

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

TUESDAY, THE 18TH DAY OF AUGUST 2015/27TH SRAVANA, 1937

OP (FC).No. 254 of 2015 (R)

AGAINST THE ORDER DT.5.6.2015 IN IA.NO.723/2015 IN OP(GW) NO.237/2015
OF THE FAMILY COURT, MALAPPURAM.

PETITIONER(S):

MUHAMMED ASHRAF CHEERANGAN AGED 46 YEARS
S/O.KUNHALAN, CHEERANGAN HOUSE, VILLOOR
INDIANOOR POST, KOTTAKKAL, MALAPPURAM DISTRICT 676 503

BY ADVS.SRI.K.RAMAKUMAR (SR.)
SRI.K.K.MOHAMED RAVUF

RESPONDENT(S):

DR.FATHIMABI, AGED 34 YEARS
D/O.KOYAMU, MANGATTIL HOUSE, SWAGATHAMAD
CHERUSOLA P.O, TIRUR TALUK, MALAPPURAM DISTRICT

R1 BY ADV. SRI.P.M.RAFIQ

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 18-08-
2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1 TRUE COPY OF THE OP(GW) NO 237/2015 DATED 25/11/2013 OF FAMILY COURT,MALAPPURAM (FORMERLY O.P NO 716/2014 OF FAMILY COURT,TIRUR)

EXHIBIT P-2 TRUE COPY OF THE I.A NO 723/2015 FILED BY THE RESPONDENT BEFORE THE FAMILY COURT,MALAPPURAM(I.A NO 503/2015 OF FAMILY COURT,TIRUR)

EXHIBIT P-3 TRUE COPY OF THE COMPLAINT DATED 20/2/2015 FILED BY THE PETITIONER BEFORE THE CHAIRMAN,CHILD WELFARE COMMITTEE

EXHIBIT P4 TRUE COPY OF THE FIR IN CRIME NO 246/2015 OF KOTTAKKAL POLICE STATION

EXHIBIT P5 TRUE COPY OF THE SUMMONS ISSUED BY THE JUDICIAL FIRST CLASS MAGISTRATE COURT I,MANJERI TO THE CHILD

EXHIBIT P5(A) TRUE COPY OF THE SUMMONS ISSUED BY THE JUDICIAL FIRST CLASS MAGISTRATE COURT I, MANJERI TO THE CHILD

EXHIBIT P6 TRUE COPY OF THE JUDGMENT IN OP(FC) NO.111/2015 DATED 5/5/2015 OF THIS HON'BLE COURT

EXHIBIT P7 TRUE COPY OF THE COUNTER FILED BY THE PETITIONER DATED 26/5/2015 BEFORE THE FAMILY COURT

EXHIBIT P8 TRUE COPY OF THE I.A NO 657/2015 IN I.A NO 503/2015 IN O.P NO 237/2015 FILED BY THE PETITIONER BEFORE THE FAMILY COURT,MALAPPURAM

EXHIBIT P10 TRUE COPY OF THE WITNESS LIST FILED BY THE PETITIONER BEFORE THE FAMILY COURT,MALAPPURAM

EXHIBIT P11 TRUE COPY OF THE JUDGMENT DATED 16/2/2012 IN S.C NO 282/2011 OF ASSISTANT SESSIONS JUDGE,MANJERI

EXHIBIT P12 TRUE COPY OF THE ORDER DATED 5/6/2015 IN I.A NO 723/2015 IN O.P NO 237/2015 OF FAMILY COURT,MALAPPURAM

EXT. P13. TRUE COPY OF THE LETTER NO.G3c-34725/2015/ MM DT. 10.8.2015 ISSUED FROM THE OFFICE OF THE POLICE CHIEF, MALAPPURAM.

RESPONDENT(S)' EXHIBITS

EXT. R1(A) AFFIDAVIT SWORN BY THE APPLICANT.

ANNEXURE A-1 TRUE COPY OF THE FIR IN CRIME NO.988/2014 OF KOTTAKKAL POLICE STATION.

ANNEXURE A2 TRUE PHOTOGRAPHS SHOWING THE LIGATURE MARKS AROUND THE NECK AND INJURIES SUSTAINED BY THE RESPONDENT

ANNEXURE A3 TRUE COPY OF THE COMPLAINT DT. 17.3.2015 SENT BY THE RESPONDENT TO THE HOME SECRETARY.

