

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN

&

THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 5TH DAY OF FEBRUARY 2015/16TH MAGHA, 1936

Mat.Appeal.No. 7 of 2014 ()

AGAINST THE JUDGMENT IN OP (G&W)73/2013 of FAMILY COURT,
MUVATTUPUZHA DATED 17-08-2013

APPELLANT(S)/PETITIONER:

YOUSAF KHAN AGED 48 YEARS
S/O. MUHAMMED, VELLUPARAMBIL HOUSE
VADATTUPARA KARA, KUTTAMPUZHA VILLAGE
KOTHAMANGALAM TALUK, VADATTUPARA PO , PIN 686 691

BY ADV. SRI.P.K.ABOOBACKER(EDAPPALLY)

RESPONDENT(S)/RESPONDENT:

RAMLATH
D/O.KHADEEJA, THOPPIL HOUSE, PUNNAMATTOM KARA
NOOLPUZHA VILLAGE, MUVATTUPUZHA TALUK, ERANALLOOR PO
PIN 686 673.

R1 BY ADV. SRI.JOY C. PAUL

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON
05-02-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

acd

V.K. MOHANAN & P.D. RAJAN, JJ.

Mat.Appeal No. 7 of 2014

Dated this the 5th day of February, 2015

JUDGMENT

V.K.Mohanan,J.

This appeal is directed against the judgment dated 17.8.2013 in O.P.(G&W)No.73/2013 of Family Court, Muvattupuzha, since, by the above judgment, the Court below declined the relief sought for by the appellant, who is the petitioner therein, to grant permanent custody of one Muhammed Sabir to him.

2. The case of the appellant is that himself and the respondent are belonged to Muslim community and their marriage was solemnized on 27.6.1999 and in that wedlock, a male baby was born to them on 8.7.2000. At the time of filing the above O.P., the child was studying in VII standard

at Fr. Joseph Memorial School, Puthuppady. The marriage between the appellant and the respondent was dissolved on 12.1.2002 as per the custom of Muslim community. According to him, at that point of time, as the child was aged only 1 year, he was kept with the respondent and the respondent had agreed to allow the appellant to meet the son. But, contrary to the assurance given by the respondent, the appellant was not permitted to meet the child. The appellant was very much interested in the welfare of the child whereas the respondent has no capacity to provide good education and food to the child. According to the appellant, the respondent was not able to meet the educational expenses of the child. The respondent was not permitting the appellant to meet the child either at her house or at the school. Under the

above circumstances, the appellant preferred a petition before the Court below under Section 7 of the Family Court Act and Section 7 and 8 of Guardians and Wards Act, 1890, with the aforesaid prayer.

3. The respondent by filing counter affidavit contended that the appellant and the respondent were residing separately even prior to the birth of the son. According to the respondent, the marriage was dissolved on 12.1.2002 as per an agreement and as per the agreement, the appellant abandoned the child and the respondent. It is also the case of the respondent that as per the agreement, no claim under Section 125 of Cr.P.C. can be raised against the appellant in future. According to the respondent, she is working as an Attender in National Rural Health Mission and she is also engaged in

manufacturing of paper bags and thus she is having sufficient income to provide good education as well as the food to the child. It is also the case of the respondent that as per the agreed order in O.P.No.132/2005 of the Family Court, Ernakulam, the respondent agreed to show the child to the petitioner once in a week at Juma Mas Jid, Punnamattom and that the petitioner had agreed to pay ₹300/- per month as maintenance. But, the appellant failed to provide the maintenance. At the time of filing the petition, according to the respondent, the child was at the age of 13 years. The appellant had lastly seen the child only when he was below 2 years. It is also the case of the respondent that the respondent is the second wife of the appellant and at present, the appellant is residing with his third wife and the respondent remained as unmarried,

considering the future of the son. So, according to the respondent, the appellant is not entitled to get the relief sought for and the welfare of the child is protected at the hands of the respondent.

4. During the trial of the case, from the side of the appellant/petitioner, himself was examined as PW1 and Exts.A1 to A3 were marked from the side of the appellant/petitioner. The respondent was mounted to the box and got herself examined as RW1. No documentary evidence was produced from her side.

5. Finally, the trial Court has found that considering the nature of the case and welfare of the child, it is necessary to retain the child with the respondent. It is also found by the learned Judge of the Family Court that the child is also not interested to go along

with the appellant-father. So, it is concluded that the custody of the child cannot be given to the petitioner/appellant. It is the above finding and declining the request of the appellant for custody of the child, the present appeal is filed.

6. Though the matter was sent for settlement to Adalath, no amicable settlement was arrived at between the parties. Subsequently, at the instance of the learned counsel for the parties and on our intervention, possibilities for settlement was enquired into in our Chamber, which was also not materialised.

7. Having regard to the facts and circumstances involved in the case and especially in the light of the evidence on record, it is crystal clear that the minor son Muhammed Sabir was born to the appellant in the wedlock

with the respondent on 8.7.2000. It is also a fact that the respondent herein was the second wife of the appellant. Admittedly, the appellant now residing with his third wife. In a proceedings under the provisions of the Guardians and Wards Act, when there is a rival claim for custody of the child, the paramount consideration must be the welfare of the child. As on today, particularly, when the matter was taken in our Chamber, the child, who appeared before us, submitted that he is now studying in the IXth standard in the above school. When we asked him as to whether he is interested to go along with the appellant-father, his answer was negative. The same is the stand taken by the child, when the learned Judge of the Family Court interviewed the child under Section 17(3) of the Guardians and Wards Act. The son of the appellant, who is now aged

13 years, is capable of taking intelligent decision and therefore, the opinion expressed by the child cannot be ignored. It is also relevant to note that the child has no contact with the appellant-his father after he crossed 2 years of age, which shows that for the last 11 years, the appellant has no contact with the child nor the child has any acquaintance with the appellant. It is also relevant to note that as per the admitted case of the appellant, he is now residing with his third wife. At present, the child is studying in the IXth Standard at Fr. Joseph Memorial School, Puthuppady, whereas the appellant is residing at Vadattuparakara in Muvattupuzha. The school is very adjacent to the residential house of the respondent from where the child is attending the school. The respondent, as claimed by her, has sufficient income to maintain the

child and to attend his educational expenses etc.

Unquestioned evidence of the respondent shows that she is working as an Attender at the National Rural Health Mission and she is getting ₹6500/- per mensem and she is also engaged in the manufacturing of paper bags. So, as claimed by the respondent, she is getting a sum of ₹ 20,000/- per month. If that be so, we are of the firm opinion that the welfare of the child is more protected in the hands of the respondent, who is none other than his mother, who is remaining unmarried after the separation between the appellant and herself, whereas the appellant is now residing with his third wife and therefore, it cannot be said that the interest of the child will be protected, if he is sent along with the appellant father. Thus, on a perusal of the impugned judgment, it can be seen that the

learned Judge of the Family Court has considered all the relevant input of the case and subsequently, found that, considering the interest of the welfare of the child, it is necessary to retain the child with the respondent-mother.

We find no illegality or irregularity in the above finding.

Accordingly, we do not find any merit in this appeal and consequently the same stands dismissed.

V.K. MOHANAN, JUDGE.

P.D. RAJAN, JUDGE.

acd

