

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****RESERVED ON 3-7-2019****DELIVERED ON 8 -7-2019****CRMP No. 1290 of 2018**

Smt. Versha Deshmukh wife of Tejram Deshmukh, aged about 32 years, resident of 5 building, Quarter No. H-2/38, Road No. 6, Durg, Police Station, City Kotwali, Durg, Tahsil and District Durg (CG)

---- Petitioner**Versus**

Tejram Deshmukh son of Khorbahra Ram Deshmukh, aged about 38 years, resident of Shyam Nagar, Risali, Quarter No. 61, Govt. Higher Secondary School, near Risali Village, Tahsil and District Durg (CG)

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For petitioner	: Shri B.P. Singh, Advocate
For respondent	: Shri Gurudev I. Sharan, Advocate

Hon'ble Shri Sharad Kumar Gupta, Judge**CAV ORDER**

1. Heard on I.A. No. 2/2018 for taking documents on record.
2. On due consideration, the application is allowed. The documents are taken on record.
3. Petitioner has preferred this CRMP under Section 482 of the Code of Criminal Procedure (in brevity Cr.P.C.) for quashing the impugned order dated 26-6-2018 passed by the Addl. Sessions Judge, Durg in Cr. Revision No. 000087/2018 whereby and whereunder he set aside the order of Sub Divisional Magistrate dated 15-2-2018 and ordered him to hand over two children to respondent within 10 days.
4. In brief the petitioner's case is that she is legally wedded wife of respondent. In their wedlock two children namely Ku. Yana and Purva Deshmukh were born. At the time of the filing the application before SDM Durg Ku. Yana was 10 years old and Purva was 5 years old. Now the

Children are living with petitioner. She is living in her paternal house since 16-1-2018. She had filed an application under Section 97 of the Cr.P.C. SDM Durg summoned the respondent. Respondent was out of station therefore, his father appeared along with the children before the SDM Durg. On 15-2-2018 SDM durg granted the custody of children in favour of petitioner. Being aggrieved the respondent preferred criminal revision. The Addl. Session Judge Durg set aside the order of SDM and directed him to hand over the children in the custody of respondent.

5. In brief case of the respondent is that application under Section 97 of the CRPC is not tenable because respondent is also natural guardian of the children. The petitioner ought to have filed the application for the custody of children under the Guardian and Wards Act.

6. Counsel for the petitioner argued that looking to the welfare of the children petitioner is the best person to get the custody of the children. Revisional Court had not inquired about the wish and will of children. This Court may call the parents and children and try to amicable settlement.

7. Counsel for the respondent argued that at the time of filing of the petition, petitioner did not raise that Court may try to amicable settlement between the parties. SDM has no right to proceed under Section 97 of the Cr.P.C. against the father of children.

8. Counsel for the respondent placed reliance in the matter of **Ramesh -v- Laxmi Bai (Smt.)** [1998 (9) SCC 266], Their Lordship of SupremeCourt observed in para 4 which reads as under :-

“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.”

9. It would be pertinent to mention the provision of Section 97 of the Cr.P.C. Which are extracted below :-

“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.”

10. The provision of Section 6-a of the Hindu Minority and Guardianship Act, 1956 (in brief 'Act of 1956') is noticeable which reads as under :-

“6. Natural guardians of a Hindu minor—The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl— the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.”

11. At the time of the filing of application under Section 97 of the Cr.P.C. the girl was 10 years old and boy was 5 years old. Thus, as per the provisions of Section 6 (a) of Act of 1956, the respondent was the natural guardian of children.

12. If the children were living along with respondent then it could not be said that he confined them under such circumstances, the said confinement was an offence.

13. Looking to the above mentioned facts and circumstances and looking to the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matter of **Ramesh** (supra) this Court finds that in the case in hand Section 97 of the Cr.P.C. was not attracted.

14. This is significant that petitioner did not approach for the custody of children and appointment of her as guardian to the competent court. Instead of doing so she has chosen to approach in the court of SDM.

15. In **Parbatbhai Aahir v. State of Gujarat**, [(2017) 9 SCC 641], again the Hon'ble Supreme Court has had an occasion to consider whether the High Court can quash the FIR/complaint/ criminal proceedings, in exercise of the inherent jurisdiction under Section 482 CrPC. Considering a catena of decisions on the point, the Hon'ble Supreme Court summarised the following propositions:

“(1) Section 482 CrPC preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

(2) xxx xxx xxx

(3) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

(4) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised (i) to secure the ends of justice, or (ii) to prevent an abuse of the process of any court.

(5) xxx xxx xxx

(6) xxx xxx xxx

(7) xxx xxx xxx

(8) xxx xxx xxx

(9) xxx xxx xxx

(10) xxx xxx xxx

16. In the matter of **Asmathunnisa v. State of A.P.**, (2011) 11 SCC 259, Hon'ble Supreme Court has held in para 12 that :-

“12. This Court, in a number of cases, has laid down the scope and ambit of the High Court's power under Section 482 of the Code of Criminal Procedure. Inherent power under Section 482 CrPC though wide has to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. The authority of the Court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the Court, then the Court would be justified in preventing injustice by invoking inherent powers in the absence of specific provisions in the statute.

17. In the case in hand, it does not appear that there is an abuse of process or intervention is necessary to secure ends of justice. Thus, looking to the aforesaid judicial precedent laid down by Hon'ble Supreme Court in the matters of **Asmathunnisa** (supra) and **Parbatbhai Aahir** (supra) this court finds that on the ground of abuse of process and to secure ends of justice, this Court cannot intervene.

18. Looking to the above mentioned facts and circumstances of the case, this Court finds that it is not a fit case where the extra ordinary jurisdiction of Section 482, Cr.P.C. be invoked which is invoked sparingly with care and circumspection. Consequently, the instant CRMP is dismissed at motion stage without entertaining it for final hearing.

19. Looking to the above mentioned facts and circumstances of the case it is ordered that the order of revisional court shall remain stayed for 2 months from the date of this order enabling the parties to approach to the competent court for obtaining the suitable order regarding custody and appointment of the guardian.

20. In view of above, I.A. No. 1/2018 for grant of stay stands disposed of.

Sd/-
(Sharad Kumar Gupta) Judge