

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 16TH DAY OF OCTOBER 2015/24TH ASWINA, 1937

Mat.Appeal.No. 829 of 2015 ()

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(AGAINST THE COMMON ORDER DATED 22-05-2015 IN I.A. No.1711/2015
IN G.O.P No.97/2011 OF THE FAMILY COURT, THRISSUR)**

APPELLANT/RESPONDENT:

**SANTHOSH K.R.
KUNNAMBATH VEETIL,
KOLAKUNDU DESOM, MANDAMANGALAM P.O.
THRISSUR DISTRICT-680 014.**

BY ADV. SMT.ASHA CHERIAN

RESPONDENTS/PETITIONER:

**SANITHA
D/O. KUNJUNNI, VARIYATHUVALAPPIL VEEDU,
MARATHUKUNNU DESOM, EANKAKKADU VILLAGE
THALAPPILLY TALUK, PIN-680 589.**

**BY ADVS. SRI.K.R.AVINASH (KUNNATH)
SRI.ABDUL RAOOF PALLIPATH**

**THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 16-10-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

AMG

APPENDIX

APPELLANT'S EXHIBITS

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| ANNEXURE-A1- | TRUE COPY OF THE ORDER DATED 25-06-2012 IN G.O.P No.97/2011 OF THE FAMILY COURT, THRISSUR. |
| ANNEXURE-A2- | TRUE COPY OF THE ORDER IN O.P (DIV.) No.96/2011 OF THE FAMILY COURT, THRISSUR. |
| ANNEXURE-A3- | TRUE COPY OF THE COMMON ORDER DATED 11-12-2014 IN G.O.P No.97/2011 OF THE FAMILY COURT, THRISSUR. |
| ANNEXURE-A4- | TRUE COPY OF I.A. 1711/2015 DATED 25-04-2015 FILED BY THE RESPONDENT IN G.O.P No.97/2011. |
| ANNEXURE-A5- | TRUE COPY OF I.A. 1711/2015 DATED 14-05-2015 FILED BY THE RESPONDENT IN G.O.P No.97/2011. |
| ANNEXURE-A6- | TRUE COPY OF THE COMMON JUDGMENT DATED 06-07-2015 IN M.A. Nos.222/2015 AND 226/2015. |

RESPONDENTS' EXHIBITS

NIL

True copy

P.A. To Judge

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

Mat. Appeal No. 829 OF 2015

DATED THIS THE 16th DAY OF OCTOBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

The above case is a splendid example of parents under matrimonial discord fighting each other for custody of their minor children for years together, case after case and court after court, merely to shed out their ego and enmity and thereby putting the helpless children being disposed of as a commodity, without any concern about their real welfare and interest. From the very circumstances existing, this court is convinced that both the parties are not giving importance to the paramount consideration which is the welfare of the minor child, which need to be taken care.

2. The litigation started based on a case instituted by the appellant herein as O.P No.97/2011 before the Family Court, Thrissur. The minor girl born out of wedlock between the parties was aged only 4 years at that time. The said case was disposed of by the Family Court through a

consented order passed on 25.06.2012. The appellant herein had agreed that the child can be continued in the custody of the respondent, subject to condition that temporary custody will be given to him on the 1st and 3rd weekend of every month, from 10 a.m on the Saturdays till 4 p.m on the succeeding Sundays. The direction was to hand over the child from the office of the Family Court and also to return her custody from the court itself. Thereafter, in June 2014, the marital relationship between the parties got dissolved through an order passed by the Family Court, Thrissur in O.P No.97/2011, dated 18.06.2014. Meanwhile, the appellant approached the Family Court in I.A No.2555/2013 alleging violation of the terms of the compromise order and seeking to impose punishment upon the respondent for violations. The respondent filed another interim application as I.A No.2317/2014 seeking to cancel the order passed in O.P No.97/2011. Both the above applications were disposed of together through a common order (Annexure-A3) passed by the Family Court on

