



2024:KER:26037

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

&

THE HONOURABLE MR. JUSTICE G.GIRISH

THURSDAY, THE 4TH DAY OF APRIL 2024 / 15TH CHAITHRA, 1946

WP(CRL.) NO. 163 OF 2024

PETITIONER:

DR. ATHULYA ASOK
AGED 37 YEARS
D/O. LATE SHRI P.S. ASOK, THOTTUNGAL HOUSE, NURANI P.O,
PALAKKAD DISTRICT, PIN - 678004

BY ADVS.
JACOB SEBASTIAN
WINSTON K.V
ANU JACOB

RESPONDENTS:

- 1 THE STATE POLICE CHIEF
STATE POLICE HEADQUARTERS, VELLAYAMBALAM P.O,
THIRUVANANTHAPURAM, PIN - 695010
- 2 THE DISTRICT POLICE CHIEF THRISSUR
OFFICE OF THE DISTRICT POLICE CHIEF, RAMAVARMAPURAM
ROAD, MANNUMKAD, RAMAVARMAPURAM P.O, THRISSUR DISTRICT,
PIN - 680631
- 3 THE STATION HOUSE OFFICER
AYYANTHOLE POLICE STATION, AYYANTHOLE P.O, THRISSUR
DISTRICT, PIN - 680003
- 4 THE CONSULATE GENERAL OF INDIA
AL HAMRIYA, DIPLOMATIC ENCLAVE, P.O BOX NO.737, DUBAI,
UNITED ARAB EMIRATES, PIN - 737



- 5 P.U VALSALA
W/O. LATE C.K BALCHANDRAN, SOWPARNIKA, OLARIKKARA,
PULLAZHI P.O, THRISSUR DISTRICT, PIN - 680012
- 6 RAJESH BABU
POYIL HOUSE, PAYANGADI P.O, KANNUR DISTRICT, PIN-670
303, PRESENTLY RESIDING AT FLAT NO.3 A3, TOWER 1, KENT
MAHAL, BRAHMAPURAM, INFO PARK ROAD, KAKKANAD, ERNAKULAM
DISTRICT, PIN - 682030
- 7 ANJU RAJESH
BUILDING NO.26A, AL GERIA STREET, BEHIND MIDRIFF CITY
CENTER, DUBAI, WORK ADDRESS REVENUE DEPARTMENT, FLY
DUBAI OFFICE, DUBAI, PIN - 737
- 8 NANDA RAJESH
GALADARI ADVOCATES AND LEGAL CONSULTANTS, GHUBAIBA
STREET, AL FAHIDI, DUBAI, PIN - 7992

BY ADVS.

ABHILASH K.N.

SUNIL NAIR PALAKKAT(K/1049/1999)

RITHIK S.ANAND(K/001899/2021)

RISHI VARMA T.R. (K/002025/2019)

K.M.TINTU(K/000478/2017)

ANU PAUL(K/002201/2021)

SREELAKSHMI MENON P. (K/001252/2022)

SRI.T.A.SHAJI, DIRECTOR GENERAL OF PROSECUTION

SHRI.P.NARAYANAN, ADDL. P.P.

SMT RASHMI K.M- SR GOVERNMENT PLEADER

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR ADMISSION
ON 21.03.2024, THE COURT ON 04.04.2024 DELIVERED THE FOLLOWING:



J U D G M E N T

G. Girish, J.

The petitioner in this writ petition under Article 226 of the Constitution of India, seeking a writ of habeas corpus, is the mother of the detenu, a boy aged 13 years. She had re-married after the dissolution of her marriage with the father of the detenu. In the wedlock of the petitioner with her present husband, she gave birth to a baby girl on 07.12.2023. The father of the detenu (petitioner's previous husband), who was employed in Dubai, had passed away on 27.10.2023 at Thrissur. The detenu was under the care and protection of his father till the death of his father. Earlier, the detenu remained in Dubai along with his father, and he was undergoing his studies in a school at Sharjah. The detenu and his father came to their home village at Thrissur in the year 2023 once it was known that the detenu's father was afflicted with incurable cancer. Till the death of the petitioner's former husband (detenu's father) on 27.10.2023, the detenu continued his studies in a school at Thrissur. However, after the demise of his father, the detenu was shifted to Dubai and taken care of by respondents 6 to 8, who are the brother-in-law, sister and sister's daughter respectively of the detenu's father. Alleging that the detenu was taken abroad in violation of the injunction order of the Family Court, Palakkad, and that the detenu was being kept under the illegal custody of respondents 5 to 8, the petitioner has moved this writ petition, seeking a writ of habeas corpus, directing the production of the detenu before this Court.



