

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MRS. JUSTICE MARY JOSEPH

SATURDAY, THE 21ST DAY OF NOVEMBER 2015 / 30TH KARTHIKA, 1937

WP(Crl.).No.476 OF 2014(S)

PETITIONER:

STACY JOHN
AGED 35 YEARS
D/O. ELEYAMMA MOSBY, 1962, VIA FLORENCE ROAD,
CHARLOTTESVILLE, VIRGINIA, USA-22911.

BY ADVS.
SRI.V.SETHUNATH
SRI.JOHN K.GEORGE
SRI.V.R.MANORANJAN (MUVATTUPUZHA)

RESPONDENTS:

- 1 THE DISTRICT POLICE CHIEF
PATHANAMTHITTA DISTRICT-689 645.
- 2 THE STATE OF KERALA
REPRESENTED BY THE HOME SECRETARY TO THE GOVT. OF KERALA,
HOME DEPARTMENT, GOVT.SECRETARIAT,
THIRUVANANTHAPURAM-695 001.
- 3 SHINOY JOHN
AGED 36 YEARS
S/O. T.C.JOHN, THENGATHALIL HOUSE,
MEZHUVELI P.O., PATHANAMTHITTA DISTRICT-689 507.
- 4 THE GOVT. OF INDIA
REPRESENTED BY THE SECRETARY TO MINISTRY OF HOME AFFAIRS,
FOREIGNERS DIVISIONS, NEW DELHI-110 001.
- 5 MAR THOMA SENIOR SECONDARY SCHOOL
KOZHENCHERRY, REPRESENTED BY ITS PRINCIPAL,
PATHANAMTHITTA DISTRICT-689 641.

R1 BY ADDL.DIRECTOR GENERAL OF PROSECUTION
R2 BY ADV. SRI. EGGY N. ELIAS, GOVT. PLEADER
R1 BY ADV. SRI.A.N.RAJAN BABU
R3 BY ADV. SRI.P.GOPALAKRISHNAN (MVA)
R4 BY SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR ADMISSION ON 21.11.2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**C.K. ABDUL REHIM, J.
&
MARY JOSEPH, J.**

W.P (Crl.) No. 476 OF 2014

DATED THIS THE 21st DAY OF NOVEMBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

The above case is filed under Article 226 of the Constitution of India seeking a writ of Habeas Corpus for directing production of two minor children of the petitioner and the 3rd respondent, namely Jeremy Shinoy John, aged 9 years and Eathen Shinoy John, aged 6 years and to release them into the custody of the petitioner, for taking them to the United States of America (USA). The above relief is sought for based on the allegation that the said two children (hereinafter referred to as the 'alleged detenues' are now kept under illegal custody of the 3rd respondent.

2. Averments in the writ petition in brief are that, the petitioner married the 3rd respondent on 14.06.2003 and three children were born out of the wedlock. The petitioner is a citizen of USA by birth, both her parents being US citizens. The 3rd respondent also acquired citizenship of USA and all the three children born to them are also US citizens, acquired citizenship

by birth in USA. One of the allegations is that, Visa of the alleged detenues had already expired on 30.11.2013 and they are overstaying in India in violation of the provisions in the Indian Citizenship Act, 1955 and the Foreigners Act, 1947. The spouses along with their three children reached India from USA on 04.06.2013. The petitioner and the three children were on Visa, which were having validity of six months, from 31.05.2013 to 30.11.2013. The 3rd respondent was holding status of an "Overseas Citizen of India" (OCI). While they were in India, there arose disputes between the spouses with respect to taking back the children to USA. On 06.09.2013 the 3rd respondent had expelled the petitioner along with the youngest child from the matrimonial home and they had gone to her parental house; and stayed there along with her mother. When all the attempts of the petitioner to get back custody of the elder two children (the alleged detenues) failed, she filed a writ petition before this court on 10-09-2013, seeking a writ of Habeas Corpus as W.P.(Crl). No. 422/2013. During pendency of the said case, a mediation settlement was arrived between the spouses and the petitioner had conceded for custody of the alleged detenues with the 3rd respondent, based on a promise

