

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 3RD DAY OF AUGUST 2015/12TH SRAVANA, 1937

OP (FC).No. 352 of 2015 (R)

AGAINST THE ORDER/JUDGMENT IN OP 2295/2013 of FAMILY
COURT,ERNAKULAM DATED

PETITIONER(S): RESPONDENT

AJITH ALEXANDER AGED 39 YEARS
S/O.LATE M.A.BABU, SARANGAM, TENRA 116
THEVALLY, KOLLAM DISTRICT-682304.

BY ADVS.SRI.V.PHILIP MATHEW
SRI.JEPH JOSEPH
SRI.GIBI C. GEORGE

RESPONDENT(S): PETITIONER

JOSEPHINE NEETHU
(A PERSON OF UNSOUND MIND
REPRESENTED BY HER FATHER AND NEXT FRIEND SILVERSTER
KADUDOSE) AGED 34
D/O.SILVESTER KADUDOSE, KUDUVASSERIL HOUSE
RADHA OIL MILLS ROAD, PACHALAM PO, KOCHI-682012.

R1 BY ADV. SRI.K.S.MOHAMED HASHIM
R1 BY ADV. SMT.CAROLIN SINDHU VAZ
R1 BY ADV. SMT.P.A.JAIMOLE
R1 BY ADV. SMT.A.NISSY

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 03-
08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP (FC).No. 352 of 2015 (R)

APPENDIX

PETITIONER(S)' EXHIBITS

- P1: COPY OF THE PETITION IN OP.NO.2295/2013
P2 : COPY OF THE PETITION IN OP.NO.2295/2013
P3 : COPY OF THE PETITION IN OP.NO.156/2015
P4 : COPY OF ORDER DATED 23-12-2013 PASSED BY THE FAMILY COURT,
ERNAKULAM IN IA.NO.4513/2013 IN OP.NO.2295/2013
P5 : COPY OF IA.NO.234/2014
P6 : COPY OF ORDER DATED 08-04-2014 PASSED BY THE FAMILY COURT,
ERNAKULAM IN IA.NO.1294/204 IN OP.NO.2295/2013
P7 : COPY OF ORDER DATED 18-09-2014 PASSED BY THE FAMILY COURT,
ERNAKULAM IN IA.NO.2314/2014 IN OP.NO.2295/2013
P8 : COPY OF ORDER DATED 20-12-2014 PASSED BY THE FAMILY COURT,
ERNAKULAM IN IA.NO.4505/2014 IN OP.NO.2295/2013
P9 : COPY OF IA.NO.866/2015
P10 : COPY OF COUNTER AFFIDAVIT FILED BY THE RESPONDENT IN
IA.NO.866/2015.
P11 : COPY OF ORDER DATED 31-3-2015 PASSED BY THE FAMILY COURT,
ERNAKULAM IN IA.NO.866/2015.
P12 : COPY OF JUDGMENT ATED 17-6-2015 PASSED BY THIS HON'BLE COURT
IN OP(FC)NO.138/2015
P13 : COPY OF IA.NO.2536/2015 FILED BY THE PETITIONER IN
OP.NO.2295/2013/
P14 : COPY OF IA.NO.2507/2015 FILED BY THE PETITIONER IN
OP.NO.2295/2015
P15 : COPY OF COUNTER AFFIDAVIT FILED BY THE PETITIONER IN
IA.NO.2507/2015 IN OP.NO.2295/2015.
P16 : COPY OF COMMON ORDER DATED 17-7-2015 PASSED BY THE FAMILY
COURT, ERNAKULAM IN IA.NO.2536/15, IA.NO.2507/15 AND
IA.NO.234/14 IN OP.NO.2295/2013.
P17 : COPY OF THE TREATMENT SUMMARY DATED 30-10-2009 ISSUED FROM
SUSRUSHA NURSING HOME, KOCHI
P18 : COPY OF THE DOCTOR'S ORDERS FROM SUSRUSHA NURSING HOME,
KOCHI.
P19 : COPY OF THE LABORATORY TEST REPORT FROM MEDI VISION
REGARDING THE RESPONDENTS DATED 30-10-2009.
P20 : COPY OF REFERRAL LETTER ISSUED FROM CENTRAL INSTITUTE OF
BEHAVIOURAL SCIENCES.