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ANNEXURE A3(A) TRUE COPY OF THE COMPLAINT DT. 17.3.2015 SENT BY THE
RESPONDENT TO THE DIRECTOR GENERAL OF POLICE.

ANNEXURE A4 TRUE COPPY OF THE COMPLAINT DT. 17.3.2015 SENT BY THE
RESPONDENT TO THE DISTRICT POLICE SUPERINTENDENT, MALAPPURAM.

TRUE COPY

PS TO JUDGE

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

OP(FC).No. 254 of 2015

Dated this the 18th day of August, 2015

JUDGMENT

K.Ramakrishnan,J.

Respondent in IA.No.723/2015 in OP (G&W) No.237/2015 on the file of the Family Court, Malappuram has filed this petition challenging Ext. P12 order passed by the Family Court under article 227 of the Constitution of India.

2. Petitioner and respondent are husband and wife and 3 children were born to them in that wedlock, of which younger child is with the mother and 2 children by name Saddam Hussain and Thamanna are with the petitioner. Now they are living separately and the children are with the father. The mother who is the respondent herein filed OP(G&W) 237/2015 originally before the Family Court, Tirur seeking permanent custody of their children and in that she filed I.A.503/2015 seeking interim custody of the children. While so, the petition was transferred to

Family court, Malappuram wherein it was assigned with the present number and IA.No. 503/2015 was renumbered as IA.723/2015. The children were aged 6 years and 4 ½ years respectively. They were studying in pre-primary classes and according to the respondent, it is necessary to get custody of the minor children. So she filed the application.

3. It is also alleged in the petition that the petitioner is a medical practitioner practicing in Unani branch and the respondent is a lawyer and on account of certain difference of opinion between them they started residing separately. She is not permitted to see the children as well.

4. The respondent appeared and filed counter denying the allegations. He had further stated in the counter that he had no objection in the mother of the children seeing the children. But the visitorial right or overnight custody of the children to the mother cannot be granted as during one of the occasion of their stay the maternal grand father had abused the minor victim and a crime was registered against the grand father and that is pending as crime No.246/2015 under section 377 of the Indian Penal Code and section 5 & 6 of the Protection of Children from

Sexual Offence Act 2012 (hereinafter called as POCSO Act) and investigation is still in progress and the maternal grand father could not be arrested in that case so far. Further he is involved in several other cases as accused as well. So under the circumstances interim custody of the children with overnight stay cannot be granted. She has allowed visitorial right of the children from the Family Court premises . After considering statement of both parties the Family Court allowed the application in part giving interim overnight custody of the minor children on every 2nd and 4th weekends and the petitioner is permitted to take the children with her by the morning hours of the 2nd and 4th Saturdays and return by 4 p.m on the next day. She was also permitted to visit the children from the school once in a week after the school hours with permission of the head of the institution by producing copy of the order. The submission of the mother regarding absence of the father in the house is recorded. It is further ordered that mother shall ensure that her visit or custody in any way not affect the education of the children. This order is being challenged by the petitioner who is the respondent in the lower court to the extent allowing

overnight stay of the children with the mother.

5. Heard both sides.

6. Sri. K. Ramkumar, senior counsel appearing for the petitioner submitted that they have no objection in providing visitorial right of the mother from the Family Court premises during day time. If the child is allowed to stay in the house of the mother, there is a possibility of maternal grand father coming to contact with the victim children. That will affect the investigation and that is against section 24(3) of the said Act read with Rule 4(3) of the Protection of Children from Sexual Offence Rules 2012. So the court below had not considered this aspect while passing the order.

7. On the other hand counsel appearing for the respondent submitted that she being the mother of the children and also considering the age of the children, the proximity of the mother will be more helpful and necessary for the welfare of the children and that aspect has been considered by the court below and rightly ordered overnight custody with the mother for some time. Further she had given an undertaking before the court below that the maternal grand father will not be available in the

house during the time when the children will be in the house. So under the circumstance necessary protection has been taken by the court below in this regard and invoking supervisory jurisdiction there is nothing to be interfered with the reasoned order passed by the court below. Counsel for the respondent also submitted that the conduct of the petitioner in the lower court will be revealed from the report submitted by the Family Court in the earlier proceedings which can also be looked into by this court.

