

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MRS. JUSTICE MARY JOSEPH

TUESDAY, THE 22ND DAY OF SEPTEMBER 2015/31ST BHADRA, 1937

Mat.Appeal.No. 343 of 2015 ()

AGAINST THE ORDER IN OA 644/2012 of FAMILY COURT,KOZHIKODE DATED
02-03-2015

APPELLANT(S) /PETITIONER:

K.P.ABDUL NASAR AGED 32 YEARS
S/O.MUSTHAFA, NASEEMA MANZIL, MANANTHALAPALAM
FRANCIS ROAD, P.O.KALLAI, NAGARAM AMSOM DESOM
KOZHIKODE TALUK, PIN-673 003.

BY ADVS.SRI.K.M.FIROZ
SMT.M.SHAJNA
SRI.S.KANNAN

RESPONDENT(S) /PETITIONER:

K.P.AYISHA AFRA, AGED 22 YEARS
D/O.ABDUL NAZAR, AJU SHALIMA MAHAL
THAYYIL THAZHAM PARAMBA, NORTH BEYPORE
NADUVATTOM POST, NADUVATTOM AMSOM, DESOM
KOZHIKODE TALUK, PIN-673 015.

BY ADV. SRI.P.V.KUNHIKRISHNAN

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
22-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.K.ABDUL REHIM & MARY JOSEPH, JJ.

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Mat.Appeal No.343 of 2015

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Dated this the 22nd day of September, 2015

JUDGMENT

Abdul Rehim, J.

The petitioner in O.A No.644 of 2012 on the files of the Family Court, Kozhikode is in appeal against an order passed by the said court on 02.03.2015. The respondent herein is the respondent before the court below. Marriage between the appellant and the respondent was on 20.04.2008. A minor child named 'Abdul Harshal' was born out of the wedlock, who is now aged six years. The marital relationship got dissolved through pronouncement of 'Thalak' made on 09.01.2012. Eventhough the respondent had not initially accepted the 'Thalak' letter, a subsequent agreement was arrived between the parties through mediation on 22.03.2012 and the 'Thalak' was accepted. According to the appellant, as per the mediation settlement arrived on 22.03.2012, the respondent had agreed to show the minor child to the petitioner and his relatives as and when

required and also agreed for the appellant taking the child to his house at least for four days in a month and on special occasions. The appellant subsequently married another lady and there is a child born in that wedlock. The respondent also got married subsequently on 04.04.2013 and is residing with her new husband.

2. The appellant had approached the Family Court in O.A No.644 of 2012 alleging that, against the terms of the agreement arrived the respondent had denied the appellant to have access to the minor child. Hence permanent custody of the child was sought for. The respondent resisted the application contending that the agreement arrived was not with her consent and that the appellant had altered terms of the agreement contrary to the understanding arrived. According to her, she happened to sign the agreement without noticing the alterations. It was contended that, at the time when the case was instituted the appellant was working abroad and that the respondent had permitted the appellant to see the child as and when he comes to native place. But he used to take away the child and to keep the respondent unaware about the child for two or three hours. Therefore it is alleged that the appellant had subjected the respondent to mental cruelty. She was compelled to

go to the house of the appellant in order to get back the child, and on that basis the appellant had made defamatory allegations against the respondent. It was also contended that the minor child would not get any proper care and attention in the house of the appellant since there are so many other children. According to the respondent, she is in a better position to give proper care and education to the minor child. It is also pointed out that the appellant is having another child in the second marriage, whereas the respondent has no other child.

3. The Family Court had adjudicated the matter based on the rival contentions and evidence on record, which includes oral testimonies of the appellant and the respondent as P.W.1 and R.W.1 respectively, and on the basis of Exts.A1 and A2 documents on behalf of the appellant and B1 to B3 documents on behalf of the respondent. After evaluation of the evidence on record the court below had arrived at a conclusion that the minor child will have to be left in the custody of the respondent, who is the mother. At the same time it was found that the appellant can be given access to the child in the court premises from 2 p.m to 4 p.m on third Saturdays of every month, until the relationship between the

appellant and the child has improved. The appellant was directed to pay to the respondent a sum of Rs.1,000/- per day of access, towards expenses. It is aggrieved by the denial of permanent custody to the appellant, this appeal is filed. Inter alia, it is contended that the visitorial right / access provided in the impugned judgment is too inadequate and insufficient.

4. On an evaluation of the impugned judgment and on a quick re-appraisal of the oral evidence on record, copies of which are made available to this court by the learned counsel appearing for the appellant, we are satisfied that the court below was fully justified in granting permanent custody of the minor child to the respondent. The court below found that the appellant is having another child in his present marriage, whereas the respondent has no other children. After ascertaining wish of the child it was found that he wants to stay with the mother. As it is trite law, paramount consideration should be the welfare of the child. A child at the age of six years needs protection, care, love and affection from the mother, no matter whether the mother is financially capable by herself in taking care of the needs of the child or whether she is dependent on her father or the subsequent husband. Therefore we

are of the considered opinion that the findings regarding permanent custody of the child does not require any interference.

