

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 9TH DAY OF DECEMBER 2015/18TH AGRAHAYANA, 1937

Mat.Appeal.No. 558 of 2015 ()

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(AGAINST THE JUDGMENT IN OP GW 438/2013 of
FAMILY COURT, MAVELIKKARA DATED 09-03-2015)**

APPELLANT/PETITIONER:

**C.JAYASREE,
D/O. CHANDRIKA,PERINGOTTU VEETIL, PAYIPPAD P.O
PAYIPPAD VILLAGE, CHANGANASERY TALUK.**

**BY ADVS.SRI.SATHISH NINAN
SRI.SANTHOSH MATHEW
SRI.K.A.ABDUL HAMEED
SRI.JENNIS STEPHEN**

RESPONDENT/RESPONDENT:

**VIVEKANANDAN.J @ JAYAN,
S/O. JANARDHANAN, GAYATHRI, ALA P.O
PERISSERI MURI, ALA VILLAGE,
CHENGANNUR TALUK, PIN-683 101.**

BY ADV. SRI.M.R.SARIN

**THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 09-12-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

AMG

**C.K. ABDUL REHIM, J.
&
MARY JOSEPH, J.**

Mat. Appeal No. 558 OF 2015

DATED THIS THE 9th DAY OF DECEMBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

Since both the parties have entered appearance and it is felt that calling of the records from the Family Court is not necessary for disposal of the appeal, the above appeal is heard and disposed of on today.

2 The appeal is instituted against order passed by the Family Court, Mavelikkara in OP (G&W) No.438/2013. Appellant herein had filed the original petition before the court below, seeking permanent custody of the minor child of the parties, namely, Kumari. Devananda. It is admitted case that the marriage between the parties were solemnized on 06-09-2007 and the child was born on 26-08-2008. It is also not in dispute that the parents of the child are living separated due to severe matrimonial discord, since 27-12-2010 onwards. There are allegations of cruelty raised against the respondent, which are denied by the

respondent as false. Counter allegations are also made that the appellant had ill-treated the respondent. While considering the question as to whether the appellant is entitled to get permanent custody of the child the court below found that the child is now living with the respondent along with paternal grand parents. Whereas, the appellant is residing in her house along with her mother. The court found that there is nothing to show that the respondent had treated the appellant with cruelty or that he had driven out her from the matrimonial home. It is also found that there is no medical records available to substantiate contentions of the appellant that she was manhandled and had undergone treatment in a Hospital. Allegations raised by the appellant are to the effect that, the respondent had even attempted to assault the child. It was also found that those allegations are not reliable and are baseless. On interaction with the child, the court below found that, she is living happily with the respondent and with the paternal grand parents. It is also noticed that the child is studying in a school near to the place of residence of the respondent and she is reluctant to

go along with the appellant. On an evaluation of the evidence on record, the court found that the respondent is having sufficient means for maintaining the minor child properly, by giving better education. Despite the willingness expressed by the respondent to take the appellant along with him, evidence tendered by the appellant is to the effect that, she was not willing to go along with the respondent and to resume cohabitation. Considering the welfare of the child, which is the first and paramount consideration, it was found by the court below that, if the child is forcefully taken from the custody of the respondent and handed over to the mother the better interest of the child will not be protected. The court below observed that, it is not proper to order custody of the child with the appellant by disturbing her studies. Despite the fact that the appellant is the mother of the child, the court gave weightage to the aspects of contentment, health, education, intellectual development and favourable surroundings conducive for the child. Hence it is found that the respondent is entitled to get permanent custody of the minor child. However, the court below had

provided visitation right to the appellant by permitting her to see the child at the respondent's house, twice in a month, on every first and last Saturdays. It is aggrieved by the denial of permanent custody of the minor child and with respect to inadequacy and insufficiency of the visitation right provided, the above appeal is filed.

3. Eventhough learned counsel for the appellant had raised strenuous arguments seeking permanent custody of the child, based on a contention that the child need love, care, protection and affection of the mother, we do not find any valid ground to upset the findings arrived by the court below with respect to the welfare of the child. The findings are to the effect that the transfer of custody of the child will affect her studies and that the respondent is in a better financial position than the appellant. Such findings are founded on facts and evidence available on record. Eventhough the aspect of custody cannot be decided on the expression of the child who is of tender age, it is a matter which is not wholly irrelevant for consideration while deciding the question of custody. Hence we are not

persuaded on the contentions of the appellant which are assailing the findings regarding refusal of the permanent custody.

4. However, after hearing counsel on both side, we are of the opinion that the visitation right provided in the impugned order is not effective and practical. It is evident that the parties are living separated due to severe matrimonial disputes. It may not be possible for the appellant to make a visit to the house of the respondent to see the child. More over, we feel that the appellant being the mother should be provided with adequate opportunity to have sufficient interactions with the child, especially the minor being a girl child at the age of 7 years. Therefore we are inclined to modify provisions made in the impugned order with respect to visitation and accessibility of minor child to the appellant.

5. Hence the above Mat. Appeal is allowed in part to the extent of modifying the impugned order on the following terms;

“The appellant/petitioner shall be permitted to have access to the child on 1st and 3rd Saturdays of every month from 11 a.m. till 4 p.m. The respondent is directed to produce the child for the above said purpose before the Family Court, Mavelikkara on 1st and 3rd Saturdays of every month, before 11 a.m. before the Chief Ministerial Officer (CMO). The CMO shall hand over custody of the child to the appellant, after noting the same in the Register kept for the said purpose. The appellant shall be permitted to take the child outside the Family Court premises, within the limits of the city of Mavelikkara. She shall entrust back custody of the child to the respondent before 4 p.m., after endorsing the same in the Register kept by the CMO of the court.”

6. The above arrangement shall continue for a period of 6 months from today. The appellant will be at liberty to approach the Family Court seeking modification of the above said arrangement, in case she is intending to seek interim custody during any vacation or holidays on an overnight basis, on the basis that she had established more

intimacy and acquaintance with the child. So also the respondent will be at liberty to seek any modification if there is any substantial change of circumstances.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

MARY JOSEPH, JUDGE.

AMG

True copy

P.A. to Judge