

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.1089 of 2022

Arising Out of PS. Case No.-68 Year-2021 Thana- SAHARGHAT District- Madhubani

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Viven Choudhary @ Vivesh Kumar Kamat S/O Lal Kamat R/O Village-
Gamhariya, P.S.- Benipatti, District- Madhubani.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Home Department,
Government of Bihar Old Secretariat, Patna-1
2. The District Magistrate, Madhubani Bihar
3. The Superintendent of Police, Madhubani. Bihar
4. The SHO, Saharghat, P.S.- Madhubani. Bihar
5. F
6. G
7. X

... .. Respondent/s

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Appearance :

For the Petitioner/s : Ms.Vagisha Pragya Vacaknavi, Advocate
For the Respondent/s : Mr. P. Nr. Sharma, Advocate

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 04-01-2023

For maintaining grace, confidentiality and dignity of a family of which respondents No. 5, 6 and 7 are members, their names have been concealed in the present judgment and order and are being referred to as F, G and X respectively.

2. The petitioner claims that X is his wife, who is a major and presently in illegal confinement of F (father) and her



G (grandmother). By making the present application filed under Article 226 of the Constitution of India, the petitioner is seeking an issuance of a writ in the nature of writ of *habeas corpus* commanding the respondents to produce X, who is in illegal confinement of her father and grandmother.

3. It emerges from the pleadings in the writ petition that father of X had got registered an FIR giving rise to Saharghat P.S. case no. 68 of 2021 on 18.06.2021 disclosing commission of the offences punishable under Sections 363/366(A) read with Section 34 of the Indian Penal Code against eight named accused persons including the petitioner with the allegation that X had been kidnapped by the accused persons either for immoral trafficking or for getting her married. The petitioner was taken into custody in connection with the said case and finally came to be released on regular bail under an order of this Court. It is the petitioner's further case that he and X have married each other willingly which was solemnized in a temple at Hazipur and both of them are major. According to him respondent no. 5 had given a false information in the FIR that X was aged 15 years. It also emerges from the pleadings that a charge-sheet has been submitted against the petitioner by the police for commission of offences punishable under Sections



363, 366A, 376 of the Indian Penal Code and Section 4 of the The Protection of Children from Sexual Offences Act, 2012. It has also been pleaded that in her statement recorded under Section 164 of the Cr.P.C., X has denied the prosecution's case of her kidnapping. She also deposed that she and the petitioner had stayed in a hotel for nearly a week. Learned Magistrate before whom the statement of X was recorded under Section 164 of the Cr.P.C., assessed age of X as 16 years.

4. Learned counsel appearing on behalf of the petitioner has argued that during the medical examination age of X has been found to be 17 years. Further, X, in her statement before the police under Section 161 of the Cr.P.C. during the course of investigation of the criminal case had disclosed her age to be 19 years, which is her correct age as would be evident from the Aadhar Card and Election Voter ID Card. She has argued that as X is in an illegal confinement of her father, this Court's intervention is required by issuing appropriate writ/direction including writ in the nature of writ of *habeas corpus* for production of X before this court.

5. It is, however, apparent from Annexure-7 to the writ application that the custody of X has been handed over to respondent no. 5 under an order passed by the court below.



6. In response to a query made by this Court as to why the petitioner, instead of invoking Sections 97 and 98 of Code of Criminal Procedure, 1973, has invoked extraordinary writ jurisdiction of this Court under Article 226 of the Constitution of India, she has submitted that the District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class, who are authorised to exercise their jurisdiction under the said provisions do not possess the powers to determine the age of X and in such background, it would be an exercise in futility if the petitioner is made to approach the authorities under the said provisions of the Cr.P.C.

7. In order to deal with the aforesaid submission made on behalf of the petitioner, we need to notice the provisions under Sections 97 and 98 of the Cr.P.C. are read as under:

"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.

98. Power to compel restoration of abducted females.—Upon complaint made on oath of the abduction or unlawful detention of a woman, or a female child under the age of eighteen years, for any unlawful purpose, a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.”

8. On plain reading of Section 97 of the Cr.P.C., it can be easily discerned that on a belief that any person(s), if confined under a circumstance that the confinement amounts to an offence, the District Magistrate, Sub-Divisional Magistrate or a Magistrate of the First class can issue a search warrant and the person to whom such warrant is directed can search for the persons so confined and such search shall be made in accordance therewith and the persons if found would be required to be immediately taken before a Magistrate who shall



thereafter make such order as in the circumstances of the case seems proper. As under Section 97 of the Act, officials exercise similar powers when it comes to unlawful detention of, “woman” or “a female child” under the age of 18 years when a complaint is made on oath of abduction or unlawful detention. Under Section 98 when a complaint is made to the Magistrate, he has the authority to make an order for immediate restoration of such “woman” to her liberty or such “female child” to her husband, parent, guardian or other person having the lawful charge of such child. The Magistrate has been given the authority to compel compliance with such order using such force as may be necessary. In our opinion thus, based on clear reading of Section 98 of the Act., a District Magistrate, Sub-Divisional Magistrate or the Magistrate of First Class has the jurisdiction to make an order for immediate restoration when a complaint is made regarding unlawful detention of a woman to her liberty or a “female child” to her husband, parent, guardian or other persons having lawful charge of such child.

9. The plea that since a District Magistrate or Sub-Divisional Magistrate or Magistrate of First Class does not have the jurisdiction to determine age of a person under any provision of law, he cannot exercise power under Section 98 of the Act is



wholly misconceived.

10. It is well established legal principle that when a power is conferred on a statutory authority, such power will also include other incidental or ancillary powers without which the main power cannot be exercised. It is settled legal principle that when a statutory authority is conferred with a power to do something, all incidental or ancillary powers to effectuate such powers are within the conferment of such power, although not expressly conferred. This legal principle is unexceptionable, in our opinion.

11. We are, thus, of the considered view that while exercising jurisdiction under Section 98 of the Cr.P.C., the concerned Magistrate has the jurisdiction to determine age of a woman/female child upon receiving a complaint on oath of her abduction or unlawful detention, for the limited purpose of exercise of power under the said provision.

12. The petitioner has, thus, an alternative, equally efficacious alternative statutory remedy under Section 98 of the Cr.P.C.. There is no extraordinary circumstance in the present case, which would require this Court's intervention under extraordinary writ jurisdiction under Article 226 of the Constitution. It is true though that existence of alternative



remedy is not a complete bar to the maintainability of writ petition, it is also trite at the same time that a writ petition can be entertained in exceptional circumstances only when there is statutory alternative remedy available.

13. In view of the discussions noted above, we are of the opinion, that no interference is required by this Court in the present case.

14. This application is, accordingly, dismissed with a liberty to the petitioner to invoke appropriate provision of law before appropriate forum in accordance with the procedure prescribed under Section 98 of the Cr.P.C..

(Chakradhari Sharan Singh, J)

I agree
Khatim Reza, J:-

(Khatim Reza, J)

Anand/Gaurav/-

AFR/NAFR	NAFR
CAV DATE	08.12.2022
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