that they will be entrusted back to her for taking them to USA. But the 3rd respondent had chosen to stay back in India, in violation of the terms of the mediation settlement and also in violation of the provisions of the Citizens Act and Foreigners Act. However, W.P.(Crl). No. 422/2013 was disposed of by this Court as per Ext.P5 judgment, taking note of the mediation settlement arrived, copy of which is produced as Ext.P2. It was endorsed in the judgment that, by virtue of the terms of the settlement, the 3rd respondent is required to entrust the 'transfer documents' of the alleged detainees with the mediator on or before 30.11.2013. As per the settlement arrived, the 3rd respondent had undertaken that custody of the alleged detainees will be handed over to the petitioner on or before 15.04.2014. But the 3rd respondent had failed to comply with the said stipulation. Therefore the petitioner submitted Exts.P3 and P4 complaints before the 1st respondent and also to the Police authorities having jurisdiction in the area. In the said complaint it was also alleged that the alleged detainees are being harassed and tortured under detention by the 3rd respondent.

3. It is stated in the writ petition that the petitioner went back to USA after signing the mediation agreement on

01.10.2013. When the 3rd respondent failed to comply with the terms of the settlement, she approached the 'Juvenile and Domestic Relations District Court for the County of Albemarle' (hereinafter referred to as "the Foreign Court" for short) in USA, seeking custody of the alleged detenues. The Foreign Court issued Exts. P6 and P8 orders, with respect to both the children, directing the 3rd respondent to return custody of them to the petitioner. It is alleged that, the elder son, Jeremy was admitted in the 5th respondent's school without any 'Education Visa' issued by any appropriate authorities. It is also alleged that the 3rd respondent is illegally keeping custody of the Passports of the alleged detenues, in violation of provisions of the Citizenship Act and Foreigners Act, under the pretext that the Passports were lost, in order to evade any due process of law in the matter of repatriation of them into USA.

4. Based on above narrated facts, alleging violation of the statutory provisions in the matter of overstay of the alleged detenues, who are on U.S Visa, and also alleging inaction on the part of the 1st respondent, this writ petition is filed. It is averred that, this Court is conferred with extra ordinary powers of judicial review and supervision in order to ensure protection of

the rights of children and to ensure their welfare and interests. Hence the reliefs as mentioned above are sought for to direct the 3rd respondent to handover custody of the alleged detainees to the petitioner, on finding that she is entitled to have such custody based on relevant statutory provisions and also on the basis of orders passed by the Foreign Court.

5. The 3rd respondent had filed detailed counter affidavit resisting all the averments and allegations. An elaborate narration of facts which led to the matrimonial disputes existing between the spouses are illustrated in the counter affidavit, which we think it not necessary to reproduce in this judgment. According to the 3rd respondent, due to the intolerable humiliations and insults from the side of the petitioner, he took a decision to resign the job and to come back to India and to look after the children for the sake of their welfare. Therefore, immediately on arriving in India in the year 2009, he put the eldest son, Master Jeremy in a school and stayed in India from 01-12-2009 to 05-06-2011. Thereafter the parties went to U.S.A and came back to India on 05-06-2013. The 3rd respondent had categorically denied all the allegations of unauthorised overstay after expiry of the Visa. According to the 3rd respondent, he is a

'Citizen of Indian Origin' and the two sons were (alleged detenues) also granted with OCI status, entitling them to stay in India for life long. It is alleged that the original U.S Passports of the 3rd respondent and the alleged detenues were destroyed by the petitioner, within an intention to prevent them from coming to India. Exhibits R3 (a) & (b) are produced to prove that OCI status of the alleged detenues were endorsed in the Passport of the alleged detenues. Thereafter the 3rd respondent applied and obtained duplicate U.S Passports and Visa for himself and the children. Now the 3rd respondent and the alleged detenues were sanctioned with OCI status for their life long stay in India. Exts.R3 (d) & (e) documents, endorsing OCI status are produced in proof of the above facts. It is contended that the 3rd respondent as well as the alleged detenues were registered as "Overseas Citizens of India" as per Section 7A (a) & (b) of the Citizenship Act, 1955. Exhibits R3 (f) & (g) are the relevant endorsements regarding the Certificate of Registration of the alleged detenues as "Overseas Citizens of India". Exhibits R3 (h) and R3(i) Passports and other documents are produced to show the above narrated position with respect to stay of the alleged detenues in India. The 3rd respondent had emphatically denied

