

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (HC) No. 16 of 2016**

Sofiya Khan W/o Shri Riyaz Khan, Aged About 27 Years R/o Noorani Chowk, Tehsil And Distirct Raipur Chhattisgarh

---- **Petitioner****Versus**

1. Riyaz Mohammed S/o S. M. Ismile Aged About 36 Years Permanently Residing At Medayil Veeldu, M. C. Street, Balaramapuram, Thruvananthapuram, Kerala, Presently Residing At Flat No. 804, Nasser Lootha Building, Muhaisnath- 4, Dubai
2. Union Of India Through Its Secretary, Ministry Of Home Affairs, Govt. Of India, North Block Cabinet Secretariat, Raisina Hill New Delhi,
3. Secretary, Ministry Of External Affairs Govt Of India North Block Cabinet Secretariat, Raisina Hill, New Delhi,
4. State Of Chhattisgarh Through Its Secretary, Department Of Home Naya Raipur Distirct Raipur Chhattisgarh
5. Superintendent Of Police, District Raipur Chhattisgarh
6. Managing Driector, Capillary Technologies Head Office 31/9 Krimson Square 1st Floor, Roopena Agraahara Hosur, Main Bangalore 560068
7. Syed Mohammed Ismayil Aged About 65 Years R/o At Medayil Veeldu, M.C. Street Balaramapuram, Thruvannanthapuram, Kerala
8. State Of Kerala, Through Its Secretary, Department Of Home, Kerala Government Secretariat Thiruvannanthapuram Kerala

-----**Respondents**

For Petitioner:	Shri Mahesh Kumar Mishra, Advocate.
For Respondents No.4 & 5/State:	Shri YS Thakur, Additional Advocate General.
For Union of India/Respondents No. 2 & 3 :	Shri Raj Kumar Gupta, Advocate.
For Respondents No.1 & 7:	Shri RS. Marhas, Advocate. Petitioner and Respondent No.1 present along with their child.

Hon'ble The Chief Justice**Hon'ble Shri Justice Sanjay Agrawal****Order on Board****Per Deepak Gupta, Chief Justice****07/11/2016**

1. This Habeas Corpus Petition has been filed by the Petitioner alleging

that her husband/Respondent No.1 illegally kidnapped and took away her daughter from her custody on 26.9.2016.

2. The undisputed facts are that the Petitioner and Respondent No.1 are Muslims and were married according to their religious rites on 10.08.2009. The Petitioner belongs to a family from Raipur in Chhattisgarh whereas the husband/Respondent No.1 belongs to a family which originally hails from Kerala but settled in Dubai. The husband even at the time of marriage was working in Dubai and the wife, after marriage, shifted to Dubai with him. Out of this wedlock, a girl child was born on 19.2.2014, who was named "Abru". Since this Court is only concerned with the Habeas Corpus Petition, we are not referring to the allegations and counter allegations made by the husband and wife against each other, except those which are absolutely relevant for the decision of this Case.

3. It is not disputed before us that on 18.8.2015, the Petitioner/wife left Dubai along with the minor girl Abru and came to India and since then, she is living with her parents at Raipur. Thereafter, the husband filed a Petition before the Court of Personal Status at Dubai against the wife. A copy of the order passed by the said Court in Case No.1270/2015 has been placed on record and as per this order, the Court revoked the Petitioner/Wife's right to custody of her daughter Abru Riaz. It is however pertinent to mention that it is an ex parte order and according to Petitioner/wife, she had no notice of this Petition.

4. The second document with which we are concerned is an order passed by the Family Court, Thiruvananthapuram on 29.1.2016 in which the Petition for restitution of conjugal rights filed by the Respondent No.1/husband was allowed and the wife was directed to join the company of her husband. This order is also an ex parte order and according to the Petitioner/wife, she had

no notice of the same. According to the Petitioner/wife, in the month of September, 2016, Respondent No.1/husband came to Raipur purportedly for having some talks of compromise and on 26.9.2016, he, by subterfuge, took away the child telling the family of the wife that he would be spending a few hours with the child but he did not return and did not even answer various e-mails and whatsapp messages sent by wife and hence the Petition.

5. The stand of the husband/Respondent No.1 is that he has always been ready and willing to keep his wife and children with him. His further stand is that he has got a Court order from Dubai in his favour and according to him, the wife has disobeyed the order of the Court at Thiruvananthapuram and on this account, the wife is not entitled to custody. It is also alleged that he took away the child with the consent of the Petitioner and her family members. He has denied all the allegations made by the Petitioner. One of the main grounds raised by Respondent No.1/husband is that the child is suffering from a major ailment. According to Respondent No.1/husband, he is having medical insurance at Dubai and he can look after the child at Dubai and it will not be possible for him to get the child treated in India.

6. In a case involving the custody of child, the most important factor is the welfare and interest of the child. Adults may have their egos. Many couples separate and fight with each other but that should not affect the rights of a child. When an unfortunate case of this sort comes up before the Court, it is the duty of the Court to try and find out what is in the best interest of the child and pass orders accordingly. We are, to the best of our ability, trying to do this with a view to ensure that the child lives with the parents. The child is less than 3 years old. She is a young girl and normally, in Indian society, it is accepted that such a young girl is most comfortable with the mother.

