

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 19TH DAY OF AUGUST 2015/28TH SRAVANA, 1937

OP (FC).No. 354 of 2015 (R)

PETITIONER(S) :

BINDU VENUGOPAL, AGED 39 YEARS
EDATHIPARAMBIL HOUSE, CHANDAPURA DESOM,
IRINJALAKUDA VILLAGE, MUKUNDAPURAM TALUK,
THRISSUR DISTRICT.

BY ADVS.SRI.G.SREEKUMAR (CHELUR)
SRI.N.L.BITTO

RESPONDENT(S) :

MANOJ, AGED 47 YEARS,
S/O.RAVEENDRANATHAN, THACHAMBILLY HOUSE, RUDRALAYAM,
ALUVA DESOM, CHENGAMANAD DESOM, ALUVA P.O.,
ERNAKULAM DISTRICT 680 001.

R1 BY ADVS. SRI.P.VIJAYAKUMAR
SRI.C.R.REGHUNATHAN
SRI.M.V.ASHIM
SRI.R.BALAKRISHNAN
SRI.B.HARRYLAL

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON
19-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS

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P1: THE TRUE COPY OF THE COMPROMISE PETITION IN GOP 1539/2012 DATED 4/4/2013.

P2: THE TRUE COPY OF THE DIVORCE PETITION OP 536/2014 DATED 24/6/2013.

P3: A TRUE COPY OF THE PERMISSION APPLICATION IA 590/2015 IN GOP.1539/2012 DATED /3/2015 BEFORE THE FAMILY COURT IRINJALAKUDA.

P4: A TRUE COPY OF THE ORDER IN PERMISSION APPLICATION IA.590/2015 IN GOP.1539/2012 DATED 24/4/2015 OF THE FAMILY COURT, IRINJALAKUDA.

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.354 of 2015

Dated this the 19th day of August, 2015

JUDGMENT

C.K. Abdul Rehim, J

This original petition is filed under Article 227 of the Constitution of India. The petitioner is challenging Ext.P4 order passed by the Family Court, Irinjalakkuda in I.A.No.590/2015 in GOP No.1539/2012, dated 24.04.2015. GOP No.1539/2012 was filed by the respondent herein seeking permanent custody of the minor child of the parties namely, Master Athul Krishna, aged 10 years (DOB 12.12.2004). During pendency of the said case before the Family Court the parties have arrived at a compromise, the terms of which were reduced into Ext.P1 petition signed by both sides. As per terms of the settlement, inter alia it was agreed to send the child along with the petitioner herein to

spend the mid summer vacation in Dubai, during the year 2013 and to return the child before 15th June, 2013 in order to admit at Santhinikethan Public School, where the child was studying at that time. Specific recital in Ext.P1 compromise petition is to the effect that, the child should be permitted to continue his studies at Santhinikethan Public School during the academic year 2013-14 and with respect to his future education the parties will arrive at a mutual settlement. It was agreed that, from June 2013 to April 2014, the minor child will be in the custody and protection of the mother of the petitioner, Smt.Saraswathy. Both the parties were permitted to have interaction with the school authorities, including video conferencing, for evaluating academic developments of the child and to have necessary interactions in that respect. It was further agreed that, the respondent will make payment of an amount of ₹4,000/- each during the months of April, May and June 2013 and thereafter at the rate of ₹5,000/-

per month, towards maintenance of the minor child, which was agreed to be deposited in an account to be opened at the Federal Bank, Irinjalakkuda Branch, in the name of the minor child with permission to operate the ATM card by the grandmother, Smt.Saraswathy. Apart from that, the respondent had agreed to bear the expenses regarding admission fee, uniform fee, special fee etc., required for the education purposes of the minor. It is stated that GOP No.1539/2012 was closed by the Family Court on the basis of Ext.P1 compromise.

2. Thereafter the petitioner herein had approached the Family Court in I.A.No.590/2015 seeking modification of the arrangement regarding custody of the minor. It is alleged that the respondent had violated terms of settlement by not paying the amount as admitted and therefore the petitioner had filed OP No.536/2014 seeking divorce on the ground of alleged cruelty, as evidenced by Ext.P2. Meanwhile the petitioner got a better job in Gulf

countries and she had obtained a 'Resident Visa'. It is mentioned that she had arranged admission for the minor child at the Indian School at Sharjah. But the respondent had refused to grant permission for taking the child along with the petitioner to Sharjah. Under such circumstances, the petitioner had approached the Family Court in I.A.No.590/2015 in GOP No.1539/2012, seeking permission to take the child to Sharjah to admit him in the said school. Ext.P3 is the copy of the interim application filed in this regard.