11.12.2014. The Family Court found that, intention of the respondent in filing the interim application is only because she does not want to give custody of the child to the appellant any longer. After a perusal of the Register maintained at the Family Court with respect to custody of the children, the Family Court observed that the appellant appeared before the Shirastadar of the Family Court on 10 different dates, from January 2014 upto August 2014. But, except on 24.05.2014, on all days the respondent had not produced the child. Even on 24.05.2014, after production of the child she had left the Family Court with the child, stating that the appellant has not appeared. But the endorsement contained in the Register on the said date is to the effect that the petitioner had informed the Advocate appearing on behalf of the respondent that he will reach the court only after one hour and that the respondent should wait. But the respondent left the premises along with the child without waiting for the appellant to come. The Family Court had found that, the wild allegations raised

apprehending abuse of the child, is totally baseless. Finding that the respondent had violated the order passed by the Family Court, purposefully without any valid reason, I.A No.2317/2014 filed by the respondent seeking cancellation of the earlier order was dismissed. The court below found that the respondent is liable to be punished for continuous violation of the directions, by not producing the child in compliance with the order passed by the said court. However, instead of punishing the respondent, the court below took a lenient view and three months time was granted to the respondent for promptly obeying the directions in a scrupulous manner. Accordingly, I. A No.2555/2013 is ordered as follows:

“(2) In IA 2255 of 2013 the violation of the court order by the respondent is found. But instead of punishing the respondent straight away, 3 months period is given to her to see that the order of the court is obeyed in its true letter and spirit. During the next 3 months if she commits any violation appropriate punishment will be given to her for the violation already found.

(3) Even after the above period of 3 months if she commits any breach the respondent is at liberty to approach the court to get permanent custody of the child by modification of the order passed earlier.”

3. The above said common order was subjected to challenge before this court in two Appeals instituted by the respondent as Mat Appeal Nos.222/2015 and 226/2015. Annexure-A6 is the common judgment through which those appeals were disposed of. During pendency of the above appeals both the parties have filed different interim applications before the court below. The appellant herein filed I.A Nos. 1229/2015 and 1230/2015 seeking for enforcement of Annexure-A3 order and also for imposing punishment on the respondent herein. Whereas the respondent herein had filed I.A No.1711/2015, 1712/2015 and 1627/2015, seeking directions for modification of the interim arrangement to the extent of directing the appellant to take the child into custody from the residence of the respondent, and seeking stay of further proceedings pursuant to Annexure-A3 order. It was also requested that

the Family Court should ascertain the mental condition of the child.

4. All the above interim applications filed by both sides were considered together by the Family court and a common order, which is impugned in this appeal, was passed on 22-05-2015. The earlier Mat.Appeals filed by the respondent herein before this court were disposed of through Annexure-A6 judgment by observing that, if the respondent herein complies with the directions contained in the modified order, then there will be no question of imposing any punishment. This court observed that there is no necessity to interfere with Annexure-A3 order, because in view of the modification granted the relief sought for in those appeals had lost significance. But, while disposing the said appeals, this court had specifically reserved liberty of the appellants herein to seek modification regarding the arrangement for custody of the child.

5. In the order impugned in the present appeal, the Family Court had allowed IA No.1711/2015 filed by the

respondent herein seeking modification of the interim arrangement made through Annexure-A3 order. In variation of the earlier arrangement to hand over the child from the Family court, the appellant is directed to take custody of the child from the residence of the respondent, on the 1st and 3rd Saturdays and to return the child on the next day morning at 10 a.m. It is aggrieved by the said order passed in I.A. No.1711/2015, to the extent it modified the interim arrangement, the above appeal is filed.

6. Contention of the appellant is that the respondent had sought for the modification only by raising a totally false and baseless claim that she met with an accident on 30-12-2014 and is unable to move around or to go to the Family Court, Thrissur, along with child. The modification was sought for to the extent of directing the appellant to take custody of the minor child from the residence of the respondent on all the 1st and 3rd Saturday and to return the child at the same place. It is pointed out on behalf of the appellant that the Family Court had categorically observed

that, even if there is any fracture sustained by the respondent, it cannot be concluded that she was unable to move around or to come to the court at Thrissur. In the absence of any documents obtained and produced from the Doctors who had treated her, such a contention could not be accepted. But it is found that the appellant has not denied the averments regarding the injury caused to the respondent. It is argued that, despite observation of the court below that the contention of the respondent that she is unable to come out of the house for a period of 3 months is not true and correct, the court directed the appellant to take custody of the child from her residence, after finding that she may have difficulty in bringing the child to the court. It is contended that the Family court had issued such an order without considering the specific objections raised by the appellant.

