



H.C.P.(MD) No.1958 of 2022

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.12.2022

CORAM:

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
AND
THE HON'BLE MR JUSTICE SUNDER MOHAN**

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Pratibha Ashok Barna

... Petitioner

-VS-

1.The State of Tamil Nadu,
Rep. by the Superintendent of Police,
Madurai,
Tamil Nadu.

2.Rajiv Lochen

3.The Inspector of Police,
Nagamalai Pudukkottai Police Station,
Madurai.

... Respondents

(R3 is suo motu impleaded as per order
of the Court, dated 23.11.2022)

PRAYER: Petition filed under Article 226 of the Constitution of India, to issue a writ of Habeas Corpus, directing the first respondent to take steps to produce the minor children Satvik, aged 11 years, S/o.Rajiv Lochen and Kartik Anirudh, aged 7 years, S/o.Rajiv Lochen before this Court to be handed over with the lawful custody of the petitioner (mother) so as to repatriate them to Australia.

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For Petitioner	: Mrs.T.Thilakavathi Senior Counsel for Ms.C.Yazhini
For R1 & R3	: Mr.R.Meenakshi Sundaram Additional Public Prosecutor
For R2	: Mr.R.Ramasamy

ORDER

DR.G.JAYACHANDRAN,J.
AND
SUNDER MOHAN,J.

This petition has been filed by the mother of the detenues born to the petitioner and the second respondent herein.

2. It is the case of the petitioner that the petitioner and the second respondent got married on 24.01.2007 and thereafter, started living in Australia, through wedlock, their first son was born on 01.05.2011 and the second son was born on 14.04.2015. The petitioner and the second respondent did not get along well and therefore, sought for divorce before the Federal Circuit and Family Court of Australia. The Family Court, Australia granted divorce. Also gave the shared parental responsibility to both the petitioner and the second respondent



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vide order, dated 22.05.2018. Thereafter, since the petitioner fell sick, she consented to an order being passed granting custody to the second respondent herein. Accordingly, the order was passed on 30.07.2019 granting custody to the second respondent and visitation right to the petitioner.

3. It is the further case of the petitioner that thereafter, without obtaining leave from the Court and without informing the petitioner, the second respondent took the minor children from Australia to India. Thereafter, She had filed another application seeking revocation of the earlier consent order passed on 30.07.2019. The Federal Circuit Court of Australia had observed that since the second respondent had removed the children from Australia without informing the petitioner, about such removal, the act committed by the second respondent was in breach of the earlier order granting custody to the second respondent. On 22.12.2021 recording the above facts, the second respondent was directed to appear before the Federal Circuit Court of Australia on 17.01.2022. Since the second respondent did not appear before the Federal Circuit Court of Australia, the said Court passed an order on 07.04.2022 recording the fact that the second respondent had removed the children in breach of Section 65(Y) of the Family Law Act and had failed to comply with orders made on 17.01.2022 and



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further passed an order on undefended interim basis holding that the petitioner shall have sole parental responsibility for making decision for the long term care of the two minor children. The Federal Circuit Court of Australia also authorised the Solicitor of the petitioner to request the High Court of Madras to do all acts and things necessary including examining, aiding, assisting and facilitating the return of the children to Australia and to request all administrative, police and other authorities in Madurai and State of Tamil Nadu, India to assist compliance with Orders made in the Federal Circuit Court of Australia.

4. Simultaneously, the petitioner has approached this Court praying for writ of Habeas Corpus Petition on coming to know that the second respondent is living with the minor children within the jurisdiction of this Court. The second respondent filed Guardian Original Petition in G.W.O.P.No.31 of 2022 for retaining the custody of his two minor sons before the I Additional District Court in Madurai.

5. On the notice issued by this Court, the second respondent appeared before this Court with the minor children and the petitioner also appeared in person before this Court on 21.12.2022 and 22.12.2022.



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6. It is the case of the second respondent that he had to travel to India due to his mother's sickness and he had no intention to commit violation of the order passed by the Family Court in Australia.

7. We personally interacted with all the parties including the minor children. The minor children expressed that they are happy to be in the company of the father in India under the care of the second respondent's mother. In our view, though the children appear to be comfortable in the company of the father, we are conscious of the fact, the mother is equally entitled to the care and custody of the minor children and the children are also entitled to the love and care of the mother. Therefore, we counselled the children as our paramount consideration was their welfare and best interests. Thereafter, we suggested to the parties that they arrive at a settlement which would protect the interest of both the parents as well as the minor children. The parties have broadly agreed that the children shall be taken to Australia by the father and the father will not suffer any consequences due to the breach of the earlier orders passed by the Federal Circuit Court of Australia, more particularly, the undefended interim order passed on 07.04.2022.



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8. In our opinion, this agreement mutually entered into by the parties would take care of the welfare and interest of the minor children, since it is desirable that they are in the company of both the petitioner and the second respondent. In order to facilitate the second respondent to take the children without being subjected to any penal consequences, the petitioner had given an undertaking that she would file a petition before the Court concerned in Australia not to enforce or take any contempt proceedings for any violation of the orders of Family Court, Australia. She would also give her consent for withdrawal of the Family Law Watchlist and ensure that the Family Law Watchlist in respect of minor children shall stand withdrawn.