3. But the court below had dismissed the application through Ext.P4 order observing that, as per terms of the compromise arrived the parties have agreed to take the child to Dubai for spending the mid-summer vacation and that the petitioner had agreed to bring back the child for continuing his education at Santhinikethan Public School, Irinjalakkuda. It is further observed that there was no agreement arrived between the parties at that

time to take the child to Sharjah for continuing his education therein and there is no reason to allow the interim application. It is aggrieved by dismissal of I.A.No.590/2015, this original petition is filed.

4. Learned counsel for the petitioner contended that the petitioner, who is the mother of the minor child, is entitled to have custody of the child with her at her place of employment. It is contended that the child requires protection, care, love and affection of the mother at this tender age. It is also pointed out that the petitioner is having Resident Permit in UAE and that she had arranged 'Student Visa' for taking the child to UAE for continuing his education at Sharjah. It is also submitted that she had made all arrangements for securing admission for the child in the Indian School at Sharjah, in 6th standard. Allegations are also raised to the effect that the respondent had failed in providing adequate maintenance as agreed upon in terms of Ext.P1 and therefore he is not entitled to object the

petitioner in taking the child to Sharjah and admitting him in a school therein.

5. Learned counsel appearing for the respondent, on the other hand, refuted all the allegations of nonpayment of maintenance to the child. According to him, there is no valid reason existing to disturb the present arrangement agreed upon under Ext.P1, with respect to the education of the minor child. It is contended that the school in which the minor is now studying is a school of good standard and that the petitioner has no case that the child will be deprived of any quality education, if he is permitted to continue in the said school. It is also contended that, it is not justifiable to deny the respondent to have access to the child by putting him permanently in a school in UAE and thereby denying any visitation of the child. It is also contended that the impugned order does not suffers from any infirmity, illegality or error. According to learned counsel for the respondent, the order does not invite any

interference in exercise of jurisdiction vested on this court under Article 227, which is supervisory in nature.

6. A decision of the Hon'ble Supreme Court in **Sh.Jogendrasinhji Vijaysinghji v. State of Gujarat & Others [2015 (3) KLT 240 (SC)]** is cited by the respondent in order to content that the power of judicial interference under Article 227 of the Constitution with respect to orders of judicial or quasi judicial nature are not greater than the power under Article 226 of the Constitution. It is held that the power of interference under Article 226 may extend to quashing of an impugned order on the ground of a mistake apparent on the face of record. But under Article 227, the power of interference is limited to see that the tribunal functions within the limits of its authority. Hence interference either under Article 226 or 227 was not justified on the facts of the case at hand, is the contention.

7. We are of the considered opinion that the

above original petition filed under Article 227 is maintainable on the basis that the Family Court went erred in the exercise of jurisdiction vested on it. It is because of the fact that, the impugned order had proceeded on the basis of a wrong assumption that by virtue of terms of the settlement arrived earlier that court cannot go beyond the settlement. But it is evident from the terms of Ext.P1 that the arrangement regarding education of the child was made only with respect to the academic year 2013-2014. It is specifically mentioned in Ext.P1 that, after the academic year 2013-14 the parties will be at liberty to take appropriate decision. Further we notice that, even by virtue of said settlement the mother, who is the petitioner herein, was allowed to take the child during mid-summer vacation to her place of employment at Dubai. More over it is pertinent to note that even during the period when the child was admitted at Santhinikethan Public School in Kerala, his custody was entrusted only to the maternal grandmother

and the respondent herein was allowed only visitorial rights subject to the terms of Ext.P1.

8. As observed above, it is evident that the court below had proceeded on a wrong assumption that it is bound to adhere to the terms of Ext.P1 regarding custody of the child. It is specifically mentioned in the impugned order that the Family Court had interaction with the child and the child had expressed his desire to go to Sharjah for staying with the petitioner. In the given circumstances, this court is of the considered opinion that the Family Court ought to have taken into consideration of the welfare of the child as the paramount consideration, as provided under Section 13 of the Hindu Minority and Guardianship Act, 1956 and as provided under Section 17 of the Guardian's and Ward's Act, 1890.

9. In the decision of this court in **Baby Sarojam v. S.Vijayakrishnan Nair (AIR 1992 (Kerala) 277)** a Division Bench of this court held that, welfare of the

minor is the prime consideration and even though the father is the natural guardian he is unfit to be as guardian and cannot claim custody of the children as of right. In the said case, the court had given custody of the child to the maternal grandmother despite specific claim made by the father. So also the Hon'ble Apex Court in **Gaurav Nagpal v. Sumedha Nagpal (2009 KHC 4035)**, held that under the Hindu Minority and Guardianship Act, 1956, the welfare of the child should be the paramount consideration while determining issues relating to child custody and visitation rights. It is held that, object and purpose of the legislation is not merely physical custody of the minor, but due protection of the rights of the ward's health, maintenance and education and concern of love for child etc. It is found that, when the court is confronted with conflicting demands made by the parents, each can justify the demands. The court has not only to look at the issue on legalistic basis. In such matters human angles are relevant for deciding those

issues. The court then does not give emphasis on what the parties say. It has to exercise jurisdiction which is aimed at the welfare of the minor. The court has to give due weightage to the child's ordinarily contentment, health, education, intellectual development and favorable surroundings including physical comforts, moral and ethical values etc. It is held that, the word 'welfare' used under Section 13 of the Act to be construed in its widest sense.