2. Respondents 1 to 3 were represented by the learned Government Pleader and the 4th respondent by the learned Deputy Solicitor General of India. Respondents 5 to 8 were represented by Adv.Sri.Sunil Nair Palakkat, the learned counsel.

3. In accordance with the direction of this Court, respondents 6 and 7 produced the detenu before another Division Bench of this Court on 15.03.2024. After interaction with the detenu and the petitioner, the parties were referred to the Family Counselling Centre attached to this Court, since the child was reluctant to go with the petitioner, his mother.

4. On 21.03.2024, we interacted with the detenu and his mother individually and collectively at Chambers. We also perused the report of the consultant Psychologist of the Family Counselling Centre here.

5. The detenu, a boy studying in the 8th standard at GEMS Millenium School, Sharjah, is an intelligent child with maturity outlying his age. He appeared to be calm and composed, and talked to us and to his mother in consistent terms and with prudence and rationale about his academic matters and his present life along with respondents 6 to 8. When we interacted with him, in the absence of his mother, he made it clear that he was not willing to go along with his mother and to live with her. The reason stated is the mental pain suffered by him due to the act of his mother, who had no qualms in speaking bad about his father, who had left for his heavenly abode. The boy who was having emotional attachment of a high grade with his father, felt it extremely hard to hear verbal abuse and ill-will uttered by the petitioner against her former husband. Even



while we interacted with the detenu and the petitioner, we could notice that there is no cordial relationship between them. The detenu has even attempted to show us from the mobile phone, the abusive chats about his father, sent at the instance of the petitioner. The report dated 15.03.2024 of the Consultant Psychologist who conducted family counselling as per the directions of this Court, is also to the effect that the detenu is not able to accept his mother and stepsister (the new born child of the petitioner in her wedlock with her present husband) in the present conditions, and that it may not be desirable for him to stay with them. The boy of charming personality told us that he is fully comfortable with his life along with his uncle, aunt and cousin (respondents 6 to 8), and that he gets a pleasant and conducive atmosphere for his studies at the school in Sharjah where he had just completed the examinations of 8th standard. He requested us not to send him along with his mother, and submitted that he may not be able to withstand the atmosphere at the home where his mother is presently residing. We are fully satisfied that the above request made by the detenu is one coming from his heart, and that it cannot be eschewed as his flimsy and childish notions.

6. Heard the learned counsel for the petitioner, learned Government Pleader representing respondents 1 to 3 and the learned counsel for respondents 5 to 8.

7. The object underlying a writ of habeas corpus is to secure the release of a person who is illegally deprived of his liberty. It is a command addressed to the person who is alleged to have another in unlawful



custody, requiring him to produce the body of such person before the court. On production of the person before the Court, the circumstances in which the person concerned has been detained can be enquired into by the Court, and upon due enquiry into the alleged unlawful restraint, pass appropriate direction as may be deemed just and proper. The Court in such proceedings conducts an enquiry for immediate determination of the right of the person's freedom, and his release when the detention is found to be unlawful.

8. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, the Apex Court in **Sayed Saleemuddin v. Dr.Rukhsana and Other [AIR 2001 SC 2172]** has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed, and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration shall be the welfare of the child.

9. In **Mrs. Elizabeth Dinshaw v. Arvand M. Dinshaw and Another [AIR 1987 SC 3]** the Apex Court held that in cases of this nature, the matter must be decided not by reference to the legal rights of the parties, but on the sole and predominant criterion of what would best serve the interest and welfare of the minor. The role of the Court in examining the cases of custody of a minor is on the touchstone of the principle of *parens patriae* jurisdiction, as the minor is within the jurisdiction of the court. The Court while dealing with the petition for



issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct to handover the custody of the child to a suitable person, or decline to change the custody of the child keeping in mind all the attending facts and circumstances of the case brought before it, whilst considering the welfare of a child which is of paramount consideration.

10. In **Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others [AIR 2019 SC 2318]** the Apex Court has held that only in exceptional cases, the rights of the parties for the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus, and that if the Court is of the view that a detailed enquiry is required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. Paragraph Nos.18 and 19 of the above judgment read as follows:

“18. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.



19. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the Court is determined by whether the minor ordinarily resides within the area on which the Court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a Writ Court which is of summary in nature. What is important is the welfare of the child. In the Writ Court, rights are determined only on the basis of affidavits. Where the Court is of the view that a detailed enquiry is required, the Court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the Civil Court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

11. The learned counsel for the petitioner would contend that the custody of the detenu with respondents 6 to 8 at Dubai is *per se* illegal since the detenu was taken outside the country in violation of Ext.P5 interim injunction of the Family Court, Palakkad in I.A.No.2 of 2023 in O.P.No.1508 of 2023.