the allegations of harassment and torturing of the alleged detainees. According to him he is staying along with the children with his parents. It is mentioned that the father of the 3rd respondent had a stroke on 14-07-2013 and he was hospitalized. The 3rd respondent told to the petitioner on 19-08-2013 that he cannot come to U.S.A because of the poor health condition of his father. She was informed that she can go back to U.S.A and the 3rd respondent will take care of all the three kids. But the the petitioner changed her attitude suddenly and threatened to kill the 3rd respondent by grabbing a knife from the kitchen. On 03-09-2013, mother of the petitioner came to the house of the 3rd respondent and threatened him and his parents with consequences of putting him in jail and of dissolving his marriage. She spoke in a rude manner and pushed the 3rd respondent's mother into the room where his father was lying ill. Because of the above incident, father of the petitioner who was in a position unable to move and talk, became totally heart-broken and was weeping on the issue. Thereafter at the instance of the mother of the petitioner, police authorities interfered in the matter. All these incidents had resulted in total breakdown of the health condition of the 3rd respondent's father and ultimately

he died on 04-08-2013. But, while the dead body of his father was in the mortuary, on the next day of death, police men came to his house and asked him to appear at the station. The petitioner and her mother joined in making complaints against the 3rd respondent raising false allegations. Thereupon the Sub Inspector of Police had threatened the 3rd respondent to release the two children along with their Passports to the petitioner, if not it was threatened that the 3rd respondent will not be allowed to attend the funeral of his father. On the next day also the 3rd respondent was required to appear before the police station. Finally on 07-09-2013 there were intervening discussions, at the behest of the police authorities and other persons who got involved in the issue; and ultimately on 10-09-2013 an agreement was arrived after long discussions permitting the alleged detenues to be with the 3rd respondent by admitting them in the school herein. It was agreed that the children will be sent on every weekend to the house of his mother-in-law. The said agreement was recorded by the police and the complaints were withdrawn. But on the next date of 10-09-2013 the petitioner filed the earlier writ petition, WP (Crl.) No.442/2013, suppressing all the materials facts. The matter was again

referred for mediation by this court and a compromise as per Ext.P2 was arrived.

6. In the counter affidavit of the 3rd respondent it is mentioned that, as per the terms of Ext.P2 it was agreed upon that the alleged detenues will be handed over to the petitioner, before 15-04-2014. But the petitioner has not acted in accordance with terms of the settlement and filed cases before the Foreign Court on 05-11-2013, seeking custody of the minor children. It is contended that, terms of the agreement arrived was contingent, depending upon certain actions to be performed by the petitioner. The terms could not be given effect only because of failure to perform the obligations cast upon the petitioner. The 3rd respondent had raised apprehension that, it is only to ruin the life of the 3rd respondent that the petitioner is insisting upon him to return to U.S.A. According to him, if he returns to U.S.A, the petitioner will take vengeance against him by filing false complaints before the American authorities. It is also mentioned that the children are now studying in Kerala in a prestigious school at Kozhencherry. They secured high marks in the examination. The allegation of disobedience of the mediation agreement is stoutly denied by the 3rd respondent. It is further

contended that the Foreign Court which passed Exts.P6 & P8 orders is not having jurisdiction in the matter. There is no law permitting execution of such order through any court in India, because U.S.A is not a reciprocating territory under Section 44A of the Code of Civil Procedure. It is further mentioned that the Foreign Court which passed the orders was not having jurisdiction, because the alleged detainees were not residing within its jurisdiction during the preceding 6 months from the date of commencement of proceedings. Exhibit R3 (m) is the copy of the relevant Statute-'Code of Virginia', produced in support of the above contention. It is pointed out that, on receiving summons from the Foreign Court, the 3rd respondent had sent written objections specifically contending about the lack of jurisdiction. According to the 3rd respondent the law applicable in the case is the Indian law, since the 3rd respondent is residing in India for more than 6 months. According to the 3rd respondent Exts.P6 & P8 orders were issued by the Foreign Court without taking into consideration of such objections. It is also alleged that those orders were obtained by fraud, because the petitioner had intention to deceive the 3rd respondent by active concealment of the factual aspects, upon which she was

