

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

MONDAY, THE 16TH DAY OF NOVEMBER 2015/25TH KARTHIKA, 1937

Mat.Appeal.No. 934 of 2015 ()

AGAINST THE ORDER DATED 07-07-2015 IN OPGW 611/2013 of
FAMILY COURT, TIRUR

APPELLANT/PETITIONER:

SHABEER,
AGED 35 YEARS, S/O. MUHAMMED,
PUKKAYIL HOUSE, PERUMBADAPPU
KIZHAKKUMMURI, PONNANI TALUK
(PERUMBADAPPU POLICE STATION LIMIT).

BY ADVS.SRI.C.KHALID
SRI.N.A.JOSEPH
SRI.K.P.MOHAMED SHAFI
SMT.K.S.HASEENA
SRI.PHIJO PRADEESH PHILIP
SMT.K.REEHA KHADER
SMT.K.K.NESNA
SRI.T.P.SAJID

RESPONDENT/RESPONDENT:

JAMSHEENA,
AGED 29 YEARS, D/O. MOIDEEN,
KOLATT THODIYIL HOUSE,
OTHALLOOR AMSOM, KOKKOOR DESOM
PONNANI TALUK, PIN-676505.
(CHANGARAMKULAM POLICE STATION LIMIT).

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 16-11-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AMG

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

Mat. Appeal No. 934 OF 2015

DATED THIS THE 16th DAY OF NOVEMBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

This appeal is instituted against the order passed by the Family Court, Tirur in OP (G&W) 611/2013, dated 07-07-2015. The parties herein are the parents of 2 children born out of their wedlock, the elder boy aged 6 years and the younger girl aged 2 ½ years at the time of institution of the case before the Family Court. The original petition before the Family Court was instituted by the appellant herein, who is the father, seeking permanent custody of the elder son Muhammed Sahal from the respondent. Marriage between the parties took place on 14-12-2006. There developed matrimonial disputes and the parties are living separated. There occurred a mediation settlement on 09-09-2012, in which it was decided to allow custody of the minor boy to the respondent till 19-08-2014.

The custody of the 2nd minor girl was entrusted with the respondent. It is stated that on 31-01-2013 the respondent's brother and co-brother had assaulted the appellant and his mother. In the case instituted before the Family Court it was contended that, as per the agreement the appellant is entitled to have custody of the minor boy from 19-08-2014 onwards. The application was opposed by the respondent contending that the respondent was compelled for the mediation settlement and for the signing the agreement, due to undue influence of the appellant on the mediators based on politics and money. It was contended that the respondent had signed the agreement only for having an amicable settlement for getting back her property. It was brought to notice that the minor son is studying in a school near to her residence. It is also brought to notice that, subject to the agreement the appellant had contracted a second marriage. Therefore it is contended that the minor son is not interested in go along with the appellant. Contention of the respondent is that there is a

change of circumstances, after the mediation settlement. It is argued that the minor child requires care, protection and love of the mother and therefore permanent custody could not be given to the appellant.

2. Evidence before the court below consisted of oral testimony from the side of appellant as PW1 and Exts.P1 to P3 documents marked on his behalf. The respondent had adduced evidence as RW1. While considering the issues the court below found that the 2nd marriage of the appellant is not a ground to refuse custody of the male child born in the first wedlock. It was noticed by the Family Court that, even custody during the holidays was not given to the appellant in compliance of the agreement. The Court below has not accepted the statement of the respondent that handing over custody of the child to the appellant during holidays would adversely affect the mental condition of the child, finding it as a strange contention raised on behalf of the respondent. Findings of the court below is that, the appellant being the father of the minor child has got preferential right than the

respondent for getting the custody of the male child. But the only impediment to allow custody to the appellant is the tender age of the minor. The Court found that the child need love, protection and care from the side of the mother for the mental and physical development. On that basis the court found that appellant is not entitled to get absolute custody of the minor child, who is aged only 8 years at the time of disposal of the case. Further it is found that the minor child is now admitted to a school near to the residence of the respondent and any change in the custody will adversely affect the education and welfare of the child. But finding that the appellant has every right to see the minor child the court below had directed temporary custody of the minor child to the appellant during all weekends from Saturday morning till Sunday evening. It was also directed that during all vacation holidays the appellant and respondent are entitled to have custody of the minor son for equal days. It is aggrieved by the said order this appeal is filed.

3. Contention of learned counsel appearing for the appellant is that, as per the personal law the appellant is the legal guardian of the minor child, who is now aged 8 years. It is contended that, only under exceptional circumstances the court can deny permanent custody in derogative of the provisions of personal law. It is also contended that the court below ought to have found that the welfare and interest of the minor child will be adversely affected if he is allowed to continue in the custody of the respondent.

4. On a primary appreciation of the contentions we are not inclined to admit the above appeal. It is trite law by this time, as held by the hon'ble Supreme Court as well as this court in various decisions, that the paramount consideration should be the welfare of the child. The welfare of the child will definitely override provisions of personal law in the matter of deciding permanent custody of a minor child. In the case at hand, the Family Court had categorically found that the child who is aged 8 years needs

care, protection and love from his mother. Further it is found that a shifting of the permanent custody at this stage will affect his studies, which is being pursued in a school near to the residence of the respondent. Despite denial of permanent custody the court below had ensured ample opportunity to the appellant for having intermittent custody during weekends as well as during holidays. We are not convinced that there occurred any illegality, error or impropriety in the order. We also take note of the fact that the appellant had contracted a second marriage and is living with his second wife, which can also be pointed out as a reason to deny permanent custody to the appellant. However, since we find that sufficient arrangements for having intermittent custody is afforded to the appellant, there is no circumstances necessitating interference by this court in any manner for modifying the impugned order.

5. Hence the appeal deserves no merit and the same is hereby dismissed. However, we make it clear that, as settled through various precedents any order with respect

to custody of the minor child is liable to be modified if there is any substantial change of circumstances. Hence we make it clear that, despite the above judgment the appellant will be at liberty to approach the Family Court seeking modification of the order, in case there is any substantial change in the circumstances.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

MARY JOSEPH, JUDGE.

AMG

True copy

P.A. to Judge