7. Keeping in view the allegations made by Respondent No.1/husband

with regard to the illness of the child, we had on, 2.11.2016, taken up this matter in Chambers and had directed both the husband and wife to take the child to MMI Narayana Hospital at Raipur, Chhattisgarh on 4.11.2016. We had also directed the Registrar General of this Court to send a letter of request to the Chief Executive Officer, MMI Narayana Hospital, Raipur requesting him to give his opinion with regard to the condition of the child, the nature of the treatment required and also to clarify whether the said treatment is available at Raipur or not. Complete report has not been received. It is no doubt true that the child is suffering with a problem in her kidney. On going through the entire record produced earlier by Respondent No.1/husband as well as the report now sent by MMI Narayana Hospital, Raipur, it is clear that this ailment is not such a serious one that it requires immediate treatment at this stage. Even the doctors at MMI Narayana Hospital had advised some tests which cannot be conducted at Raipur and it can only be conducted in cities like Nagpur, Vishakhapatnam and Mumbai etc.

8. This brings us to the issue of the order passed by the Dubai Court. By now the law is well settled that each country must give due deference and respect to the orders passed in Courts at different countries. At the same time, we are not oblivious to the fact that in this case, the Petitioner, her husband/Respondent No.1 as well as the minor child continue to be Indian citizens and holders of Indian passports and therefore, the questions can be raised with regard to the jurisdiction of the Courts at Dubai. The order was an ex parte order and even if this order as per international law, is executable in India, the same has to be executed by following the procedure prescribed by law. No person can take law in his own hands and say that since he has an order passed in his favour in some other country, he can forcibly take away the child. If the husband/Respondent No.1 has a legal and valid order in his

favour, nothing prevents him from executing the same in India in accordance with law.

9. We are making it clear that we are only deciding the Habeas Corpus Petition dealing with the immediate custody of the child. We are not deciding the case on merits as to who is entitled to the custody of the child. That will be decided by the concerned Family Court and not by us. However, as far as the present case is concerned, we are clearly of the view that Respondent No.1/husband could not have taken the child from the custody of the mother without her consent. Admittedly, the child was in the custody of the mother because the husband/Respondent No.1 himself had approached the Court at Dubai seeking revocation of the custody of the child from the wife. Once it is accepted that the custody of the child was of the wife, then the procedure prescribed by law had to be followed to take the child from her custody. The husband/Respondent No.1 has not done so and has taken away the child without following any procedure prescribed by law and as such we have no hesitation in holding that the custody of the child must be restored to the mother forthwith.

10. Before parting with this case, we are constrained to make certain observations with regard to the order passed by the Family Judge, Thiruvananthapuram. The Petition for restitution of conjugal rights has been purportedly signed on 11.12.2015 by one Syyed Mohd Ismail, who is stated to be the power of attorney holder and father of Riyaz Mohammad/husband. We are not certain whether in a case for restitution of conjugal rights or custody of child, a Petition can be filed through power of attorney holder. Not only that, another surprising aspect of the matter is that the husband/Respondent No.1 had also filed a Petition for custody of the child before the Family Court, Thiruvananthapuram. We are not certain how the Family Court at

Thiruvananthapuram will have any jurisdiction in the case because the case of the husband before us is that their marriage was solemnized at Raipur and thereafter, the husband and wife lived together at Dubai and last resided together at Dubai itself.

11. Another aspect of the matter is that this Petition has been filed not by the husband but one Syyed Mohd Ismail who is stated to be the father of Respondent No.1/husband and grand-father of the child. We are not sure whether such a Petition can be filed by power of attorney holder or not. The Respondent, along with his reply, filed another judgment dated 29.1.2016 in Original Petition No.1420/2015. This is a judgment in a Petition filed for restitution of conjugal rights. We are not certain whether Muslim law provides for restitution of conjugal rights or not. But one thing is clear that in the order passed by the Family Court, it is not mentioned how the wife was served. It is not even clear when the Petition for restitution of conjugal rights is filed. But admittedly it must have been filed after the Courts at Dubai had passed the order and the wife came to the husband/Respondent No.1.

12. In view of the above discussion, we direct the husband/Respondent No.1 to handover the custody of the child to the mother by 4.30 pm today in the Court premises itself. However, though we have ordered the custody of the child to be handed over to the mother, we would like to clarify certain aspects. The husband/Respondent No.1 is and shall be entitled to meet the child any time when he comes to Raipur and visitation rights will be granted to him. The husband/Respondent No.1 shall also have a right to ensure that the daughter is given proper medical treatment. In this regard, we may observe that the Counsel for the wife has stated that she belongs to a rich family engaged in leather business who can bear any expenses of the treatment of the child.

13. Though the husband and wife may fight, the child has the right to get love and affection from both the parents because if the parents are fighting with each other, there is no reason why the child should be deprived of the love and affection of any one of the parents. Therefore, even if the child is living with the wife, the wife will not deny the visitation rights of the husband and as and when the husband comes from Dubai to India, she will allow the husband to meet the child. We may also clarify that the husband can pursue any other lawful remedy to seek custody of the child and the judgment passed by us has been passed only in Habeas Corpus Petition and shall not be treated as evidence or in any way influence the Court dealing with the custody matter which must be decided strictly in accordance with law and the evidence led before the Court. Even if such Court gives custody of the child to one spouse, the Court must ensure that the other spouse gets proper visitation rights. We may also make it clear that if the order of the Dubai Court can be executed in India, as per international law, the husband is free to do so and the wife is entitled to raise all objections with regard to the same. What we basically have held is that the husband having not followed the procedure prescribed by law, is not entitled to retain the custody of the child at this stage.

14. In view of above, the Habeas Corpus Petition is allowed.

Sd/-
(Deepak Gupta)
CHIEF JUSTICE

Sd/-
(Sanjay Agrawal)
JUDGE