having knowledge. It is also pointed out that the Foreign Court had failed in taking note of the proceedings in the Kerala High Court, in Ext.P5 judgment, accepting the mediation agreement. Under such circumstances it is contended that, eventhough no appeal is filed against Exts.P6 & P8, those orders are invalid, void or voidable. The 3rd respondent had denied of having committed any offence in violation of the Citizenship Act or Foreigners Act. Hence it is contended that custody of the minor children with the 3rd respondent is not in any manner an illegal detention and that the writ petition is not sustainable.

7. The petitioner filed detailed reply affidavit mainly disputing that the OCI status was obtained by way of fraudulent acts. Contentions were also raised to the effect that the court in U.S.A which passed Exts.P6 & P8 orders was having jurisdiction. It is contended that the 3rd respondent is an offender in the eye of law in U.S.A, having violated Exts.P6 & P8 orders and warrant is pending against him issued by the Foreign Court. Hence violation of Exts.P6 & P8 custody orders and detention of the children need to be considered as abduction which is punishable under criminal law prevailing in India. Further, as per Ext.P14 'Extradition Treaty' signed between India and the United States,

warrants issued by the Foreign Courts are enforceable in India. The petitioner had cited various legal precedents illustrating legal position with respect to enforcement of foreign decrees in the matter of custody of minor children.

8. An additional counter affidavit was also filed by the 3rd respondent categorically denying the allegations regarding commission of any offence for obtaining OCI status of the alleged detenues. It is also mentioned that the 3rd respondent is working as a Marketing Manager in a firm at Kozhencherry and is a partner in some business activities. Documents are produced to show that the alleged detenues are studying in 5th respondent's school and they got very good academic merits. The 3rd respondent had also produced certain additional documents to show that the petitioner had sent certain letters to the school authorities threatening action with respect to admission of the alleged detenues. According to the 3rd respondent the elder child was admitted in the 5th respondent's school after obtaining necessary letter from the school authorities at Virginia. Various documents were also produced to show that the said child was moved to the school in India after getting due consent from the school at Virginia. Further, contention is raised that the

petitioner is not able to look after welfare of the children, since she became bankrupt by availing loans from various Banks and other funding agencies in U.S.A. Exhibits R3 (ag) is produced to show that the petitioner had filed a 'bankruptcy application' in Virginia court, which is pending adjudication. It is also revealed that the 3rd respondent is not liable to be proceeded with on the basis of the International Treaties on Abduction of Children, since the country of India is not a signatory of the Treaty in 1980 -'Hague Convention on Civil aspects of Child Abduction'.

9. Rival pleadings as enumerated above would reveal the undisputed fact that both the parents as well as the children are holding American Passports. But the 3rd respondent and the two elder children (alleged detenues) are holding OCI Registration and Visa permitting them to stay in Indian life long. It is also evident that the parents came to India along with the children, during June 2013 and they were residing together till September 2013. It is not in dispute that, September 2013 onwards the alleged detenues are in the custody of the 3rd respondent. Further it is not in dispute that the petitioner and the 3rd respondent had arrived into a settlement regarding custody of the children as per Ext.P2. It is clear that the parties have

agreed that the 3rd respondent has to be in Kerala, because the alleged detainees were studying in a school in Kerala. Agreement was to the effect that the 3rd respondent along with the alleged detainees will return to America in the 2nd week of April 2014, as and when the academic year will be over. It is also pertinent to note that, an earlier petition filed seeking a writ of Habeas Corpus was disposed of on the basis of the terms of the said mediation agreement. Admittedly, the petitioner went back to U.S.A on 01-10-2013. It is evident that she instituted the custody cases before the Foreign Court during November 2013, exactly on 05-11-2013. The Foreign Court had issued Exts.P6 & P8 orders on 10-03-2014 and 17-07-2014, respectively. It is clear that those orders were passed with notice to the 3rd respondent. Evidently those orders are not complied with, and the petitioner had already initiated steps of execution before the Foreign Court.

