

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 5TH DAY OF AUGUST 2015/14TH SRAVANA, 1937

OP (FC).No. 363 of 2015 (R)

IN OP 74/2015 of FAMILY COURT, THALASSERY

PETITIONER(S):

**JOFFY BABU, AGED 35 YEARS
S/O. BABU V.I., VAZHAPILLY HOUSE,.
ARTHAT P.O., KUNNAMKULAM
REP. BY HIS POWER OF ATTORNEY HOLDER BIJOY BABU
AGED 35, S/O. BABU, VAZHAPILLY HOUSE
ARTHAT P.O., KUNNAMKULAM, THRISSUR DISTRICT.**

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDENT(S):

**JEEVA JOSEPH, AGED 35 YEARS,
D/O. JOSEPH, URUMBIL HOUSE, THATTYATT VELLARVALLI P.O.
PARAVUR, THALASSERY - 676 001.**

R1 BY ADV. SRI.ALEXANDER JOSEPH

**THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON
05-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1 - A TRUE COPY OF THE POWER OF ATTORNEY EXECUTED BY THE PETITIONER DT. 16.5.2013.
- EXT.P2 - A TRUE COPY OF THE PASSED IN IA NO. 4208/2013 IN IA NO. 3745 OF 2013 IN OP NO. 1809/2013 ON THE FILE OF THE FAMILY COURT, THRISSUR DT. 28.12.2013.
- EXT.P3 - A TRUE COPY OF THE ORDER IN TR.P.C NO. 158/2014 DT. 26.11.2014 OF THIS HON'BLE COURT.
- EXT.P4 - A TRUE COPY OF THE AGREEMENT DT. 19.5.2015.
- EXT.P5 - A TRUE COPY OF THE CERTIFICATE ISSUED BY THE HOSPITAL SUPERINTENDENT DT. 15.7.2015.
- EXT.P6 - A TRUE COPY OF THE MEDICAL CERTIFICATE ISSUED BY THE DOCTOR DT. 08.7.2015.
- EXT.P7 - A TRUE COPY OF THE REFER NOTE OF THE ARTHAT, PRIMARY HEALTH CENTER DT. 08.7.2015.
- EXT.P8 - A TRUE COPY OF THE INTERIM ORDER PASSED IN OPFC NO. 335/2015 BEFORE THIS HON'BLE COURT DATED 20.7.2015.
- EXT.P9 - A TRUE COPY OF THE ORDER PASSED DT. 16.7.2015 IN IA NO. 535/2015 IN OP NO. 74/2015 ON THE FILE OF THE FAMILY COURT, THALASSERY.
- EXT.P10 - A TRUE COPY OF THE ORDER PASSED IN IA NO. 550/2015 IN OP NO. 74/2015 DT. 24.7.2015 ON THE FILE OF THE FAMILY COURT, THALASSERY.
- EXT.P11 - A TRUE COPY OF MEDICAL RECORD PROVIDED BY THE ROYAL HOSPITAL, KUNNAMKULAM DT. 23.7.2015.
- EXT.P12 - A TRUE COPY OF THE MEDICAL CERTIFICATE ISSUED BY THE DISTRICT HOSPITAL, THRISSUR DT. 30.7.2015.
- EXT.P13 - A TRUE COPY OF THE OUTPATIENT TICKET ISSUED DT. 29.7.2015.

RESPONDENT(S)' EXHIBITS

NIL

/TRUE COPY/

PA TO JUDGE

VS

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

O.P.(F.C).No.363 of 2015

Dated this the 5th day of August, 2015

JUDGMENT

K.Ramakrishnan, J.

The petitioner in I.A.No.4208/2013 in I.A.No.3745/2013 in O.P.No.1809/2013 is the petitioner herein, challenging Exts.P9 and P10 orders of the Family Court, Thalassery, invoking jurisdiction under Article 227 of the Constitution of India.

2. The petitioner, who is represented by his Power of Attorney Holder, is the husband of the respondent herein. In that wedlock, a child was born to them, who is now aged 3 ½ years. Since the child was in the custody of the mother, aggrieved by the non getting of the custody, the petitioner herein filed O.P.No.1809/2013 before the Family court, Thrissur, seeking permanent custody of the minor child. While the Original Petition was pending, they alleged have been entered into Ext.P4 agreement, regarding the entire

disputes between them in which, the custody of the child was given to the petitioner herein. On the basis of the agreement a joint petition for divorce is also filed. According to the respondent, there was some violation in the terms of the agreement as the child was not handed over to her. She moved the Family court, Thalasserry by filing I.A.No.535/2015, seeking a direction to the petitioner to produce the child before the Family court and the Family court directed the petitioner to produce the child and posted the case to 16.07.2015. Since the child was not produced as directed, the Family court waited upto 12.20 p.m., on that day to ascertain whether the child could be produced. But the child was not produced and no reason was given for non production of the child. The Family court directed the respondent to take steps to bring the child by other coercive methods and posted the case to 21.07.2015. This order was earlier challenged by the petitioner by filing OP(FC)No.335/15 before this Court, stating that since the copy of the order could not be obtained, he was not able to produce the same and since

the child was hospitalized, he could not produce the child and wanted some interim direction from this Court to restrain the Family court from implementing that order. Accordingly, this Court by Ext.P8 order directed the Family court to issue certified copy of the order, at the earliest possible time at any rate, within a period of 10 days and posted the case today and it is further ordered that till then coercive steps if any ordered for production of the minor child shall be kept in abeyance. It is thereafter, that Ext.P10 order was passed by the Family court, Thallassery directing the child to be produced on 05.08.2015 before that court. That order is also being challenged by the petitioner by filing this writ petition.

