

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 27TH DAY OF NOVEMBER 2015/6TH AGRAHAYANA, 1937

WP(Crl.).No. 462 of 2015 (S)

PETITIONER:

**NAMITHA ANIL,
AYSHA MANZIL, KUNNUMPURAM,
THRIKKAKKARA**

BY ADV. SMT.K.K.RAZIA

RESPONDENTS:

- 1. NAHAZ NAZEER
CASINO, EDATHUMKUNNEL, AMARAVATHY
2ND MILE STONE, KUMILY-685509.**
- 2. SEENA NAZEER
CASINO, EDATHUMKUNNEL, AMARAVATHY
2ND MILE STONE, KUMILY- 685509**
- 3. NAZEER
CASINO, EDATHUMKUNNEL, AMARAVATHY
2ND MILE STONE, KUMILY- 685509**
- 4. THE SUB INSPECTOR OF POLICE,
KUMILY, IDUKKI, PIN-685501.**

**R1,R2, R3 BY ADVS. SRI.N.SUKUMARAN (SR.)
SRI.S.SHYAM**

**R4 BY ADV. SMT. SREELATHA PARAMESWARAN, (SPL. G.P. FOR WOMEN
AND CHILDREN)**

**THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD ON 27-11-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

AMG

WP(Crl.).No. 462 of 2015 (S)

APPENDIX

PETITIONER'S EXHIBITS

**EXHIBIT P1 - TRUE COPY OF THE FIR REGISTERED BEFORE THE 4TH
RESPONDENT 10-11-2015.**

RESPONDENTS' EXHIBITS

**EXHIBIT R1 (a) - TRUE COPY OF THE CERTIFICATE ISSUED FROM ST.
AUGUSTINE'S HOSPITAL, KUMILY DATED 11-11-2015.**

True copy

P.A. To Judge

AMG

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

W.P (Crl.) No. 462 OF 2015

DATED THIS THE 27th DAY OF NOVEMBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

The petitioner is a 23 year old lady, who is the mother of a one year old child. She is seeking a writ of Habeas Corpus for directing production of the child and to hand over custody to her. The 1st respondent is the husband of the petitioner and the respondents 2 & 3 are his parents. Marriage between the petitioner and the 1st respondent was solemnized on 22-12-2013 and the child was born at a hospital near to the residence of the respondents 1 to 3. Allegations are that, the 1st respondent used to manhandle the petitioner after consuming alcohol and the respondents 2 & 3 only supported him. It is alleged that, even after the delivery the petitioner was not permitted to go to her parental house or to have any regular communications with her parents. It is stated that the petitioner was virtually under house arrest and she was afraid of making any

complaint to the police about the illegal business activities of the 1st respondent. Allegations are made to the effect that the 1st respondent is having illicit relationship with other ladies. When questioned about this the 1st respondent had brutally manhandled the petitioner with the support of the 2nd respondent on 04-11-2015, and she had to run away from the house on 05-11-2015, is the allegation. It is stated that the petitioner was not permitted to take with her the child or any valuable documents, including the Marriage Certificate. Since 05-11-2015 onwards the petitioner is living at her parental house, separated from the child, who is taking breast feeding. The petitioner and her parents are afraid of approaching the respondents for getting custody of the child. The respondents 1 to 3 have refused to give custody of the child, when asked over telephone. It is alleged that the respondents 1 to 3 gave a warning to the petitioner that they will transfer the child to some unknown place. It is also stated that, based on a complaint lodged by the petitioner the police authorities at Kumaly had registered Ext.P1 criminal case against respondents 1 & 2

alleging offences punishable under Sections 498A, 323 & 34 of IPC. But the 4th respondent has not taken any steps to get custody of the child to the petitioner. Based on the specific allegation that the child is being illegally detained by the respondents 1 to 3, the above writ petition is filed.

2. Under normal circumstances, this court may not be inclined to entertain the above writ petition, because the child is now in the custody of her father and paternal grandparents. But in this case the child is only one year old and is allegedly taking breast feeding. Therefore this court ordered notice to respondents 1 to 3, directing production of the minor child.

