

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

CRR 600 of 2022

**Shrimanta Patra
Vs.
State of West Bengal & Anr.**

For the State : Mr. Avishek Sinha, Adv.

**Heard &
Judgement on : 20.06.2022.**

Bibek Chaudhuri, J.

The petitioner is absent when the matter is taken up for hearing. It is submitted by the Learned Advocate for the opposite party no. 1/State of West Bengal that the petitioner used to move the instant application in person. However, for consecutive dates he failed to take any step. Therefore, this matter is fixed for order.

The instant criminal revision has been filed challenging legality, validity and propriety of the order dated 1st February, 2022 passed by the Learned Additional Chief Judicial Magistrate, Tehatta in connection

with Case No. 428/2021 under Section 97 of the Code of Criminal Procedure directing the Officer-in-Charge, Haroa Police Station to recover the child aged about five years of the parties from the house of his father, petitioner herein and to produce him in Court on the next date of hearing on 24th February, 2022. It is needless to say that the aforesaid order was passed upon an application under Section 97 of the code of Criminal Procedure.

Section 97 runs thus:-

“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”.

Thus, it appears from plain reading of the provision contained in Section 97 of the Code of Criminal Procedure that it is *sine quo non* that any order passed under Section 97 must be preceded by recording of reason to believe and finding that the alleged confinement of any person

in the particular facts and circumstances of the case amounts to a wrongful confinement.

It is not in dispute that the child is now living under the custody of her father who is his natural guardian. Since the child is aged about five years, the mother can claim her custody and it is open for the Court considering the paramount interest of the child to pass necessary order under the Guardians and Wards Act. A criminal Court cannot generally pass an order for custody taking the child from the lawful custody of the father and handing him over to the custody of her mother.

In support of my observation the decision of this Court in ***Atanu Chakraborty –Vs.- State of West Bengal & Anr.*** reported in **2010 Vol. 2 CHN 556** and ***Ramesh –Vs.- Lakshmi Bai*** reported in **(1998) 9 SCC 266** may be relied on.

For the reasons stated above, this Court finds that the impugned order dated 1st February, 2022 cannot be sustained and accordingly, the same is set aside.

The instant revisional application is, thus, **allowed** on merit.

There shall be no order as to costs.

(Bibek Chaudhuri, J.)