RESPONDENT(S)' EXHIBITS

NIL

TRUE COPY

PS TO JUDGE

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

OP(FC).No. 352 of 2015

Dated this the 3rd day of August, 2015

JUDGMENT

K.Ramakrishnan,J.

The petitioner herein who is the father of the minor child Alvin Ajith filed this writ petition challenging Ext.P16 order passed by the Family Court under Article 227 of the Constitution of India.

2. It is alleged in the petition that the petitioner and respondent are man and wife and they were working earlier at Bangalore and living together as husband and wife. A minor child was born to them in that wedlock. Thereafter their relationship strained. they happened to come to the native place in Kerala and from that day onwards the child was with the mother. Respondent filed OP.No.2295/13 before the Family Court, Ernakulam for declaring her as guardian alleging that the petitioner being a mentally ill person incapable of acting as a guardian of the minor. The petitioner also filed OP.No.

156/2015 before the Family Court ,Ernakulam for declaring him as guardian of the minor child as Ext.P3. Earlier the petitioner herein filed IA.No.4513/13 in OP.2295/2013 before the Family Court for interim custody of the child and the Family Court by Ext.P4 order allowed the application by granting 3 days overnight stay of the child from 2.00 pm on 25.12.2013, 26.12.2013 and 27.12.2013 and directed to return the child on or before 5 p.m. on 27.12.2013. Since there was no compliance of the order, the petitioner filed Ext.P5 application IA.No.234/2014 for taking action against the respondent herein for violating the order. While that petition was pending, again the petitioner herein filed IA.No.1294/14 in OP.No.2295/2013 for interim custody of the child and the Family Court by Ext.P6 order granted interim custody of the child to the petitioner on all Saturdays from 12.4.2014 till June 2014 from 10.00 a.m till 4.30 p.m. in the court premises. He was also given liberty to take the child for outing if required during day time but to return the child on or before 3.30 p.m. to the respondent. This order was not challenged. Thereafter on the basis of the application filed by the petitioner himself as IA.2314/14 in OP.No.2295/2013 the order in

Ext.P6 has been modified by Ext.P7 order giving custody of the child to the father every alternate Sunday at 10.00 A.M. till 5.00 p.m. Thereafter again the petitioner filed IA.No.4505/14 in OP.No.2295/13 seeking interim custody of the child and Ext.P8 order was passed by the Family Court allowing access of the child to the petitioner during day time from 26.12.2014 to 30.12.2014 from 10 30 am. till 3 p.m. while in court premises. Thereafter when application was filed for interim custody of the child during mid summer vacation the Family Court passed Ext.P11 order in IA.No.866/15 granting custody of the child on every Saturday from 10 a.m. to 1 p.m. in the premises of the court by modifying earlier order during summer vacation. This order was challenged by the petitioner by filing OP(FC) 138/2015 before this court and this court as an interim arrangement by order dt. 24.4.2015 granted interim custody of the child to the father on all Sundays between 10 a.m. and 5 p.m. and directed the child to be produced before the Family Court Ernakulam on every Sunday and this court by Ext.P12 final judgment disposed of the OP stating that since the period sought for has already been over and nothing survives in that writ petition, this court disposed of

the writ petition with liberty to the parties to move the Family Court for modification of the order if any required and also directing the Family Court to pass appropriate orders in IA.No.234/2014 filed by the petitioner seeking action to be taken against the respondent for violating the court order. Thereafter the petitioner as well as the respondent filed IA.2536/15 and IA.2507/2015 respectively for modifying the condition regarding custody of the child and the Family Court disposed of these applications along with IA.No.234/14 by Ext.P16 common order whereby IA.No.234/2014 was dismissed and condition regarding interim custody was modified giving custody of the child on the 1st & 4th Saturdays between 10 a.m. and 1 p.m. from the court premises and disposed of the applications accordingly. This order is being challenged by the petitioner by filing this writ petition.

