

(2015) 07 KL CK 0158

In the High Court Of Kerala

Case No : Writ Petition (Criminal) No. 288 of 2015 (S)

Divya

APPELLANT

Vs

City Police Commissioner, Ernakulam and Others

RESPONDENT

Date of Decision : 02-07-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 07 KL CK 0158

Hon'ble Judges : C.K. Abdul Rehim, J;K. Ramakrishnan, J

Bench : Division Bench

Advocate : T.M. Raman Kartha and Manju R. Kartha, for the Appellant

Final Decision : Dismissed

Judgement

C.K. Abdul Rehim, J—The petitioner is the mother of the alleged detenu, Master Hrishikesh Manojkumar, aged 4 1/2 years, born out of her wedlock with the 3rd respondent. Marriage between the petitioner and the 3rd respondent was on 26.10.2009. After the marriage, the spouses lived together in Mumbai for sometime. The child was born at Mumbai on 23.12.2010. In August 2012, the 3rd respondent got an employment at Sharjah, UAE. Within three months thereof, the petitioner and the child were also taken to Sharjah on the strength of a family visa arranged by the 3rd respondent. Due to difference of opinion the petitioner and the 3rd respondent got separated on 29th March 2013. Since then the petitioner was staying along with her parents at Sharjah. It is alleged that the 3rd respondent took the child forcefully to India. It is alleged that the child was transported on a Passport of some other child. According to the petitioner, the original of the Passport, the "UAE ID" and "Insurance Card" of the child are in the custody of the petitioner. When the child was taken to India by the 3rd respondent, the petitioner along with her parents came back and had negotiations with him for getting back custody of the child. It is conceded that, in January, 2014, the child was sent along with the petitioner and thereafter the petitioner was staying along with the child in her parental home at Thrissur. It is

alleged that, thereafter the 3rd respondent took away the child from custody of parents of the petitioner, in her absence, and taken back the child to Sharjah. Even though the petitioner went back to Sharjah in search of the child, she could not locate him, because the 3rd respondent had left the child in the custody of his sister, who is settled in Ajman, UAE. However, the petitioner located the child in the custody of the 3rd respondent's sister at UAE. Even though she had approached the authorities in UAE to get custody of the child, they have not taken any action. It is alleged that, when the petitioner attempted negotiations through brother-in-law of the 3rd respondent, the child was again removed to Kerala. Thereafter the petitioner reached Kerala and filed a case before the Family Court, Thrissur as O.P. No. 382/2015 seeking for permanent custody of the child. It is specifically stated that in order to avoid the legal consequences, the 4th respondent, who is the father of the 3rd respondent, had permitted the child to be in the custody of the petitioner, on 17.2.2014. But on the very next day the 3rd respondent again forcefully taken the child from her custody. The case before the Family Court, Thrissur was returned for presentation before proper court. Accordingly, the case was presented before the Family Court, Ernakulam and it is renumbered as O.P. No. 1042/2015. An interim application seeking custody of the child was also filed along with the said case. It is stated that, even though the Family Court, Ernakulam ordered notice to the 3rd respondent, service could not be effected because the house of respondents 3 and 4 was seen locked and it was learnt that the 3rd respondent, his parents and the child have went back abroad. Subsequently service was effected through affixture and the case now stands posted before the Family Court, Ernakulam on 4.8.2005.

2. It is averred in the writ petition that the petitioner had submitted Exts. P6 to P8 complaints before the respondents 5 to 7 raising allegation that the 3rd respondent had taken the child abroad on the basis of forged travel document. She had also filed Ext. P9 complaint before the 1st respondent seeking action to trace out the child and to rescue him from the alleged illegal detention. According to the petitioner, even though under normal circumstances custody of the child with the 3rd respondent cannot be considered as illegal detention, in the instant case the life of the child is in peril, since he was transported from Sharjah to India and back only for the purpose of defeating the legal proceedings initiated by the petitioner. Further, it is alleged that the child is being transported on the basis of the fake travel documents or on fake identity of the some other child. It is also alleged that the welfare of the child is prejudiced on account of the frequent transportation to the foreign country and back. The mental health of the child is put to prejudice due to the high handed action on the part of the 3rd respondent, is the allegation.

3. Based on the above mentioned facts, this writ petition is filed seeking for a writ of habeas corpus for causing production and release of the child, based on the specific allegation that the child is under illegal detention of the respondents 3 and 4.

4. As far as the present writ petition is concerned, the relief sought for is only to the extent of issuing a writ of habeas corpus for production and release of the child. For granting such a relief, this court should be convinced that the alleged detenu, the minor child, is illegally detained. Admittedly, the child is in the custody of the 3rd respondent, who is the biological father of the minor child. Even assuming the allegations regarding frequent transportation of the child from Sharjah to Kerala and back is true and correct, that by itself cannot be taken as a reason to arrive at a conclusion that the child is illegally detained. On the facts conceded by the petitioner herself, the child was in the custody of the petitioner as well as the 3rd respondent intermittently during different periods, from March, 2013 onwards. Even though the allegation is that on two occasions the custody of the minor child was taken forcibly from the petitioner, we are not inclined to hold that the 3rd respondent had no authority to keep the child in custody, he being the son of the 3rd respondent. However, the question as to who among the petitioner and the 3rd respondent is legally entitled and competent person to have the custody of the child, is a matter which could not be adjudicated in this proceeding which is instituted under Article 226 of the Constitution of India. Evidently, the petitioner had already approached the appropriate court by instituting a proper legal proceedings in this regard. It is for the petitioner to pursue the remedies available under law before that court to secure custody of the child. We find no reason to presume that the Family Court will not consider urgency of the matter, if it is moved for getting appropriate orders.

5. Vehement arguments were made for consideration of the matter by this Court, on the basis of the allegations that the child is being transported on the strength of fake documents to outside the country and back. It is affirmed by the petitioner that the original passport and other documents of the minor child is still in her possession. However, we notice that the petitioner had already moved respondents 5 to 7 by lodging complaints with respect to the alleged illegal acts on the part of the 3rd respondent. It is left open to the petitioner to pursue such remedies before those authorities. Even if the allegation of the petitioner regarding inaction on the part of the respondents 5 to 7 based on Exts. P6 to P8 is considered, no relief can be granted in this writ petition filed seeking a writ of habeas corpus directing for production of the child. It is left open to the petitioner to pursue such remedies against the administrative inaction if any, by taking appropriate legal steps.

6. Since this court is not at all convinced that there exists any circumstance to invoke the jurisdiction vested under Article 226, for issuance of a writ of habeas corpus on the basis that the minor child Hrishikesh Manojkumar is illegally detained by the respondents 3 and 4, we are not inclined to admit this writ petition. It is made clear that the petitioner will be entitled to pursue remedies before the appropriate forum in this regard, un-trammelled by any of the observations contained herein above.

This writ petition is dismissed subject to the above observations.