

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. 852 of 2015 ()  
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AGAINST THE ORDER/JUDGMENT IN OP 2142/2012 of FAMILY  
COURT,THRISSUR DATED 29-06-2015

APPELLANT(S)/APPELLANTS/PETITIONERS IN O.P.NO.2142 OF 2012:  
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1.VELAYUDHANKUTTY AGED 61 YEARS  
SON OF SRI. VELAYUDHA MENON, RESIDING AT 'SAGARIGA'  
POOTHOLE, THRISSUR-680004  
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER  
VIJAYALAKSHMI-THE 2ND APPELLANT.

2. VIJAYALAKSHMI AGED 54 YEARS  
WIFE OF SRI. VELAYUDHANKUTTY, RESIDING AT 'SAGARIGA'  
POOTHOLE, THRISSUR-680004

BY ADVS.SRI.C.S.DIAS  
SRI.N.K.SUBRAMANIAN  
SMT.B.BINDU  
SMT.P.K.DHANYA

RESPONDENT(S)/RESPONDENT/RESPONDENT IN O.P.NO. 2142 OF 2012:  
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C.P.SUDHEER, AGED 42 YEARS  
SON SRI. ARAKKAL KOTTEERI KUTTYRAMAN NAIR  
& CHANGARATH PUTHENVEETIL MADHAVIKUTTY  
NOW RESIDING AT F.I.SURYA RESIDENCY APARTMENT  
ABHILASH CORNER, PUTHURKKARA DESAM, P.O.AYYANTHOLE  
AYYANTHOLE VILLAGE, THRISSUR TALUK, PIN-68003.

R1 BY ADV. SRI.P.VENUGOPAL (1086/92)

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

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

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MA. No. 852 of 2015  
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Dated this the 16th day of October, 2015

JUDGMENT

Abdul Rehim,J.

A common order passed by the Family Court, Thrissur in GOP.Nos.2142/2012 and 1785/2013 is under challenge in this appeal filed by the petitioners before the Family Court in GOP.No.2142/12. The respondent herein is the respondent in the said case. The issue involved is with respect to custody of two minor children viz. Niranjan, born on 5.2.2003 and Niveditha born on 30.1.2007, out of the wedlock between the respondent herein and the deceased daughter of the appellants, Smt. Anjaly, who died on 2.7.2007 at the matrimonial home due to the burn injury sustained. GOP.No.2142/2012 was filed by the appellants who are the maternal grand parents seeking appointment of them as legal guardian of the minor children. The respondent had also filed GOP.No.1785/13 seeking permanent custody of the children. The Family Court considered both the cases together

and disposed of them through the impugned order. GOP.No.1785/13 filed by the respondent herein was dismissed, whereas GOP.No. 2142/12 filed by the appellants were allowed to the extent of granting permanent custody of the minor children to them, subject to reserving liberty to the respondent to have custody of the children on the 2<sup>nd</sup> weekend of every month, between 10 a.m. on the 2<sup>nd</sup> Saturdays and 5 p.m on the succeeding Sundays. So also it was ordered custody of the children to the respondent during half period of the summer vacation, Onam, Pooja and Christmas holidays. It is aggrieved by the arrangement of interim custody ordered in favour of the respondent, the above appeal is preferred.

2. Contention of the appellants is that, the granting of interim overnight custody of the minor children to the respondent was ordered without properly appreciating the factual aspects and the evidence on record. It is contended that the Family Court ought not have made any such arrangement, after ascertaining wishes of the minor children, who were not at all interested to go along with the respondent. It is contended that since children are of the age of 12 years and 8 years respectively,

they are at the age of proper understanding and are able to express their preferences, which the Family Court had failed to give weightage. It is also contended that the arrangement ordered is without taking note of the agreement entered into between the parties as early as in the year 2008, wherein the respondent had relinquished custodial rights over the children and consciously surrendered his right for the custody of the children. It is contended that the observations made by the Family Court to the extent of disbelieving the complaint submitted as Ext.A6, was totally unwarranted and baseless. It is a matter which is under the investigation of police and that the Family Court ought to have taken the view refraining the respondent from having overnight access to the children, atleast until the investigation based on Ext.A6 complaint is finalised.