5. The appellant had raised contentions to the effect that the court below had erred in limiting the access of the appellant to the child only for a period of two hours that too only during third Saturdays of every month. According to the appellant, such a decision was taken solely depending on the finding that the child was not willing to go with the father and to have overnight stay with him. It is contended that the court below was not justified in ascertaining wish of a child of five year age and in taking a decision solely depending on such wish. It is alleged that, the wish expressed by the child was totally tutored and the proper procedure in ascertaining such wish was not followed by the court below. It is contended that, as per the mutual agreement, copy of which was marked as Ext.A1 in evidence, the respondent had permitted the appellant to take the child to his house at least four days in a month and also on special occasions. According to the appellant, a contrary stand taken by the respondent ought to have been discarded by the Family Court. It is specifically contended that the court below had failed to mark in evidence a

CD (Compact Disc) produced by the appellant containing 30 photographs and videos showing intimacy and acquaintance of the child with the appellant, which was produced before the court below along with I.A No.25/2015. The allegation raised by the respondent that the child was afraid of coming along with the appellant is only a story cooked up for the purpose of the case. Hence, a strong appeal is made for interference of this court in modifying the visitation rights.

6. The respondent raised vehement contentions opposing the reliefs, stating that the Family Court had restrained the visitation right only for two hours, on the basis that the wish of the child was ascertained and that the child was not willing to go along with the appellant. It is further contended that the circumstances prevailing in the house of the appellant is not conducive for the child to have a satisfactory residence. Relying on Ext.B1 series photographs, it is contended that the house of the appellant is situated in a small plot of three cents and there is a stream passing nearby to the house, which will cause potential endanger if the child is left unattended. It was also pointed out that the child is having mental anxiety problems with respect to separation, for which the child was taken

for consultation at the Medical College Hospital, Kozhikode. Ext.B3 is the O.P ticket, dated 21.04.2014 with respect to such consultation of the child made before the said hospital.

7. While appreciating the rival contentions, we take note of the fact that there is no justification at all in denying the appellant to have proper access to the child, he being the father. Eventhough permanent custody to the mother is justified, the appellant cannot be denied of proper access to the child merely because he got remarried and has got another child in the second marriage. The minor child in the case is not a small baby of tender age. It is always better on considering his future and welfare, that the boy need to have access and acquaintance with his father. We are also constrained to take note of the facts regarding Ext.A1 agreement and the terms contained therein with respect to custody of the child, eventhough execution of such an agreement was denied by the respondent.

8. When the appeal came up for consideration on 05.05.2015, this court passed an interim order permitting the appellant to have access to the child continuously for a period of two weeks from 10 a.m to 5 p.m in the premises of the Family Court. Through a further

order dated 15.07.2015, the child was handed over custody on two days, on 17.07.2015 and 18.07.2015 from 9:30 a.m till 3 p.m. Still further, on 21.08.2015 this court directed the respondent to hand over custody of the child for four days to the appellant from 26.08.2015 to 29.08.2015 from 9:30 a.m till 3 p.m. On 27.08.2015, the appellant was also permitted to take the child to attend the 'house warming' ceremony arranged with respect to the new house constructed, by handing over the child at 5:30 a.m and returning the child at the residence of the respondent before 7 p.m. There is no complaint that on any of the above said occasions there were any incident of ill treatment or any laches in providing care and protection to the child. It is admitted by the learned counsel appearing for the respondent that the appellant had paid up-to-date arrears of maintenance awarded to the child at the rate of Rs.3000/- per month from 10.01.2014 onwards, as per the order in M.C No.10 of 2014 of the Family Court, Kozhikode dated 17.06.2015.

9. Considering the circumstances as mentioned above, we are inclined to modify the arrangements made by the court below in the impugned judgment, regarding visitation right of the appellant.

Hence the appeal is allowed in part to the following extent.

The impugned order in O.A No.644 of 2012 is modified to the extent of permitting access of the appellant to the child on the following terms.

- i) The appellant will be entitled to have custody of the minor child 'Abdul Harshal' for two days during the 4th weekend of every month. For the said purpose, the respondent is directed to produce the child before the Family Court at 10 a.m on the 4th Saturday of every month and to hand over the child to the appellant. The appellant will return custody of the child at the same premises before 4 p.m on the next day (4th Sunday).
- ii) The appellant shall be given custody of the minor child for four days during the onam holidays and Christmas holidays in the first half, from the first day of the beginning of of the holidays, by producing the child before the Family Court with the timings mentioned as above. In the same manner interim custody of the child shall be handed over to the appellant for 15 days during summer vacation in its first half.

The above arrangement will continue till the child attains majority. However, either of the parties will be at liberty to seek modifications before the Family Court in case there is any material change in the circumstances.

Sd/-
C.K.ABDUL REHIM, JUDGE

Sd/-
MARY JOSEPH, JUDGE

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