

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 25TH DAY OF MAY 2015/4TH JYASHTA, 1937

WP(Crl.).No. 166 of 2015 (S)

PETITIONER(S)/PETITIONER:

THAJIN NISAMOL T.M.,
THAJ MANZIL, KUMMANOM.P.O, KOTTAYAM.

BY ADV. SRI.A.K.HARIDAS

RESPONDENT(S)/RESPONDENTS:

1. CIRCLE INSPECTOR OF POLICE,
MAVELIKKARA CIRCLE INSPECTOR'S OFFICE,
ALAPPUZHA-690 101.
2. ADUL KALAM,
KALAM MANZIL, MANGAMKUZHY.P.O, MAVELIKKARA,
ALAPPUZHA-690 101.

R1 BY ADDL.DIRECTOR GENERAL OF PROSECUTION
R2 BY ADV. SRI.K.K.SETHUKUMAR
GOVERNMENT PLEADER SRI. JOBY JOSEPH.

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON
25-05-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

:2:

WP(Crl.).No. 166 of 2015 (S)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1 PHOTOGRAPH OF THE CHILDREN

**EXT.P2 TRUE COPY OF THE COMPLAINT FILED BEFORE THE CHILD
WELFARE COMMITTEE.**

RESPONDENT(S)' EXHIBITS

NIL

// True Copy//

P.A. to Judge

SS

**C.K. ABDUL REHIM
&
K. RAMAKRISHNAN, JJ.**

W.P.(Crl.) No.166 of 2015

Dated this the 25th day of May, 2015

JUDGMENT

C.K. Abdul Rehim, J

The petitioner is seeking a writ of Habeas Corpus directing production of her children Miss.Shalamol, aged 14 and Miss.Shahanamol, aged 10 years, alleging that the children are kept under illegal custody and detention of the 2nd respondent, who is the former husband of the petitioner and father of the children.

2. Allegations in the writ petition is that, the petitioner had entered into an agreement with the 2nd respondent pursuant to settlement of the matrimonial disputes, in which custody of the minor children was agreed to be with the 2nd respondent from April 2015 onwards, subject to visitorial rights provided to the petitioner. On the basis of the said agreement the 2nd respondent took

custody of the children to his house at Mavelikkara. It is stated that the 2nd respondent had married another lady after dissolution of the marriage with the petitioner and a child was born in the said wedlock. Allegation is that the 2nd respondent is not allowing the petitioner to visit the children and that the children are treated in a very cruel manner by the 2nd respondent and the step mother. It is further alleged that they were forced to do laborious works at home and they are illegally detained within the house, without allowing to interact with the petitioner, when she made visit to the house of the 2nd respondent. The petitioner alleges that when she had visited the children on 09.04.2015, they were crying and requested her to take them along with her.

3. When the writ petition came up for consideration, this court directed the 2nd respondent to produce the children. The children were produced before this court on 21.04.2015. This court found that the children

were crying and stated that they are being ill treated by the father and his 2nd wife. They expressed desire to go along with the petitioner. Under such circumstances, this court permitted custody of the minor girls with the petitioner, notwithstanding stipulations contained in the agreement entered between the parties, considering the welfare and well being of the minor children. The petitioner was directed to keep the children in custody till today and to produce them before this court.

4. Today also, when we have interacted with the children, both the children are adamant in their stand that they will not go along with the 2nd respondent. They requested this court to permit them to be with the petitioner, who is their mother.

5. In the counter affidavit filed by the 2nd respondent it is pointed out that, by virtue of terms of the agreement executed on 29.01.2015, copy of which is produced as Ext.R2(1), an original petition which was

pending before the Family Court, Kottayam (at Ettumanoor) was settled. In terms of the said agreement 2nd respondent had deposited a sum of ₹4,00,000/- in the name of their children at the State Bank of Travancore, Kallimel branch, in fixed deposit. Copies of the fixed deposit receipts are also produced. It is further mentioned that an amount of ₹4,00,000/- was paid to the petitioner on 29.01.2015, the receipt of which is produced as Ext.R2(4). It is stated that he had married another woman after dissolution of the marriage with the petitioner. According to 2nd respondent, after Ext.R2(1) agreement the petitioner visited his house frequently and created quarrel with his 2nd wife and his parents. She started to spend a lot of time at the house of the 2nd respondent, on frequent days, from 11.0 a.m. to 4.00 p.m. The 2nd respondent had complained about the attitude of the petitioner to the police authorities. Copy of the complaints submitted in this regard are also produced.

