

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MRS. JUSTICE MARY JOSEPH

MONDAY, THE 14TH DAY OF SEPTEMBER 2015/23RD BHADRA, 1937

OP (FC).No. 408 of 2015 (R)

PETITIONER/PETITIONER:

SABITH YOONUS NALAKATH,
S/O.DR. YOONUS NALAKATH, UDAILIYA VEEDU
PATHANAPURA, VALILLAPPUZHA POST, ARECOKKODE
MALAPPURAM DISTRICT.

BY ADVS.SRI.P.M.ZAFARULLAH
SRI.A.A.ZIYAD RAHMAN
SRI.LAL K.JOSEPH
SRI.V.S.SHIRAZ BAVA
SRI.JOSEPH KURIAN VALLAMATTAM
SRI.K.H.ANSAR

RESPONDENTS/RESPONDENTS:

1. AHSANA NAVAL.K.
D/O. DR.K.MUHAMMED SAJITH, KALLINGAL, DARUL IHASAN
P.T.USHA ROAD, THER VEEDU LANE, KOZHIKODE
KOZHIKODE DISTRICT-675001.
2. DR. K.MUHAMMED SAJITH
KALLINGAL, S/O.AHAMMED AMEED, DARUL IHASAN
P.T.USHA ROAD, THER VEEDU LANE, KOZHIKODE
KOZHIKODE DISTRICT-675001.

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 14-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AMG

APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1 - TRUE COPY OF THE PETITION BEARING NO.OP(G&W)NO.32/12
- EXT.P2 - TRUE COPY OF THE JUDGMENT DATED 10.06.2015 IN
OP(FC)NO.181/2015.
- EXT.P2(A) - TRUE COPY OF THE ORDER DATED 02.07.2015 IN RP NO.54/15 IN
OP(FC)NO.181/15.
- EXT.P3 - TRUE COPY OF THE PETITION IA NO.644/15 BEFORE THE
FAMILY COURT.
- EXT.P4 - TRUE COPY OF THE COUNTER AFFIDAVIT DATED 15.06.2015.
- EXT.P5 - TRUE COPY OF THE REPLICATION STATEMENT DATED 22.06.2015.
- EXT.P6 - TRUE COPY OF THE ADDITIONAL AFFIDAVIT IA NO.644/15 IN
OP(G&W)NO.32/12.
- EXT.P7 - TRUE COPY OF THE ORDER DATED 24.07.2015 IN IA NO.644/2015 IN
OP(G&W) 32/2015

RESPONDENTS' EXHIBITS

NIL

True copy

P.A. To Judge

**C.K. ABDUL REHIM, J.
&
MARY JOSEPH, J.**

O.P (FC) No. 408 OF 2015

DATED THIS THE 14th DAY OF SEPTEMBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

The petitioner is approaching this court by invoking its supervisory jurisdiction vested under Article 227 of the Constitution of India for challenging Ext.P7 order passed by the Family Court in IA No.644/2015 in OP (G&W) 32/2015, which was instituted by the petitioner against the respondents herein seeking permanent custody of the two minor children born out of the wedlock between the petitioner and the 1st respondent.

2. On an earlier occasion, another order passed by the Family Court in IA 44/2015, refusing interim custody of the minor children and only allowing visitorial right to the petitioner was subjected to challenge before this court in OP (FC) No.181/2015. This court had disposed of the said original petition through Ext.P2 judgment, effecting

modifications in the visitorial right permitted to the petitioner. This court allowed visitorial right to the petitioner on the children on alternate Saturdays. He was permitted to keep the children from 10.30 a.m. to 4 p.m. on that day. The petitioner was also allowed take the children to his brother's house, who is residing 4 Kms. away from the Family Court premises. The visitorial right was given subject to restriction that the petitioner shall not take the children beyond city limits of Kozhikode.

3. The modifications effected through Ext.P2 judgment was sought to be reviewed by the 1st respondent herein, by filing a Review Petition as RP No. 548/2015. The 1st respondent expressed concern about the petitioner taking the children to the house of his brother, alleging that the petitioner alone will be available in the said house and there will not be anybody available to look after the children. When the review petition came up for consideration the petitioner herein submitted that he is prepared to bring his parents to be present with him so as

to cater needs of the children. Accordingly the Review Petition was disposed of recording the submission made on behalf of the petitioner herein that either the father or the mother of the petitioner will be present in the house when the children are permitted to take there as per Ext.P2 judgment.

4. The petitioner herein subsequently filed IA 644/2015 before the Family Court seeking permission to admit the elder minor child namely, 'Mariyam Bindh Sabith' in L.K.G and for that purpose to grant custody of that child to the petitioner. In the affidavit filed in support of the said application it is averred that the elder minor child had attained the age of 3½ years and that she need to be admitted in L.K.G. According to the petitioner, only if the child is admitted to L.K.G class her future education can be pursued in a better manner. Therefore it is contended that, considering welfare of the child it is necessary to handover custody of the child to the petitioner. The 1st respondent herein had filed a counter affidavit to the above interim

application, as evidenced from Ex.P4. She had also filed an 'addendum affidavit' as per Ext.P6. The Family Court after considering the rival contentions passed on Ext.P7 order dismissing the interim application, finding that as per Ext.P3 judgment this court had permitted the petitioner to have only a visitorial right of the children on alternate Saturdays from 10.30 a.m. to 4 p.m., and it is not proper for allowing the I.A. granting custody of the child to the petitioner.

5. It is contended by the petitioner that the Family Court had failed to consider the aspect that the respondents herein have denied the right of education to the minor child. Referring to Ext.P6 'addendum affidavit' filed by the 1st respondent it is pointed out that, the respondents have expressed their attitude in clear terms that they are not intending to admit the child in any kindergarten school. But on the other hand, it is said that they have arranged home tuition for the said child. Referring to provisions contained in the Right of Children to Free and Compulsory Education

Act, 2009, learned counsel appearing for the petitioner contended that, apart from the moral obligation on the part of the parents it is a statutory right conferred on the child to have proper education by admitting them in school. But it is noticed that such a right conferred by the statute is only from the age of 6 years. However, it is for the Family Court dealing with the matter under the Guardian and Wards Act to consider whether proper facilities for education is provided to the minor child with respect to whom custody is given to one of the parents, by exercising the role of parent patria. But as far as the order impugned in the present case is concerned, this court do not find any illegality, error or impropriety committed by the Family Court. As observed in the impugned order the petitioner cannot seek interim custody of the minor child for whatever reasons, going by terms of Ext.P2 judgment rendered by this court. Of course, if there is any material change in the circumstances, the parties are at liberty to seek modification. Merely for the allegation that the child is not admitted to LKG, it is not

possible to hand over interim custody to the petitioner. Therefore we are not inclined to interfere with Ext.P8 order.

6. However, it is made clear that if the child is not admitted to school or kindergarten at the proper age, it will be left open to the petitioner to approach the Family Court seeking proper directions to the parent who is given interim custody of the child. If any such application is filed before that court the same shall be adjudicated with opportunity afforded to both sides, and appropriate decision shall be taken on the question of issuing any such directions.

The original petition is disposed of subject to the above observations, and declining interference with Ext.P8 order.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

MARY JOSEPH, JUDGE.

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True copy

P.A. to Judge