

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition (C) No. 1637 of 2020

Dinesh Pradhan S/o Shri Balram Pradhan Aged About 26 Years R/o Village Kailashpur (Dongripali) , Police Station and Tahsil Pithora, District Mahasamund Chhattisgarh.

---Petitioner(s)

Versus

1. State of Chhattisgarh Through Collector/District Magistrate Mahasamund, District Mahasamund Chhattisgarh.
 2. Sub Divisional Magistrate Pithora District Mahasamund Chhattisgarh.
 3. Station House Officer Pithora Tehsil Pithora, District Mahasamund Chhattisgarh.
 4. Superintendent of Police Mahasamund District Mahasamund Chhattisgarh.
 5. Priyanka Pradhan W/o Shri Dinesh Pradhan Aged About 27 Years R/o Village Kailashpur (Dongripali), Police Station and Tehsil Pithora , District Mahasamund Chhattisgarh.
 6. Balram Pradhan S/o Shri Jagdish Aged About 50 Years
 7. Smt. Mongra W/o Late Shri Jagdish Aged About 70 Years
 8. Shreya Pradhan S/o Shri Balram Aged About 48 Years
 9. Pavitra Pradhan D/o Shri Jagdish Aged About 32 Years
- Respondents No. 6 to 9 are R/o Village Kailashpur (Dongripali) , Police Station And Tehsil Pithora, District Mahasamund Chhattisgarh.

---Respondents

For Petitioner	:	Shri Sarfaraz Khan, Advocate.
For State	:	Ms. Sunita Jain, Govt. Advocate.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

04.08.2020

1. The challenge in the present writ petition is to the order passed by the Sub Divisional Magistrate (in short, SDM), Pithora, District Mahasamund, dated 13.07.2020. Vide the impugned order, the SDM has on an application moved by the Respondent No.5 under Section 97 of the Cr.P.C. allowed the same and has ordered for the custody of the child born out of the marriage of the respondent No.5 with the present petitioner be given to respondent No.5.
2. Having perused the impugned order and the contents of the same, it reveals that the marriage between the petitioner and the respondent No.5

took place on 22.04.2018 and a child from the said wedlock was born to them. That on the date when the application was filed by the Respondent No.5, a child of which the custody was being sought by the respondent No.5 was just three months old and looking into the tender age of the child the SDM has allowed the application under Section 97 Cr.P.C.

3. During the course of the hearing, learned counsel for the petitioner submits that pursuant to the order of the SDM, the custody of the child has been given to the respondent No.5 the mother i.e. the wife of the petitioner.
4. The challenge to the order is primarily on the ground that the SDM does not have the power and jurisdiction to decide the issue of custody of a child invoking the provisions of Section 97 and 98 of Cr.P.C. The contention further is that if at all if the respondent No.5 wanted the custody of the child, she should have approached the concerned Family Court under the provisions of the Guardians and Wards Act, 1890 (in short, the Act, 1890). Further contention of the petitioner is that the application of the Respondent No.5 under Section 97 Cr.P.C. was not maintainable itself as the custody of the child was with the petitioner, the Biological Father, which would not firstly amount to illegal confinement, secondly it also would not amount to an offence as is required for attracting Section 97 Cr.P.C.
5. Perusal of the impugned order clearly reflects that the contention of the respondent No.5 was that the child was just three months old and that it cannot survive without breast feeding which was being provided. That in the absence of the child not being provided with the breast feed, the very survival of the child would be difficult and these are aspects which have been considered by the SDM.

6. Though, prima facie this court is of the view that for deciding an issue of custody of a child, the proper forum to decide is the one prescribed under the Act, 1890. So far as Section 97 Cr.P.C. is concerned, this court again is of the view that a child in possession of the Biological Father cannot be said to be in illegal confinement unless there is an order of a court otherwise. At the same time, it would also not amount to an offence as the possession of the child with the father was not for any unlawful purpose so as to attract the provision of Sections 97 or 98 Cr.P.C. However, still this court is of the opinion that in the facts of the present case where, when the application was filed before the SDM, the child was just three months old and was totally depending upon the breastfeed, it was required that the custody of the child be given to the mother or else, the survival of the child would had been difficult. At this tender age if the custody is not provided to the mother or if the father insist for the custody of the child to be retained by him, then the finding of the SDM that he has reason to believe that the said custody of the child with the father may amount to an offence cannot be said to be firstly illegal and secondly illogical. A child of that tender age requires for the betterment of the growth of the child to be in custody of the mother who can breastfeed the child the maximum at that stage, otherwise it would definitely be depriving the mother her right to bring up of the child during that stage and age and it would also be denying the child its right of being fed by the mother, particularly when the mother can and she is willing.
7. Given the said facts and circumstances of the case, this court finds it difficult to hold that the order to be bad or warrants interference. However, now that the order under Section 97 Cr.P.C. having been passed by the SDM, it is left open for the petitioner if he so wants to avail appropriate

remedy under the Act, 1890 for obtaining the custody of the child in accordance with law by moving an appropriate application before the appropriate forum.

8. It is made clear that in the event if any such application is moved by the petitioner before the appropriate forum, the order passed by the SDM or the observations made in the said order dated 13.07.2020 would not come in the way of the petitioner in seeking the appropriate relief that he intends to claim.
9. Needless to mention that in the event of any such occasion arising, the observations made by this court in the present writ petition also should not have any influence upon the forum deciding the application under the Act, 1890 to be preferred by the petitioner, if any.
10. The writ petition accordingly stands disposed of

Sd/-
(P. Sam Koshy)
Judge

inder