9. With more precision, both the parties have now filed a Joint Compromise Memo, dated 22.12.2022 which reads as follows:-

“The compromise between the parties made at Madurai on this the Twenty second day of December, 2022 between Ms.Pratibha, D/o. Ashok Barna, Hindu, aged about 41 years, residing at 5, Stewart Close, Cheltenham, NSW, Australia-2119 (hereinafter called Mother) of the One Part and Mr.Rajiv Lochen, S/o.Chandrasekaran, Hindu, aged 45 years residing at No.3/38, Rajiv Ramya Bhavan, Nagamalai, Alampatty, Madurai-625 013



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WEB COPY (hereinafter called *Father*) of the Other Part.

As per the instructions of this Hon'ble Court, the petitioner mother and the second respondent father are filing this joint memo considering the welfare and future prospects of the children.

The following undertaking is given by the father

- 1.The father will produce the children before the Federal Circuit and Family Court of Australia on 24.02.2023 and hand over the physical custody to the mother and submits to accept the decision taken by the Federal Circuit and Family Court of Australia regarding the custody, visitation rights.*
- 2. The father has booked flight tickets to Australia for himself and the children and is departing from India on 21.02.2023.*
- 3.The father submits that he will not take any steps to renounce the Australian citizenship of the children in the future.*
- 4.The father shall withdraw the custody case filed by him I.e., G.W.O.P.No.31 of 2022 pending before the I Additional District Court, Madurai and shall produce a proof of the same to the mother before 31.01.2023.*
- 5.The father shall provide the child care support that is ordered by the Courts in Australia.*
- 6.The father shall allow the mother to have interaction with the children after the school hours and on holidays during the Children's stay in India till 21.02.2023.*
- 7.The father shall allow the mother to take the children with her and*



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spend time with them during her stay in India till 04.01.2023.

8.The father shall initiate an application (referred as the Consent Order) before the Federal Circuit and Family Court of Australia in P(PAC) No.6919/2021 which will address the following.

a.Non initiation of Contempt Proceedings by the mother

b.Removal of both the father's name and the children's name from the Family Law Watchlist.

c.No legal expenses will be claimed by the mother with respect to the application initiated by her and the father in turn will pay \$16000 in monthly installment over a period of one year.

The following undertaking is given by the mother

9.The mother shall sign the Consent Order initiated by the father as mentioned in clause 8 before the Federal Circuit and Family Court of Australia in P(PAC) No.6919/2021 and she will not initiate any contempt proceedings with regard to breach of the orders passed by the Federal Circuit and Family Court of Australia in P(PAC) No. 6919/2021 against the father.

10.The mother agrees to withdraw all the domestic violence cases initiated by her in the past.

Sd/-

Signature of the mother

Sd/-

Counsel for mother

Sd/-

Signature of father

Sd/-

Counsel for father ”



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10. The photocopy of the Joint Compromise Memo signed by the parties and their counsel shall be annexed with this order.

11. As per the terms of the Joint Compromise Memo, dated 22.12.2022, the second respondent shall take the children to Australia on 21.02.2023 and appear before the Federal Circuit Court of Australia. The parties shall pursue any other claims before the Federal Circuit Court of Australia which is not already settled by mutual agreement. The petitioner shall not initiate penal proceedings against the second respondent for the breach committed by the second respondent, namely, father of the children for the unauthorised removal of the children. The petitioner shall also take steps to remove the name of the second respondent and the children from the Family Law Watchlist. She undertakes not to claim legal expenses incurred by her before the Court at Australia. However, second respondent has agreed to pay a sum of \$16000 to the petitioner in monthly instalments over a period of one year. We ensured that the parties incorporate the above terms, so that no legal harm is caused to the second respondent when he returns to Australia.



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12. The learned counsel appearing for the petitioner is directed to file compliance report regarding withdrawal of all complaints against the second respondent before the Federal Circuit Court of Australia touching upon the removal of the custody of children from Australia to India.

13. The learned counsel for the second respondent is directed to file compliance report about the withdrawal of G.W.O.P.No.31 of 2022 pending before the I Additional District Court, Madurai. Even otherwise, the Guardian Wards Original Petition has become infructuous in view of the order passed by this Court in the Habeas Corpus Petition.

14. Further, the learned counsel for the second respondent is directed to file a report about the compliance of the terms of the contract in respect of Clause 1 & 2.

15. With the above observations, this Habeas Corpus Petition is closed.



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WEB COPY 16. Post the matter on 27.02.2023 for reporting compliance.

[G.J.,J.] [S.M.,J.]
22.12.2022

Index : Yes / No
Internet : Yes / No
am

**Note: Copy of this Order to be forwarded
to The Federal Circuit Court of Australia
through The Registrar (Judicial) Madurai
Bench of Madras High Court, Madurai.**

To

- 1.The Superintendent of Police,
Madurai,
Tamil Nadu.
- 2.The Inspector of Police,
Nagamalai Pudukkottai Police Station,
Madurai.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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