12. A perusal of the above order of the Family Court, Palakkad would reveal that it has been passed in the interim application filed in an Original Petition instituted by the maternal grandmother of the detenu against his paternal grandmother, who is the 5th respondent in this writ petition. Respondents 6 to 8 are apparently not parties to the above proceedings of the Family Court, Palakkad in which Ext.P5 interim injunction was issued. Therefore, the respondents 6 to 8, who are taking care of the detenu and looking after his affairs, cannot be said to be



keeping him under unlawful custody. There is absolutely nothing on record to show that the petitioner's son was taken abroad by the respondents 6 to 8 in violation of any court order interdicting them from doing so. Nor could the petitioner establish that the act of respondents 6 to 8 keeping the custody of the detenu with them, and taking care of his affairs including education and grooming up, is in violation of any law applicable to the parties.

13. The learned counsel for the petitioner would further argue that the petitioner, being the mother of the detenu, stands in a better position for having his custody since the respondents 6 and 7 who are the uncle and aunt respectively of the detenu cannot be expected to take care of the detenu with an affection and sincerity more than the maternal affection and care which could be bestowed by the petitioner. The contention of the learned counsel for the petitioner in the above regard cannot be accepted for the reason that the detenu, who is having mental maturity far beyond his age, has conveyed to us in unequivocal terms that he will not be able to live along with his mother who often ventured to hurt him by saying bad words about his deceased father with whom he was having deep affectionate bondage. As already stated above, the opinion of the Psychologist who conducted family counselling as per the direction of this Court, is also that it may not be desirable for the detenu to stay with his mother, and her present husband and child.

14. It is not possible to blame the petitioner for opting for a second marriage immediately after the dissolution of her marriage with the father



of the detenu on the basis of any concepts of morality or lack of concern to the well-being of the progeny born in her earlier marriage and the emotional feelings of that child. However, while dealing with the writ of habeas corpus relating to the custody of children, the paramount consideration should be the welfare of the children. It has been held by a Division Bench of this Court in **Sangeetha v. Commissioner of Police [AIR 2002 (Ker) 16]** that in a writ of habeas corpus relating to the custody of children, the Court is not adjudicating the question as to who should be the legal guardian of the children, and that the Court has got the power to change their custody in the best interest of the children and taking into account of various attendant circumstances. Paragraph No.21 of the aforesaid judgment reads as follows:

“21. It is well settled proposition of law that custody of children by their very nature is not final but are interlocutory in nature subject to modification upon change of circumstances requiring change of custody and such change of custody must be proved to be in the best interest of the children. Reliance may be placed on the decisions, *Rosy Jacob v. Jacob A. Chakramakkal*, 1973 (1) SCC 840 : (AIR 1973 SC 2090), *Jai Prakash Khadria v. Shyam Sunder Agarwalla* 2000 (6) SCC 598 : (AIR 2000 SC 2172) and *R. V. Srinath Prasad v. Nandamuri Jayakrishna*, 2001 AIR SCW 1033 : (AIR 2001 SC 1056). Some of the cases are coming under the Guardians and Wards Act. Courts have reiterated that paramount consideration is the welfare of the children and Court has got the power to change their custody in the best interest of the children and taking into consideration of various attendant circumstances. We are aware, as far as writ of habeas corpus is concerned, we are not adjudicating the question as to who should be the legal guardian of the children. Between the parties there



is a valid binding judgment in M.F.A.No.744 of 1998 and by which legal custody was given to petitioner on the basis of the compromise decree. Therefore as per law the petitioner is the legal guardian of the children. In writ of habeas corpus neither the provisions of the Guardians and Wards Act nor the provisions of the Hindu Marriage Act would stand in the way; nor a decree passed under Section 13B of the Hindu Marriage Act. In writ of habeas corpus the question is whether fourth respondent is illegally detaining the children and as to whether he is detaining the children against their wish. We have already indicated children have narrated before us that they were with the father from the infancy and that he used to look after their welfare and education. Barring a few days from 7-6-2001 to 2-7-2001 all along they were with their father. Probably a psychological bond with the father might have prompted them to escape from the school on 2-7-2001. We notice from the affidavit filed by the fourth respondent as well as the story unfold by the children to us that they left the maternal home on their own accord and they reached Pandalam on the night of 2-7-2001. It is the fourth respondent's friend Radhakrishnan who telephoned fourth respondent and it is at his instance father came to Pandalam and took the children to the house at Trivandrum. Since the children are with the fourth respondent on their own volition and that the children expressed their desire to be with the father and that it is their wish that their interest would be better safeguarded if they are with the father, we are of the view that the children are not in the illegal custody of the fourth respondent."