6. From the facts enumerated and from the

rival contentions raised, we are of the considered opinion that there exists a dispute between the parents with respect to custody of the minor children. It is not a matter for this court to adjudicate upon such dispute and to arrive at any findings regarding custody of the children, either permanently or on a temporary basis. It may require appreciation of factual aspects and circumstances and also oral evidence in order to take an appropriate decision. The competent court conferred with jurisdiction in the matter is the Family Court. The present writ petition, once being filed seeking a writ of habeas corpus, cannot be entertained because the custody of the minor children with the 2nd respondent, who is the parent and legal guardian, cannot be termed in any manner as an illegal detention.

7. However, even though we are not exercising jurisdiction under Article 226, it is discretionary on the part of this court to consider the welfare and well being of the minor children, at least on a temporary basis. We notice

the fact that both the minor children were in custody of the petitioner for quite a long time and Ext.R2(1) agreement was executed on 29.01.2015. It is revealed that the 2nd respondent was employed abroad before the settlement. Adamant stand taken by both the children is that they will only go along with the petitioner. They categorically mentioned that they were being ill treated at the house of the 2nd respondent. Under such circumstances, in order to achieve the ends of justice, we feel that custody of the minor children can be entrusted with the petitioner, who is their mother, on a temporary basis, till the rights of the parties are decided by the competent Family Court or till any proper interim arrangement with respect to their custody is made by the said court.

8. It is brought to our notice that both the children were studying at Mount Carmel Vidyanikethern School, Kanjikuzhy, Kottayam in 7th and 3rd standards respectively. They are now promoted to the next classes.

The petitioner told that the 2nd respondent had obtained Transfer Certificate (T.C.) from the said school with respect to both the children in order to put them in some school near to his residence. Since we are ordering custody of the children with the petitioner, it is only just and proper in the interest of justice that the children should be permitted to be put back to the very same school. Therefore the 2nd respondent is directed to get back the Transfer Certificate, if he has entrusted the same with any other school and to hand over the same to Mount Carmel Vidyanikethan School in order to enable the petitioner to admit the children in the said school. In case the Transfer Certificate is not returned back, the school authorities are permitted to admit them even without production of the Transfer Certificate. The 2nd respondent shall also hand over the original Birth Certificates of the children to the above said school authorities.

9. It is made clear that either the petitioner or

the 2nd respondent will be at liberty to approach the Family Court having jurisdiction in the matter, seeking custody of the minor children. If any such petition is filed before the Family Court having jurisdiction, that court will be at liberty to consider about granting interim custody of the minor children and to take an appropriate decision in that respect. We are of the considered opinion that, till such a decision is taken by the appropriate court having jurisdiction in the matter custody of the minor children in this case can be entrusted with the petitioner, subject to the directions contained herein above with respect to studies of the children. However, we think it appropriate to permit the 2nd respondent to have visitorial right, which we ensure by permitting the 2nd respondent to visit the children at Mount Carmel Vidayanikethan School, Kanjikuzhi, Kottayam during lunch time in the presence of a teacher authorized by the Headmistress, once in a week. It is made clear that 2nd respondent shall not cause any disturbance to the children

and shall not hurt feelings of the children in any manner. If the family court is approached by either of the parties, that court shall consider the entire factual circumstances and shall take an appropriate decision, untrammelled by any of the observations contained herein above, as well as untrammelled by the interim arrangement made herein above.

The writ petition is disposed of subject to the above directions and observations.

Sd/-

C.K. Abdul Rehim, Judge

Sd/-

K. Ramakrishnan, Judge

// True Copy//

P.A. to Judge