

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 29TH DAY OF JUNE 2015/8TH ASHADHA, 1937

OP (FC).No. 273 of 2015 (R)

AGAINST THE ORDERS IN IAS 144/2015 AND 655/2015 of FAMILY COURT,
MALAPPURAM

PETITIONER/RESPONDENT:

MURSHIDA,
D/O. MUHAMMED ABDURAHIMAN, KURUKKAN HOUSE, MUNDENGARA,
EDAVANA POST, ERNAD TALUK, MALAPPURAM DISTRICT

BY ADVS.SRI.K.M.SATHYANATHA MENON
SMT.KAVERY S THAMPI

RESPONDENT/PETITIONER:

JUNAISHAD,
S/O. AHAMMED KUTTY (LATE), THACHAPPARAMBAN HOUSE
MUNDENGARA, EDAVANA POST, ERNAD TALUK,
MALAPPURAM DISTRICT, PIN-679 541

BY SRI.T.M.ABDUL LATHEEF
BY SRI.U.K. DEVIDAS

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON
29-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP (FC) .No. 273 of 2015 (R)

APPENDIX

PETITIONER'S EXHIBITS:

EXHIBIT P1: TRUE COPY OF THE ORDER DATED 30.4.2015 IN IA NO. 144 OF 2015 IN OP(G & W) NO. 74 OF 2015 OF THE FAMILY COURT, MALAPPURAM.

EXHIBIT P2: TRUE COPY OF THE IA NO. 655 OF 2015 IN OP(G& W) NO.74 OF 2015 FILED BY THE RESPONDENT BEFORE THE FAMILY COURT, MALAPPURAM.

EXHIBIT P3: TRUE COPY OF THE COUNTER AFFIDAVIT DATED 9.6.2015 FILED BY THE PETITIONER TO EXT.P2.

EXHIBIT P4: TRUE COPY OF THE ORDER DATED 9.6.2015 IN IA NO. 655 OF 2015 IN O.P(G&W) NO.74 OF 2015 OF THE FAMILY COURT, MALAPPURAM.

RESPONDENT'S EXHIBITS: NIL

/TRUE COPY/

P.S TO JUDGE

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

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O.P.(FC)No.273 of 2015
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Dated this the 29th day of June, 2015.

JUDGMENT

Ramakrishnan, J:

This original petition is filed by the respondent in I.A.No.144/2015 in O.P.(G&W) No.74/2015 and I.A.No.655 of 2015 in the same petition before the Family Court, Malappuram challenging the orders passed in these applications invoking supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

2. The petitioner is the mother of a minor girl by name Khadeeja Nourin, aged 3 ½ years. The respondent herein is the father of the child. He filed O.P.(G&W)No.74/2015 before the Family Court, Malappuram seeking custody of the minor child. Along with that petition, he filed I.A.No.144/2015 before the Family Court seeking interim custody of the child for two days. The Family Court earlier passed Ext.P1 order directing production of the child and handover custody of the child to the petitioner therein as per the agreement entered into between them. It is also mentioned in the order that if the petitioner

finds it difficult in enforcing the order, he was given liberty to approach the court. Accordingly, he filed Ext.P2 petition stating that on two occasions namely 1.5.2015 and 25.5.2015 when he went the house of the respondent to get the custody of the child, the respondent and her parents did not hand over the child. So the petitioner wanted to enforce the order. The respondent filed Ext.P3 objection denying the allegations. Even as per the agreement, the child will have to be given on two Sundays in every month and the days on which he alleged to have taken the child were not Sundays and in fact he did not come on those days as alleged. It is also mentioned in the objection that the respondent remarried and her husband is working in gulf country and so she is residing in the tharavadu house. She had also raised a contention that the agreement was obtained by force. She had denied that the petitioner had not approached her for getting custody and prayed for dismissal of the application. Later the Family Court posted the case to 9.6.2015. On that day the child was not produced and so the court below had passed Ext.P4 order directing custody of the child to be given on 2nd and 4th Sundays until further orders and the respondent was directed

to produce the child. It is mentioned in the order that parties have agreed to handover the child on 2nd and 4th Sundays of every month until further orders and agreed to produce the child in petitioner's brothers house and on that basis the petition was disposed of accordingly. These two orders are being challenged by the petitioner by filing this petition.