3. Since Sri.Alexander Joseph, entered appearance for the respondent, we thought that the petition can be admitted and disposed of today itself on merits after hearing both sides. So the Original Petition is admitted. Sri.Alexander Joseph, learned counsel for the respondent takes notice for the respondent.

4. The learned counsel for the petitioner

submitted that the Family court should not have taken such extreme view by passing Ext.P10 order, especially when Ext.P8 has been produced before that court, giving different interpretation. Further the child is undergoing treatment, which is evident from Ext.P12 and the doctor advised rest for 30 days from 30.07.2015. He is prepared to produce the child, if the condition of the child is conducive for production before the Family court.

5. The counsel for the respondent submitted that the mother is being denied the custody of the child and from the date on which the child was born, he was under the care and protection of the maternal grand parents and only by virtue of the alleged Ext.P4 agreement, the child was given to the petitioner, on condition of returning the child within one week and that was violated by the petitioner and the petitioner is not in station and the counsel for the respondent also submitted that though the respondent was working abroad, now, for the sake of the child, she had resigned her job and came to India and wanted to settle in the native place and she is

prepared to look after the child and she is now in India.

6. It is an admitted fact that the petitioner and the respondent are man and wife and the child was born to them in that wedlock. It is also an admitted fact that at the time when the child was born, both of them were working abroad and the child was being look after by the maternal grand mother in their absence. However, when there was difference of opinion arose between them, that prompted by the petitioner herein to file OP.No.1809/2013 before the Family court, Thrissur seeking permanent custody of the child, at the time when the child was only aged 1 ½ years and the child was in the custody of maternal grand mother and obtained Ext.P2 order, directing the petitioner to go to the house and take the child from the maternal grand mother. It is thereafter, it appears that Ext.P4 agreement was entered between the parties, settling all disputes between them and decided to separate and file a joint petition for divorce by mutual consent. One condition mentioned in the agreement was that the child will have been returned to the petitioner.

However, the execution of that agreement, it appears is being challenged by the respondent. All those are matters to be considered by the Family court.

7. Since the child was not given, the respondent filed I.A.No.535/15, directing the petitioner herein to produce the child and it appears from Ext.P9 order that there was an interim direction to produce the child on 16.07.2015 and when the case was taken up on that day, the child was not produced till 12.20 p.m., and no representation was made regarding the reason for non production of the child on that day. The Family court permitted the petitioner to take coercive steps to bring the child before the Family court and posted the case on 21.07.2015. This order was challenged by filing OP(FC) No.335/2015, on the ground that the copy of the order could not be produced as it was not given. So this Court, without admitting the petition, issued notice on admission to the respondent and also directed the Family court to issue certified copy of the order within 10 days and till then, the coercive steps to be taken was directed to be

kept in abeyance. Thereafter, the present petition was filed by the respondent herein as I.A 550/15 for police assistance to get the child and after considering Ext.P8 order and also considering the objections raised by the petitioner regarding the non production of the child, as directed, the Family court ordered to produce the child on today before that court by the impugned Ext.P10 order.

8. It is seen from the documents produced that the child was having some health problem and he was treated in Royal Hospital as inpatient from 15.07.2015 to 23.07.2015. The petitioner also produced certain documents, to show that prior the child was admitted in the Royal Hospital for treatment, he was treated in the Government Hospital. It is seen from Ext.P11 that the child was discharged with direction to review after 4 days. But it is thereafter, that Ext.P12 certificate was obtained from a Government Hospital, stating that the child requires one month rest to restore his general health and advising avoid travelling during this period. We are not going into the question of genuineness of the documents

produced in this petition. However, when a direction is given by the court to produce the child, the petitioner is bound to produce the child and it is for the Family court to consider as to whether the interim custody has to be given to the mother or it has to be retained with the father, after considering the welfare of the child, which is the paramount criteria to be considered by the court, while considering the question of interim custody. So since no orders have been passed in the Family court in I.A.No.535/15, this Court feels that it is not proper for this Court to usurp the powers of the Family court and pass any final orders in that application. But at the same time, the petitioner is bound to obey the order passed by the Family Court also by producing the child before the Family court as directed, as no explanation was given by him on 16.07.2015, when already a direction was there to produce the child on that day. So under the circumstances, we feel that the writ petition can be dispose of, directing the petitioner to produce the child before the Family court on 11.08.2015 and the Family

court is directed to consider and disposed of I.A.No.535/15, after hearing both sides and pass appropriate orders on that application as far as possible on the same day, without moved away by the conduct of the parties as observed in Exts.P9 and P10, taking into consideration the paramount interest of the child and also taking into consideration the principles laid down by the Apex court regarding granting of interim custody of the child under the Guardian and Wards Act.

With the above observations and directions the writ petition is disposed of. The office is directed to communicate this order to the Family Court, Thallassery immediately by Fax, so that the court below can hear and dispose of the application on 11.08.2015 itself as directed by this Court.

C.K.ABDUL REHIM, JUDGE

K.RAMAKRISHNAN, JUDGE

VS