8. It is an admitted fact that the petitioner and the respondent are man and wife and 3 children were born to them in that wedlock, of which younger child is with the mother and 2 children by name Saddam Hussain and Thamanna are with the petitioner. It is also in away admitted that a case has been registered against the maternal grand father of the children for abusing the minor children as crime No.246/2015 under section 377 of the Indian Penal Code and section 5 & 6 of the POCSO Act and another case has been registered for attempt to kill the petitioner as well and in both these cases it is seen from the documents produced that the maternal grand father could not be

arrested . It is true that considering the tender age of the children, the court below must always be inclined to grant custody of the children to the mother but at the same time if the court is of the opinion that it is against the welfare of the children, then the court will be at liberty to restrict custody with the father as well. This court is of the opinion that the interim custody of the children for a longer period cannot be given to the mother. Section 24(3) of the POCSO Act says that the police officer making the investigation, shall while examining the child, ensure that at no point of time the child come in the contact in any way with the accused. Further Rule 4(3) of the Protection of Children from Sexual Offence Rules 2012 says that where the SJPU or the local police receives information under sub section (1) of section 19 of the Act, and has a reasonable apprehension that the offence has been committed or attempted or is likely to be committed by a person living in the same or shared household with the child, or the child is living in a child care institution and is without parental support, or the child is found to be without any home and parental support, the concerned SJPU, or the local police shall produce the child before the concerned Child Welfare

Committee (hereafter referred to as CWC) within 24 hours of receipt of such report, together with reasons in writing as to whether the child is in need of care and protection under sub-section (5) of section 19 of the Act, and with a request for a detailed assessment by the CWC. These two provisions are intended to protect the victim from coming into contact in any way with the accused who is alleged to have committed crime under the provisions of the Act.

9. Counsel for the respondent submitted that all these cases were subsequently created for the purpose of denying custody of the children to the mother at the instance of the father who is practicing as a lawyer in that area. However whether it is a false case or not is a matter to be considered by the court which has to try the case and it is not for this court at this stage to consider the genuineness of the allegations made in the case regarding the commission of the crime by the alleged accused who is the maternal grand father of the children.

10. The apprehension of the senior counsel appearing for the petitioner that it is not possible for the court to oversee as to whether any violation of this order has been committed as

coming and going of the maternal grand father to the house of the respondent cannot be monitored by the court. There is some force in the submission by the senior counsel in this regard. It is also settled law that the court can pass orders in such a way that it must be an executable one. Further if the order will have to be monitored by the court during the pendency of the proceedings then it must be capable of monitoring as well. If overnight custody is given to the mother the possibility of maternal grand father coming to contact with the victims who are the children in this case either directly or indirectly and threatening or influencing the children cannot be ruled out. While giving interim custody in such cases, such accused persons are also likely to interact with the children. The court is bound to take into consideration the protection given to the children under the POCSO Act before passing an order in favour of the mother who has some connection with such accused person involved in the case. So under the circumstances we feel that the order passed by the court below giving overnight custody given to the mother is liable to be interfered and it has to be modified. As regards the visitatorial right given to the mother we do not think

it requires any interference as it is not affecting the alleged victim as provided under the POCSO Act. As regards overnight custody is concerned that will have to restrict during day time from the Family Court premises or permission to take the children outside the Family Court, not far away from Malappuram town where the Family Court is situated . So under the circumstance this court feels the order passed by the court below to the extent mentioned above has to be set aside and it has to be modified as follows:

11. The respondent mother is granted right of visitation of the children from Family Court premises on all Fridays between 10.30 a.m. and 4 p.m. The petitioner is directed to produce the children before the CMO of the Family Court, Malappuram who shall handover the children to the mother and mother shall return the children to the CMO at 4 p.m. so that the CMO can return the children to the father after entering the handover and taking back in the register maintained by the Family court. If any Friday happens to be a holiday, the children will have to be present before the officer present in the court below for making necessary entries in the register. The mother will be at liberty to

take the children outside the court premises but not beyond the city limits of Malappuram town and she should ensure that the children should not come into contact with any way with the maternal grand father directly or even over phone till the case is disposed of by the Family Court.

With the above modification of the impugned order passed by the lower court, the original petition is disposed of accordingly.

C.K.ABDUL REHIM, JUDGE

K.RAMAKRISHNAN, JUDGE

Pmn/