10. Under the above mentioned factual situation, question remains as to whether custody of the alleged detainees by the 3rd respondent will amount to an illegal detention, with respect to which the extra ordinary original jurisdiction of this court need to be invoked to order release of them and to handover custody

to the petitioner.

11. There exist a dispute between the petitioner and the 3rd respondent as to whether the alleged detainees are overstaying in India after expiry of the period of Visa granted by U.S.A. Contentions of the petitioner in this respect was refuted by the 3rd respondent on production of documents prima facie evidencing that the alleged detainees have got registration as 'Overseas Citizens of India' and that they are entitled to stay lifelong in India. For the purpose of arriving at any conclusion on this disputed aspect of alleged overstaying, this court is of the considered opinion that, it cannot be adjudicated in the present proceedings. Secondly, there is alleged violation of the terms of mediation settlement arrived in the earlier proceedings. Execution of such a compromise settlement cannot be achieved through the present proceedings which again is seeking a writ of Habeas Corpus. It also requires proper adjudication before appropriate forum as to whether there exist a blatant violation of the terms and conditions of the settlement. Thirdly, the petitioner contends that the order of the Foreign Court need to be executed in India. On the contrary, the 3rd respondent alleges fraudulent act on the part of the petitioner in securing those

orders from the Foreign Court. In other words, contentions of the 3rd respondent is that those orders are vitiated by fraud. Whether those orders are executable under provisions of the Code of Civil Procedure, is also not a question which can be adjudicated upon in the present proceedings. Lastly, the petitioner urges that extra ordinary powers of judicial review and supervision need to be invoked to ensure protection of the rights of the alleged detenues considering their welfare and interests. In this respect, who among the parents is the most suitable person to be entrusted with the custody of the alleged detenues, is a question which need to be decided based on factual aspects, which need to be elucidated in evidence. It will be hazardous for this court to venture upon in arriving at any conclusion on the said aspect, without support of all the factual aspects proved in evidence through documents and oral testimonies.

12. Under the above mentioned circumstances, we do not think that interference with the present custody of the alleged detenues with the 3rd respondent, in the present writ petition, will not be possible. At the same time we may make it clear that it will be left open to the petitioner as well as to the 3rd

respondent to seek appropriate remedies on the issues from appropriate forums. It need not be clarified that any such adjudication by any appropriate court, forum or authority shall in any manner may not be influenced by any of the observations contained in this judgment.

Hence the above writ petition is hereby disposed of allowing liberty to the parties as mentioned above.

(Sd/-)

C.K. ABDUL REHIM, JUDGE.

(Sd/-)

MARY JOSEPH, JUDGE.

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APPENDIX

PETITIONER'S/S EXHIBITS:

- EXHIBIT P1 COPY OF THE WRIT PETITION (CRL) NO.422 OF 2013 ON THE
FILE OF THIS COURT.
- EXHIBIT P2 COPY OF THE MEDIATION AGREEMENT.
- EXHIBIT P3 COPY OF THE EMAIL COMMUNICATION SENT TO THE 1ST
RESPONDENT'S OFFICIAL EMAIL ID 5.4.214, 20.5.2014.
- EXHIBIT P4 COPY OF THE COMPLAINT PREFERRED BEFORE THE 1ST
RESPONDENT.
- EXHIBIT P5 COPY OF THE JUDGMENT OF THIS COURT IN
WP (CRL.) NO.422 OF 2013.
- EXHIBIT P6 COPY OF THE ORDER OF THE JUVENILE DOMESTIC
RELATIONS DISTRICT COURT, FOR THE COUNTY OF
ALBEMARLE DTD.10.3.2014.
- EXHIBIT P7 COPY OF THE APPLICATION SUBMITTED BY THE 3RD
RESPONDENT BEFORE THE 5TH RESPONDENT.