---- Petitioner****Versus**

Sailesh Lillariya S/o D. Lillariya, R/o 11/3 Nehru Nagar West Bhilai District Durg Chhattisgarh

**---- Respondent**


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| For the Petitioner | : | Shri Ghanshyam Patel, Advocate. |
| For the Respondent | : | Shri R. Pradhan, Advocate.      |

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**Hon'ble Shri Justice Rajendra Chandra Singh Samant****CAV ORDER**

1. This petition has brought under Section 482 of the Code of Criminal Procedure with a prayer to exercise inherent jurisdiction of this Court under Section 482 of the Cr.P.C. for quashing the impugned orders passed by the Second Additional Sessions Judge, Durg vide order dated 2.6.2017 in Criminal Appeal No. 243 of 2016 and the order by the Sub-Divisional Magistrate, Durg in Case No. 5151 of 2014 dated 3.10.2016.

2. The petitioner and the respondent are wife and husband and they had a child, namely, Chayank aged about 26 months on the date of filing of this petition. The petitioner filed an application under Section 97 read with 98 of the Code of Criminal Procedure before Sub-Divisional Magistrate, Durg alleging that she was driven out from her matrimonial home on 14.9.2013

and her son aged about 26 months was detained by the respondent wrongfully and without her consent. Sub-Divisional Officer issued a notice to the respondent for production of this child and it was not complied with. Thereafter, S.D.M. Durg issued a search warrant. The child was recovered from the custody of Ramendra Verma at Chandigarh on 23.7.2014 and produced before the Sub-Divisional Magistrate, Durg on 30.7.2014. Thereafter, the S.D.M. Durg by order dated 3.10.2016, handed over the custody of the child to the petitioner and passed an order (Annexure-P/1) by giving a finding of entitlement of the petitioner to have the custody of the child. This order was challenged in Criminal Revision No. 234 of 2016 before the Second Additional Sessions Judge, Durg. The Second Additional Sessions Judge passed an order dated 2.6.2017 by which the order passed by the S.D.M. Durg was set aside. Hence, this petition.

3. Learned counsel for the petitioner submits that the order of the S.D.M. passed in exercise of powers under Section 97 read with 98 of Cr.P.C. is well within the jurisdiction and the revisional Court below has committed procedural impropriety and illegality in not considering the material on record and passed the order in violation of the principles of natural justice. Hence, the order impugned is illegal, which may be quashed. It is also submitted that the mother is a natural guardian of minor child below the age of five years. Hence, the petitioner is entitled to have the custody of the child and the order of the S.D.M. Durg did not suffer from any infirmity.

4. Learned counsel for the respondent submits that the petitioner left her matrimonial home on her own will leaving the child Chayank and lodged a First Information Report against the respondent in Mahila Thana, Durg. After

passing of eight months from the date which she left her matrimonial home, the application under Section 97 read with 98 of the Cr.P.C. was filed before the S.D.M. Durg which was dismissed as withdrawn. Thereafter, a repeat application under Section 97 of the Cr.P.C. was filed. In the meanwhile, the child was continuously in the custody of the respondent. The respondent being father of the child is also a natural guardian and is entitled to have the custody of his own child. The order passed by the Revisional Court below is legally sustainable order, in which it has been clearly held that under Section 97 of the Cr.P.C. there is no provision to decide the entitlement of custody of a child and the jurisdiction to give decision on the entitlement of custody of a child lies only with the Civil Court or Family Court. For these reasons, the order of the S.D.M. Durg was an illegal order in the eyes of law.

5. Reliance has been placed by the respondent on the judgment of the High Court of Punjab and Haryana at Chandigarh in **Bir Singh and Another vs. State of Punjab and Another** reported in **CRM-M-5552 of 2011**, order dated 30.10.2013, in which it was held that Section 97 of the Cr.P.C. has no jurisdiction to decide the entitlement for custody. The proper course for the parties was to approach the Competent Court. Reliance has also been placed on the judgment of Bombay High Court in **Vishal Jivan Jogure vs. Smt. Megha Vishal Jogure and Anr.** reported in **2005(4) MHLJ 54** in which it was held that the custody of a minor child with father does not amount to any offence which being so, no warrant can be issued under Section 97 of the Cr.P.C. Reliance has also been placed on the judgment of the Apex Court in the case of **Anjali Anil Rangari vs. Anil Kripasagar Rangari and Others** reported in **(1997) 10 SCC 342** in which it was held that the question of guardianship of a child has to be decided by a Family Court/ Appropriate

Court under the provisions of Guardian and Wards Act, 1890. Hence, it is prayed that this petition may be dismissed.

6. Learned counsel for the petitioner submits in reply that the child Chayank was not found in the custody of the respondent/ the father when he was searched and recovered on the basis of search warrant. He was recovered from the possession of Ramendra Verma in Chandigarh. Hence, in this situation the order passed by the S.D.M. Durg was a proper order for giving custody of a child to the petitioner/ the mother.

7. Learned counsel for the respondent submits further that in the proceedings before the S.D.M. Durg a document Ex. D/1 was filed in which the petitioner had made a statement that she has left her matrimonial home and child on her own will and her in-laws are looking after the child well. The copy of the statement given by the respondent before the S.D.M. Durg is also on record. In this statement, he has stated that he alongwith his son Chayank and mother had been to Mathura at her sister's house, where he received information on 13/ 14<sup>th</sup> July, 2014 about the illness of his father residing at Bhilai, for which he had to come back leaving his mother and child. In the meanwhile, his brother-in-law Ramendra Verma was transferred from Mathura to Chandigarh and as such the child was in the company of Ramendra Verma in Chandigarh. It is submitted that on the basis of this statement it is clear that the child was though found in Chandigarh, but he was in custody of Ramendra Verma and his mother under the authority of the respondent.

8. Considering all the submissions made and the material on record and

also the principles of law in this respect, it is very clear that Section 97 of the Cr.P.C. does not empower the Magistrate to decide the entitlement of custody of a minor especially when it is a matrimonial dispute. The respondent being father of the child has equal entitlement for the custody of the child. Hence, the order passed by the S.D.M. Durg had been without jurisdiction which has been rightly set aside by the Revisional Court below, which needs no interference. The correct forum to be approached for legal custody of a child is the Family Court. The petitioner shall be at liberty to file a suitable application before the concerned Family Court.

9. In view of the above, this petition is without merit and it is dismissed accordingly.

**Sd/-**

**(Rajendra Chandra Singh Samant)**  
Judge