3. Heard counsel for the petitioner and the respondent.

4. Counsel for the petitioner submitted that by virtue of the different orders passed by this court, in fact the time to access for the father of the child has been reduced considerably without looking into the feelings of the father. Further the brother of the

petitioner had come and he wanted to see the child and to spend some time. So for that purpose atleast one day overnight custody has to be given. He is accusing of mental illness of the mother and according to the mother, the father is not competent to look after the child. He had relied on Ext.P17 and Ext.P20 for that purpose.

5. On the other hand counsel for the respondent submitted that while passing interim order in OP(FC)138/2015 this court had occasion to interact with the father, mother and the child and it is thereafter that the interim arrangement has been passed. That shows the mental attitude of the father and it is not safe to give the child over night stay with the father. Further the child will have to attend Sunday classes in the church so that the period of visitation of the child has to be reduced from 11 a.m. to 6 pm to 10 a.m. to 1.00 p.m.. if at all this court is prepared to grant access to the father, this was opposed by the counsel appearing for the petitioner on the ground that he may be getting only lessor period.

6. It is an admitted fact that the father and mother of the minor child are accusing each other for suffering from mental

illness as according to them, this a disqualification for each other to become a guardian of the child. It is quite unfortunate that the child will have to live with such parents. But at the same time the father and mother will have an equal right for getting custody of the child but the age of the child and the welfare of the child are matters to be considered by the court while passing order of interim custody. Admittedly the child has not been given love and affection of both parents on account of ego between the parents. In fact joint custody of the children with parents is not at all given and child is being shifted from one person to another for a short period and the child will have to go back to the original position and considering the circumstances, the Family Court itself has modified interim custody of the child after Ext.P4. This court feels that the court below was perfectly justified in dismissing IA.No. 234/2014 filed by the petitioner for taking penal action against the mother. If any penal action is taken, then the welfare of the child also will be affected and that should not be the attitude of the Family Court while passing orders. So under the circumstances we do not find any reason to interfere with the order in IA.No.234/2014 dismissing the said IA.

7. As regards the custody of the child is concerned, the Family Court as well as this court atleast once passing interim orders found that the prolonged custody with the father need not be given but at the same time Family Court as well as this court found custody of the child can be given to the father during day time on Sundays. The only objection raised by the counsel for the respondent is that if custody of the child is given in the morning itself, the child will be losing to attend sunday classes in the church. Counsel for the petitioner submitted that he is prepared to take the child to the same church for attending the sunday classes. Considering these facts and also considering the feelings of the father also we feel that the custody can be given to the father from 10 a.m to 5 p.m on all sundays and the petitioner is at liberty to take the child outside the court premises also but shall not take the child outside the Family court jurisdiction. But he will have to return the child on that day itself in the Family court itself. So the child can be taken by the mother. In order to avoid successive application filed by the parties during the pendency of the application during vacation, we feel some interim arrangement will be given in this case.

During onam vacation one sunday the child can be permitted to be taken to Kollam but he must return the child on the evening itself in the Family Court premises. On one sunday falls during onam vacation, the respondent shall produce the child in the Family Court at 8.00 a.m. and the custody can be given to the father petitioner and he is permitted to take the child to Kollam and then return the child in the Family Court premises on the same day at 6 p.m. and the child can be handed over to the mother respondent herein. Similarly during X'mas vacation also the child can be given on one sunday on the same condition mentioned above. During the time when the child is being taken to Kollam the mother of the petitioner will be present along with the petitioner. Considering the fact that the dispute is only with respect to the custody of the child, and the OPs are pending from 2013 onwards, this court feels that the Family Court is directed to dispose of both cases as expeditiously as possible , at any rate before 31.3.2016. No further modification of this order need to be done by the Family Court during the pendency of the proceedings before that court till the disposal of the OP as directed by this court.

With the above directions, observations and modifications this OP(FC) is disposed of. Office is directed to communicate the order to the concerned parties.

C.K.ABDUL REHIM, JUDGE

K.RAMAKRISHNAN, JUDGE

Pmn/

