

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 13TH DAY OF JULY 2015/22ND ASHADHA, 1937

OP (FC).No. 218 of 2015 (R)

PETITIONER(S):

SAM KUMAR, AGED 48 YEARS,
S/O.D.ISSAC, RESIDING AT PUNNATHOTTAM, THIRUMALA,
THRIKKANNAPURAM, ARAMADA VILLAGE, THIRUVANANTHAPURAM.

BY ADVS.SRI.C.MOHANAN (THIRUPURAM)
SRI.SEBASTIAN JOSEPH (KURISUMMOOTIL)
SRI.JOHNSON K.KURIEN

RESPONDENT(S):

SUJA, AGED 42 YEARS,
W/O.SAM KUMAR, FORMERLY RESIDED IN TC 81/1227,
PUNNATHOTTAM HOUSE, THIRUMALA, THRIKKANNAPURAM,
ARAMADA VILLAGE, THIRUVANANTHAPURAM,
AND NOW RESIDING AT 'NANDANAM', AMBEDKAR ROAD, THAMALAM,
KARAMANA P.O, THIRUVANANTHAPURAM - 695 101.

BY ADV.SRI.PIRAPPANCODE V.S.SUDHIR

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON
13-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

:2:

OP (FC).No. 218 of 2015 (R)

APPENDIX

PETITIONER(S) ' EXHIBITS

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EXHIBIT P1. COPY OF THE PETITION IN OP (G&W) NO.390/15 OF THE
FAMILY COURT, THIRUVANANTHAPURAM FILED BY THE
RESPONDENT.

EXHIBIT P2. COPY OF THE PETITION IN IA 662/15 IN OP (G&W)
NO.390/15 OF THE FAMILY COURT, THIRUVANANTHAPURAM.

EXHIBIT P3. COPY OF THE OBJECTION FILED BY THE PETITIONER BEFORE
THE FAMILY COURT, THIRUVANANTHAPURAM.

EXHIBIT P4. COPY OF THE ORDER DATED 7.5.15 IN IA 662/15 IN OP
(G&W) 390/15 OF THE FAMILY COURT, THIRUVANANTHAPURAM.

RESPONDENT(S) ' EXHIBITS

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//True Copy//

P.A. To Judge

SS

**C.K. ABDUL REHIM &
K. RAMAKRISHNAN, JJ.**

O.P.(F.C.) No.218 of 2015

Dated this the 13th day of July, 2015

JUDGMENT

K. Ramakrishnan, J

The petitioner herein was a respondent in I.A.No.662/2015 in O.P.(G&W)No.390/2015 on the file of the Family Court, Thiruvananthapuram, challenging the order in that application under Article 227 of the Constitution of India.

2. It is alleged in the petition that the petitioner and respondent are husband and wife and three children were born to them in that wedlock. There was some misunderstanding arose between them which resulted in their separation and the children were residing with the respondent. He filed O.P.(G&W)No.697/2014 before the Family Court, for permanent custody of two children, namely 2nd and 3rd children and that matter was referred for Adalat and during the Adalat, according to the respondent, petitioner had forcibly taken the younger child, who was

aged only 12 years at that time from the Adalat premises. So she filed O.P.No.390/2015 for custody of two children who are with the petitioner and also filed I.A.No.662/2015 for their interim custody and the Family Court Judge, after considering the submissions of both sides, directed the custody of the younger son to the respondent on or before 12th May, 2015 and interim custody as regards the younger daughter was given to the respondent for 7 days from 12th May to 18th May, 2015. This order is being challenged by the petitioner who is the respondent in the court below. The order passed by the court below was not challenged by the respondent.

3. Heard both sides.

4. It is an admitted fact that the petitioner and respondent are husband and wife and they have three children in the marriage, out of which elder daughter has become major and she is now with the respondent herein. Earlier the 2nd child was with the father and the 3rd child was with the mother along with the eldest daughter. So the petitioner herein filed O.P.(G&W)No.697/2014 for getting

custody of both the children who are with the respondent and that matter was referred to Adalat and after the Adalat the petition was not pressed by the petitioner herein. Thereafter, the present respondent filed O.P.No.390/2015 seeking permanent custody of two children who are with the petitioner, alleging that the youngest child was forcibly taken by the petitioner after the Adalat was over from the Adalat premises and that prompted her to file the petition. This was denied by the respondent by filing detailed counter, in which it was stated that, the 2nd child had accompanied the father expressing his willingness to come and stay with the father and that was how the child happened to be with the father and he had made arrangement for the education of the child also.

5. The court below had allowed interim custody in the nature of permanent custody during the pendency of the proceedings, as regards the younger minor child to the respondent herein on the ground that, accepting the allegation of forceful taking away of the child from the Adalat premises. However, the court below did not grant

permanent custody as interim custody regarding the 2nd child who is admittedly with the petitioner and only interim custody for 7 days during vacation alone was granted. That order was not challenged by the respondent by filing any petition before this court.

6. On going through the allegations, it appears that no attempt was made by the court below to consider the opinion of the child before handing over the child as interim custody to the respondent. The child is aged now 12 years. So the court below ought to have interacted with the child also to consider the opinion of the child as to whether he is interested in living with the father or mother and it is thereafter that the court below ought to have taken a decision as to whether in the welfare of the child, the child ought to have been handed over to the respondent as an interim custody as done in this case.

7. So under the circumstances, there is some force in the submission made by the counsel for the petitioner on this aspect and the Hon'ble Supreme Court also in such cases observed that, the opinion of the child

has to be considered by the court before ordering interim custody of the children in the pending matter. So under the circumstances, we feel that the order to the extent directing the custody of the younger child to the respondent herein who is the petitioner before the court below has to be set aside and the matter has to be remitted to the court below for considering that aspect alone afresh after having interaction with the child to consider his desire in this regard and then pass appropriate orders in accordance with law. We do so.

So the writ petition is disposed of with the above direction and observation for fresh disposal to the extent mentioned above.

Sd/-
C.K. Abdul Rehim, Judge

Sd/-
K. Ramakrishnan, Judge

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P.A. to Judge