7. On the other hand, learned counsel appearing for the respondent contended that the arrangements now ordered through the impugned order will not cause any

prejudice to the appellant in any manner and that the direction to produce the child before the Family Court is highly inconvenient for the respondent and it is difficult to be complied with.

8. While considering the issue, it is necessary to have an evaluation of the history of the case. The right of temporary custody during the 1st and 3rd weekend of every month was provided to the appellant through Annexure-A1 order of the Family Court, which was issued as early as on 25-06-2012. But the respondent had failed to comply with the arrangement, consecutively for a long period. Thereafter, based on interim applications filed by the appellant, the Family Court passed Annexure-A3 order on 11-12-2014. Specific finding contained in the said order is that the respondent had violated the directions continuously from January 2014 till August 2014, on more than 10 occasions. Despite such violation being noticed, the Family Court took a lenient view and allowed further time of 3 months to the respondent to strictly adhere to the directions

and to comply with the order. But, instead of complying with such a direction, the respondent had sought for a modification of the earlier order and also sought for staying further proceedings pursuant to Annexure-A3. Evidently those applications were filed during pendency of the appeals instituted by her before this court, challenging Annexure-A3 order. In all probability such an attempt was made only because she was not successful in getting any interim order from this court to the extent of staying the operation of Annexure-A3 order. Thereafter when the appeals were disposed of by this court, she had not pursued the challenge against Annexure-A3, presumably because that time the interim arrangement was already modified by the court below. But on a perusal of the impugned order it is evident that the respondent had not produced any documentary evidence to substantiate her claim that she is remaining disabled from movement or restraining her from producing the child before the Family Court. Even assuming that her claim is true and correct, the contention was only

to the effect that she is restrained from movements for a period of 3 months, from the date on which she sustained the injury of fracture. Admittedly the injury was sustained on 30-12-2014. The order impugned was passed only in May, 2015. By that time the 3 months period was over. But the Family Court, without taking note of the above mentioned history and circumstances, had allowed a modification of the arrangement. A detailed objections filed by the appellant was also not seen taken into consideration.

9. This court is of the firm opinion that, a person who is continuously violating directions of the court do not deserve any leniency. More over it is evident that the parties are living separated since the last so many years and that their marital relationship got dissolved as early as on 18-06-2014. That being the position, considering the fact situation it is not proper to direct the appellant to go to the residence of the respondent to collect the child. Such an order may gave rise to further clashes and untoward incidents. Therefore it is only just and proper to have

continued with the arrangement with respect to temporary custody as ordered in Annexure-A1. The Family Court ought to have considered the directions issued under Annexure-A3 and ought to have made a verification as to whether the respondent had complied with the directions within the period of 3 months as stipulated therein. The modification granted through the impugned order, as well as the dismissal of the interim application filed by the appellant seeking for stringent action against the respondent for violation of the directions, cannot be justified as a proper exercise of jurisdiction vested on the Family Court.

10. Under the above mentioned circumstances, we are inclined to interfere with the order impugned and to allow the appeal. Hence the above Mat. Appeal is allowed to the extent of setting aside the impugned order passed in IA No.1711/2015 in G.O.P No.97/2011. The interim arrangement for temporary custody of the minor child, which was ordered by the Family Court in Annexure-A1, order dated 25-06-2012 is hereby restored. The Family

Court, Thrissur will take necessary steps to ensure that the directions contained in the said order is strictly complied with. If any violation is brought to notice of the said court, immediate action shall be taken, taking note of Annexure-A3 order passed earlier by the said court, on 11-12-2014.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

MARY JOSEPH, JUDGE.

AMG

True copy

P.A. to Judge