10. Bearing in mind the legal principles settled through precedents as cited above, this court is of the considered opinion that, while passing Ext.P4 order the Family Court had totally failed in exercising its jurisdiction in the real perspective. In the case at hand the parents are at a strained matrimonial relationship. It is evident that, pending litigation regarding custody of the minor child an arrangement was made for a specific period by virtue of which the maternal grandmother had given custody in preference to the respondent herein, who is the father and

legal guardian. However, it is evident that the petitioner/mother is now in a better position at her place of employment. The petitioner is having a 'Resident Permit' and employment visa in Sharjah, which fact was opposed by counsel appearing for the respondent. In order to verify veracity of the claim we directed the counsel for the petitioner to produce details of her employment abroad, in a sealed cover, because apprehension was expressed that if the place of employment is revealed the respondent will create trouble by contacting the employer and by sending false allegation. Learned counsel for the petitioner had produced copies of passports of the petitioner and the child and also the Resident Permits of the petitioner and the child. On a perusal of those documents we are convinced that the petitioner is holding a resident permit as an employee in a private company in Dubai and the permit is valid up to 20.12.2016. The permit was seen issued on 21.12.2014. So also there is a resident student permit

granted in the name of Master Athul Krishna Manoj, (minor child of the parties) on 06.05.2015. It would indicate that the child is permitted to stay at UAE as a student, till 05.05.2017. Therefore it is evident that the mother is capable of looking after the welfare of the child by admitting him in a proper school at UAE. We are of the considered opinion that the residence of the minor child in the presence of his mother will be more beneficial considering his welfare and future prospects. Therefore we are not inclined to deny the modification sought for by the petitioner with respect to the arrangement made through Ext.P1 agreement.

11. However, we are of the considered opinion that the respondent being the father should be provided with adequate access to the child by permitting intermittent custody. On the basis of direction issued by this court, learned counsel for the petitioner had ascertained and submitted that the child will be having annual vacation from

the middle of July in every year. So also there will be a vacation of 10 days during the Christmas season in December. We are of the opinion that, it is for the petitioner to bring the child during the annual vacation to Kerala and to hand over custody of the child to the respondent/ father for a period of one month. We are also of the opinion that the respondent can be permitted to bring the child to Kerala for a week's time during December (during Christmas holidays) at his own expenses.

12. Under the above mentioned circumstances, the original petition is allowed and Ext.P4 order passed by the Family Court is hereby quashed. I.A.No.590/2015 in GOP No.1539/2012 on the files of the Family Court, Irinjalakkuda, is allowed on the following terms.

(i). Custody of the minor child, Master Athul Krishna, aged 10 years, is granted to the petitioner herein, subject to the following terms, until any modified order is passed in this regard.

(ii) The petitioner is permitted to take the minor child to UAE to admit him in the Indian School at Sharjah or any other school having good standard and to keep residence of the child along with her, during the period of her stay in UAE. The expenses with respect to education of the child shall be met by the petitioner herein.

(iii) The petitioner shall bring the minor child, Master Athul Krishna to Kerala during the annual vacation in July-August on every year and shall hand over the custody of the child to the respondent herein for a period of one month, immediately on arriving in Kerala, on the beginning of the vacation, with due intimation given to the respondent for the said purpose. During the period which the respondent shall take custody of the child, he should reside along with the child in the presence of the paternal

grandparents.

(iv) It will be left open to the respondent to make arrangements for bringing the child to Kerala during Christmas holidays in the month of December in every year, for a period of one week, at his expenses. For the said purpose, the respondent should provide the flight ticket for the child and shall make necessary previous intimation to the petitioner, at least one month in advance of the date of travel. The details of the flight tickets if any booked shall also be intimated to the petitioner in advance.

(v) It is made clear that during the period of stay of the minor child at UAE, the respondent herein and the paternal grandparents will be at liberty to contact the child over telephone and to have conversation with him. The petitioner shall not prevent any such interaction in any manner.

13. It is made clear that the parties on either side will be at liberty to seek modification of the arrangement made as above by approaching the Family Court having jurisdiction, in case there arise any change of circumstances. It is also made clear that if there is any violation of the conditions incorporated as above from the side of any of the parties, it will be left open to the other side to approach the Family Court seeking enforcement of the conditions through appropriate steps. We also make it clear that the arrangement regarding payment of maintenance stipulated in Ext.P1 will continue to be in force.

Sd/-

C.K. Abdul Rehim, Judge

Sd/-

K. Ramakrishnan, Judge

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P.A. to Judge

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