3. The respondents 1 to 3 entered appearance and filed counter affidavit denying all the allegations. Counter allegations are raised to the effect that the petitioner was not breast feeding the child since her delivery and the child was given only 'formula food' all along, using feeding bottle. It is alleged that the petitioner had neglected the child and it is the 2nd respondent who is taking care of the child, ever since the birth. Being a premature born baby, the child had

several health problems requiring constant medication and attention and all such needs were meticulously taken care by respondents 1 to 3. The child is in the custody of the respondents and she is sleeping only with the 2nd respondent. It is alleged that the petitioner was undergoing a course in Accountancy for the last 5 months in an institution at Ravipuram, Erankulam and she was staying only with her parents. She only occasionally visits Kumaly, is the allegation. All the complaints raised in Ext.P1 with respect to assault and cruelty are denied, as totally false and baseless. Allegations of the respondents are that, the petitioner was not even in good terms with her own parents and therefore they have not even visited the child after the delivery. The respondents have denied the allegation that the petitioner was under house arrest. It is stated that she was sent for higher studies at the expense of the respondents 1 to 3. It is alleged that the petitioner shows strange behaviour at lucid intervals and she had some problem on the evening of 04-11-2015. She left the matrimonial house at the morning on 05-11-2015 in an

Autorickshaw summoned by her. At that time she did not even asked for custody of the child. She stated that she is going to live with her parents at Ernakulam for continuing her studies. Allegation of the respondents are that the petitioner is mentally ill and she was under treatment earlier. It is stated that the petitioner is not in a position to lookafter the child and the welfare of the child will be adversely affected if given custody to the petitioner.

4. On 16-11-2015 when the case is posted we interacted with the petitioner, her parents and with the respondents 1 & 2, separately. We directed respondents 1 & 2 to hand over custody of the child to the petitioner and the petitioner was permitted to have access with the child till the afternoon. Despite detailed deliberations conducted with the parties for an amicable settlement of the issues, we felt that there is no immediate possibility of a reunion or reconciliation of the marital status. Considering the very tender age of the child, we are of the opinion that the mother cannot be denied of having custody of the child, subject to protecting visitation rights of the respondents 1

to 3. Therefore, to workout possibilities of an amicable settlement, atleast with respect to interim custody of the child, we have decided to refer the case for mediation. Accordingly the parties were relegated for mediation, to the Ernakulam Mediation Centre, on 24-11-2015. But the report submitted by the Mediator on the same day itself indicated that the matter could not be settled. On 24-11-2015 also the child was given temporary custody to the mother and she was permitted her to have access with the child for sometime. Since the parties could not arrive at any mutual understanding with respect to interim custody of the child, the matter was taken for consideration to be decided on merits.

5. It is now trite law that even the High Courts exercising power under Article 226 need to bear in mind the 'parens patriae' jurisdiction, in order to ensure that the paramount consideration which is the welfare of the minor child is protected properly. Here is a case where a mother is approaching this court seeking custody of a minor girl child of one year age, allegedly taking breast feed. Of

course, the parties are at severe dispute on various factual aspects, including the aspect of breast feeding. Allegations and counter allegations are there with respect to the reasons for the matrimonial discord. Who among the parents is the best suitable person to have custody of the minor child, is a matter which could be properly adjudicated, based on various facts and circumstances by the appropriate court having jurisdiction under the Guardian and Wards Act. But considering the fact that the child is of very tender age and is a female child who needs care, protection and affection from the petitioner/mother, keeping the child away from her mother may not be in the best interest and welfare of the child. This is especially because there is an allegation that the child is taking breast feeding. Hence we are inclined to direct to hand over custody of the child to the mother, subject to liberty reserved to the 1st respondent to approach the Family Court concerned seeking appropriate relief under the Guardian and Wards Act. It is for the Family Court to take note of all the factual situations and circumstances to arrive at a just

and proper conclusion regarding entitlement for custody of the minor, among the petitioner and the 1st respondent. It is also appropriate for the Family Court to take immediate steps to pass orders on the question of temporary custody, pending disposal of any such case.

6. Learned Senior Counsel appearing for respondents 1 to 3 submitted that they are ready to approach the Family Court, Ernakulam seeking for appropriate reliefs. In this writ petition this court is proposing only to make an arrangement for having custody of the minor child with the petitioner, till the Family Court takes an appropriate decision in this regard.

7. In the result, this court directed the respondents 1 to 3 to hand over custody of the minor child to the petitioner. The child was accordingly given custody to the petitioner and to her parents on today, which is taken note on record. The 1st respondent is given liberty to approach the Family court in any appropriate petition under the Guardian and Wards Act, and also given liberty to move any appropriate interim application for temporary

custody/visitorial rights. The parties are at liberty to take all contentions before the Family Court. Needless to observe that, if any such application is filed before the Family Court, immediate steps shall be taken to pass orders on the question of interim custody, pending disposal of such application.

8. The writ petition is disposed of accordingly.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

K. RAMAKRISHNAN, JUDGE.

AMG

True copy

P.A. to Judge