3. Learned counsel for the appellants had raised vehement arguments based on Ext.A6 complaint and based on the alleged reinvestigation being conducted in Crime No.264/2007 of Valancherry Police Station, registered with respect to death of the mother of minor children. It is pointed out that the said criminal case was registered implicating the respondent as

accused for offences punishable under sections 306 and 498A IPC. Admittedly, the said case ended up in an acquittal, by virtue of Ext.A3 judgment of the Assistant Sessions Court, Tirur in SC 74/2008 dated 14.10.2008. It is evident that Ext.A1 agreement with respect to custody of the child was arrived between the parties during October 2008 itself. Contentions of the appellants are to the effect that, a reinvestigation of the said case is now being pursued on the basis of Ext.A6 complaint submitted by the 2<sup>nd</sup> appellant before the police authorities. In Ext.A6 complaint the 2<sup>nd</sup> appellant had stated that, the elder child had made a revelation that the respondent had immolated his mother. It is stated that he had witnessed the respondent pouring Kerosene on her. It is argued that the Family Court went highly erred in finding that the contents of Ext.A6 complaint is not true and correct. According to the appellants, the Family Court had omitted notice of the necessity to keep the minor children from access of the respondent, until the reinvestigation is culminated. Therefore it is argued that interim arrangement of overnight custody ordered by the Family Court need to be modified .

4. While appreciating the contentions raised by the appellants this court takes note of the fact that, the wife of the respondent died as early as on 2.7.2007. In the case registered against the respondent he was acquitted on 14.10.2008. Ext.A3 judgment would indicate that both the appellants were examined in the said case as witnesses. The appellants have never deposed any incriminations against the respondent, with respect to the death of their daughter. It is also evident that in the year 2008 the appellants have agreed upon an arrangement permitting intermittent interim custody of the minor children with the respondent. That arrangement made during October 2008 continued till the appellants instituted GOP.No.2142/12. The above case was instituted after lodging of Ext.A6 complaint by the 2<sup>nd</sup> appellant before the Deputy Superintendent of Police, seeking reinvestigation of the crime. Allegation in Ext.A6 is to the effect that the elder child made the above said revelation and hence the case need to be reinvestigated and the respondent should be implicated as accused in the murder of her daughter. The said complaint was submitted only on 4.4.2014. The second appellant herein, who was examined before the Family Court as

PW1 deposed that, the child had made such a revelation during the year 2009, after two years of the death of the daughter of the appellants. But in the impugned order of the Family Court it is mentioned that, according to PW1 the revelation was made about two years back. But learned counsel appearing for the respondent had corrected the above said aspect with due reference made to the deposition of PW1. Therefore it is evident that the alleged revelation and the complaint in Ext.P6 made before the police cannot be taken as a ground for denying interim custody of the children to the respondent. The observations made by the Family Court with respect to Ext.A6 complaint and the reinvestigation of the case, need to be sustained. While analysing the sequence of events in the matter as narrated above, Ext.A6 complaint was not there at the time when the appellants have instituted the case before the Family Court, as GOP.No.2142/12. Subsequently only on 4.4.2014 the complaint was raised. In between the respondent had instituted GOP.No.1785/13 seeking permanent custody of the minor children. Evidence of the 2<sup>nd</sup> appellant as PW1 would indicate that the child made such a revelation as early as in the

year 2009. Even when GOP.2142/12 was filed there was no allegation based on any alleged revelation, which was admittedly made in the year 2009. Therefore, findings arrived by the Family Court in this respect is supported by factual matrix and probabilities. However, this court is of the opinion that the Family Court should not have arrived at a conclusion with respect to the contents in Ext.A1 complaint, since it is a matter which is pending investigation before the appropriate police authorities. But we do not find any reason to interfere with the order of interim custody passed by the Family Court on the basis of the above said factual aspects. Hence we are not inclined to interfere with the said order. However, it is necessary to make it clear that the appellants will be at liberty to approach the Family Court seeking modification of the existing arrangement of temporary custody given to the respondent, in case the investigation now being conducted by the police authorities has concluded in any final report charge sheeting the respondent with any accusation of murder of the mother of the minor children.

5. Hence the above appeal is hereby dismissed subject to reserving liberty to the appellants to seek modification of the

arrangements based on any subsequent change of circumstances,  
as mentioned above.

C.K.ABDUL REHIM, JUDGE

MARY JOSEPH, JUDGE

Pmn/