3. Heard counsel for the petitioner and the respondent.

4. Counsel for the petitioner submitted that the petitioner had no objection in giving custody of the child to the respondent. But there is none in the house of the respondent to look after the child as earlier his brother and his family were residing. Now his brother has got employment in Mali and his family was shifted and the respondent is alone in the house and there is no one to look after the child and it is not safe to hand over the custody of the child to the respondent though in the changed circumstances. Those aspects were not considered by the Family Court and that will affect the mental capacity of the child as well.

5. On the other hand, counsel for the respondent submitted that earlier there was an agreement between the parties and on the basis of which divorce was effected and

custody of the child was also determined. He wanted only to enforce the terms of the agreement. Since custody of the child was not given, he was compelled to file OP(G&W) No.74/2015 seeking permanent custody of the child and along with that an application was filed seeking interim custody of the child and in that, the respondent therein had agreed to handover the child and accordingly, the Family Court passed Ext.P1 order. Since Ext.P1 was not complied with he was compelled to file Ext.P2 petition. In the objection filed, no contention was raised which was projected by the counsel for the petitioner in this Court and he wants only custody of the child only on two days in a month which cannot be said to be an irrational desire of a father.

6. It is seen from Ext.P1 order passed by the court below that earlier there was an agreement between the parties, by which they have decided to separate and in that agreement a provision was made regarding custody of the child and also regarding payment of iddat maintenance and fair and reasonable provision payable to a divorced woman. As per the agreement, on two Sundays in every month, it was agreed that custody of the child will be given to the father from 9

a.m to 6 p.m. Since this condition was not complied with, the respondent herein filed O.P.(G&W)No.74/2015 before the Family Court, Malappuram for permanent custody of the child and along with that, he filed I.A.No.144/2015 for interim custody and after hearing both sides and considering the terms of the agreement, the Family Court has passed a considered order dated 30.4.2015 directing handing over custody of the child in terms of the agreement entered into between the parties. According to the petitioner in the lower court, since the child was not given as per the order, he was compelled to file Ext.P2 petition. On that basis the application was posted on 9.6.2015. On that date the respondent appeared and filed counter stating that she is always prepared to honour the order and also submitted before the court that parties have entered into an agreement regarding custody of the child. It is on that basis Ext.P4 order was passed. Further it appears to be a consent order as well. So, under the circumstances, it is not proper to interfere with that order.

7. The counsel for the respondent herein submitted that he is prepared to have even a change in the visitorial right making first and third Saturdays for giving custody of the

child and instead of handing over the child to the brother's house, the child can be produced before court at 10 a.m and he will return the child at 5 p.m.

8. The apprehension of the petitioner is that the child will have to be left in the house of the respondent without the company of any one and that can be removed by making any of the relative lady available in the house to look after the child and she will be assured that no harassment will be caused to the child. So under the circumstances, we record the submission of the counsel for the respondent and the order passed by the court below is modified as follows:

Interim custody of the child is given to the respondent herein, who is the petitioner before the court below, on 1st and 3rd Saturday of every month between 10 a.m and 5 p.m. The petitioner is directed to produce the child before the Family Court on 4.7.2015 at 10 a.m before the CMO and CMO shall hand over the child to the respondent and the respondent shall return the child before the CMO at 5 p.m and he shall return the child to the petitioner. If any of the Saturdays happened to be a holiday, then the person available in the Family Court on holiday duty has to carry out the direction by

entering production and return of the child in the custody register maintained in the Family Court. If any modification is required, it is left open to the petitioner to move the Family Court and if such an application is filed, the Family Court is at liberty to consider and dispose of the same in accordance with law.

With the above modifications, this petition is disposed of.

Sd/-

C.K.ABDUL REHIM, JUDGE.

Sd/-

K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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