15. In **Latori Chamar v. State of M.P and Others [2007 Cri LJ 1105]** a Division Bench of the Madhya Pradesh High Court has held that a child cannot be denied protection as enshrined under Article 21 of the Constitution of India and that she has to be allowed to live in an acceptable dignified atmosphere. It is further observed thereunder that a child cannot



be permitted to live in an atmosphere which is alien and with a person who would not like to have her.

16. As already discussed in the foregoing paragraphs, the legal rights of the parties concerned as per their personal law to have custody of the child, is not having much significance while this Court is dealing with the question as to the order of custody to be passed in a writ petition seeking writ of habeas corpus. If it is found that, in a given case, if an order directing the custody of a child with a parent is likely to be detrimental to the interest of that child, especially when the child is of advanced age, and having considerable maturity in mind to decide his future course of action, it is not possible for this Court to pass an order compelling that child to live with such parent who is totally unacceptable to him.

17. As far as the present case is concerned, we understand from the interaction with the detenu separately and jointly with the petitioner, that he is likely to suffer emotional trauma leading to disruption of his studies and peace of mind if he is compelled to live with the petitioner. The respondents 6 to 8 with whom the detenu is presently living comfortably and peacefully and pursuing his studies in a good manner, shall continue to take care of him unless there is an order from a competent court exercising jurisdiction on minority and guardianship matters, to hand over the custody of that child to the petitioner.



18. In that view of the matter, the request of the petitioner to have custody of the detenu cannot be entertained in this petition for a writ of habeas corpus.

In the result, this writ petition fails and the same is dismissed. It is made clear that the observations made by us in this judgment will not be binding on the court of competent jurisdiction dealing with the issue of the guardianship of the detenu in a proper proceedings instituted under the relevant personal law.

(sd/-)

ANIL K. NARENDRAN, JUDGE

(sd/-)

G. GIRISH, JUDGE

jsr/vgd

**PETITIONER EXHIBITS**

- Exhibit-P1 A TRUE COPY OF THE JUDGMENT DATED 12.08.2021 IN MAT.APPEAL NO.301/2019 AND CONNECTED CASE OF THIS HONOURABLE COURT.
- Exhibit-P2 A TRUE COPY OF THE JUDGMENT DATED 24.03.2021 MAT.APPEAL.NO.921/2019 AND CONNECTED CASE OF THIS HONOURABLE COURT.
- Exhibit-P3 A TRUE COPY OF THE APPLICATION FOR ADMISSION SUBMITTED IN THE SCHOOL ON 13.09.2023.
- Exhibit-P4 A TRUE COPY OF THE DEATH CERTIFICATE ISSUED BY THE CHERANALLUR GRAMA PANCHAYAT ON 08.11.2023.
- Exhibit-P5 A TRUE COPY OF THE ORDER OF INJUNCTION DATED 10.11.2023 IN I.A. NO.2/2023 IN O.P NO.1508/2023 ISSUED BY THE FAMILY COURT, PALAKKAD.
- Exhibit-P6 A TRUE COPY OF THE COMPLAINT DATED 08.02.2024 SUBMITTED BY THE PETITIONER BEFORE THE 3RD RESPONDENT.
- Exhibit-P7 Photographs of the petitioner and detenu.
- Exhibit-P8 A true copy of the birth certificate of the daughter of petitioner dated 12.12.2023

RESPONDENT EXHIBITS

- Exhibit-
R7(1) The true copy of the order dated 11/10/2018 in O.P No. 227/2017 of Family Court, Ottapalam
- Exhibit-
R7(2) The true copy of the schedule for annual examination, 2024 issued by the GEMS Millennium School, Sharjah dated nil



- Exhibit- R7(3) The true copy of the Exhibit B7 which are the aforesaid text messages between the petitioner and 3 others dated 24-09-2013 in O.P No. 227/2017 on the files of Family Court, Ottapalam
- Exhibit- R7(3) [A] The true copy of the Exhibit B7 which are the aforesaid text messages between the petitioner and 3 others dated nil in O.P No. 227/2017 on the files of Family Court, Ottapalam
- Exhibit- R7(3) [B] The true copy of the Exhibit B7 which are the aforesaid text messages between the petitioner and one Mr. Zaheer Sulthan dated nil in O.P No. 227/2017 on the files of Family Court, Ottapalam
- Exhibit- R7(4) The true copy of the Whatsapp messages sent by the petitioner to the 7th respondent dated nil
- Exhibit- R7(5) The true copy of the relevant pages of the Federal Law No 28/2005 dated nil
- Exhibit R7[6] THE PHOTOGRAPHS OF THE PETITIONER'S WEDDING