

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 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

OP (FC).No. 410 of 2015 (R)

**(AGAINST THE ORDER IN IA No.1493/2015 IN OP No.477/2014
DATED 29-05-2014 OF FAMILY COURT, ATTINGAL)**

PETITIONER/PETITIONER:

**NAVAS,
AGED 34 YEARS, S/O.SAINULABDEEN,
RESIDING AT BAITHUL NOORU
PEROOR.P.O, VELLALLOOR VILLAGE,
CHIRAYINKEEZH TALUK.**

**BY ADVS.SRI.SIVAN MADATHIL
SMT.P.USHAKUMARI**

RESPONDENT/RESPONDENT:

**SURUMI,
D/O. JAMEELA BEEVI, PUTHENPALATHU VEEDU
CHATHANTHARA.P.O, PATHANAMTHITTA DISTRICT
PRESENTLY RESIDING AT PULIPPARAYIL HOUSE
CHIRAKKADAVU EAST.P.O, KOTTAYAM DISTRICT-686001.**

BY ADV. SRI.M.R.SARIN

**THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 02-11-
2015, ALONG WITH MA. 1072/2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

AMG

APPENDIX

PETITIONER'S EXHIBITS

- P1 TRUE COPY OF THE AGREEMENT DATED 13-11-2013 ENTERED BETWEEN THE PETITIONER AND THE RESPONDENT.
- P2 TRUE COPY OF THE ORDER DATED 6-5-2014 IN I.A.716/14 IN OP.477/14 PASSED BY THE LEARNED FAMILY COURT, ATTINGAL.
- P3 TRUE COPY OF THE ORDER DATED 13-5-14 IN WP(CRL)NO 200/2014 PASSED BY THIS HON'BLE COURT.
- P4 TRUE COPY OF THE JUDGMENT DATAED 28-7-2015 IN OP(FC)363/14 PASSED BY THIS HON'BLE COURT.
- P5 TRUE COPY OF THE ORDER DATED 11-8-15 IN I.A.11782/15 IN OP(FC)363/14 PASSED BY THIS HON'BLE COURT.
- P6 TRUE COPY OF THE PETITION DATED 31-8-2015 VIDE I.A.1552/15 IN O.P.477/14 FILED BY THE PETITIONER BEFORE THE FAMILY COURT, ATTINGAL.
- P7 TRUE COPY OF THE AFFIDAVIT AND PETITION DATED 2-9-2015 TO BE FILED BY THE PETITIONER BEFORE THE FAMILY COURT, ATTINGAL.
- P8 TRUE COPY OF THE ORDER OF SEARCH WARRANT DATED 31-08-2015 ISSUED BY THE THE FAMILY COURT, ATTINGAL.
- P9 TRUE COPY OF THE ORDER DATED 8-8-14 IN OP (FC) No.363/2014 PASSED BY THIS HON'BLE COURT.

RESPONDENT'S EXHIBITS

NIL

True copy

P.A. To Judge

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

**O.P (FC) No. 410 OF 2015
&
Mat. Appeal No. 1072 OF 2015**

DATED THIS THE 2nd DAY OF NOVEMBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

Since both the above cases are arising out of the same original petition before the Family Court, Attingal and since the parties in the cases are common, both the above cases are considered and disposed of together through this common judgment.

2. The petitioner in O.P.(FC)No.410 of 2015 who is the appellant in Mat.A.No.1072 of 2015, is the petitioner before the court below in O.P.(G&W)No.477 of 2014. The respondent herein is the respondent therein. The case was instituted before the Family Court seeking permanent custody of a minor child, namely Ali Hyder, born out of the wedlock between the parties. Due to matrimonial discord the petitioner had pronounced 'Talaq' and dissolved the

marriage. Afterwards a compromise crime was executed between the parties on 13.11.2013, settling all the matrimonial issues. Thereafter the respondent started life with her parents along with the minor child. Subsequently she had contracted another marriage. Meanwhile the petitioner had taken custody of the minor child and thereafter approached the Family Court, Attingal in O.P. (G&W)No.477 of 2014 seeking for a declaration that he is the guardian of the minor child, and for restraining the respondent by way of a prohibitory injunction from forcibly taking custody of the minor child from the petitioner. The Family Court passed an interim injunction in the said case, as per order in I.A.No.716 of 2014, restraining the respondent from taking custody of the child from the petitioner, until further orders. But the respondent had approached this court in a writ petition filed as W.P.(Crl.) No.200 of 2014, seeking a writ of Habeas Corpus for directing production of the minor child and for handing over custody to the respondent. The said case was disposed of

by this court through the judgment dated 13.5.2014, finding that the respondent can be permitted to take custody of the child, subject to orders which would be passed by the Family Court, Attingal, after hearing both sides. The respondent was directed to produce the child before the Family Court, Attingal on 17.5.2014 and the Family Court was directed to take an appropriate decision with respect to granting interim custody of the child, at the earliest possible. Till such decision is taken by the Family Court, this court permitted to have interim custody of the child with the respondent. Subsequently, the Family Court, Attingal passed an order granting interim custody of the minor child to the respondent herein, in I.A.No.826 of 2014 filed in O.P.(G&W)No.477 of 2014, on 29.5.2014. The said order was challenged by the petitioner before this court in O.P.(FC)No.363 of 2014. The said case was disposed of by this court through the judgment dated 28.7.2015, declining interference on the order passed by the Family Court in I.A.No.826 of 2014. The decision taken by the Family Court

to the effect that the mother will be the best person to look after the child was concurred and the decision directing handing over custody of the child to the mother was confirmed. However this court observed that, if the appellant has got any grievance regarding any change of circumstance which warrants any modification in the order, he is at liberty to move the Family Court for that purpose. Liberty was reserved to the Family Court to consider and pass appropriate orders in such application. This court also observed that "if any objection has been raised regarding the territorial jurisdiction of the court in entertaining the petition, that also be considered by the Family Court and pass appropriate orders in accordance with law without delay". In the said judgment, this court allowed a modification to the petitioner regarding his visitorial rights. The petitioner was given visitorial right on the child on alternate weekends, for which the respondent was directed to produce the child before the Family Court at 10 a.m. on alternate Saturdays and the petitioner was directed to

return the child at 4 p.m. on the succeeding Sundays before the Family Court, Pala.

3. While passing the above said judgment, this court had specifically directed the petitioner to hand over custody of the child to the mother on or before 5.8.2015, because at the time of passing the judgment the child was in the custody of the father as entrusted by this court through an interim order passed.

4. Subsequently, the respondent herein approached this court by filing I.A.No.11782 of 2015 raising complaint that the petitioner had failed to hand over the child as directed by this court, on or before 5.8.2015. The respondent sought for further directions compelling the petitioner to handover the minor child, in compliance of the directions contained in the judgment in O.P.(FC)No.363 of 2014. While considering the said interim application, this court passed an order on 11.8.2015 making it clear that if the petitioner is not complying with the directions contained in the judgment, it will be left open to the respondent to

take appropriate steps before the Family Court to enforce the directions. It is found that no further direction is warranted from this court.

5. Thereafter the petitioner filed I.A.No.1552 of 2015 in O.P.(G&W)No.477 of 2014 before the Family Court, Attingal seeking for a consideration of the question of territorial jurisdiction to entertain O.P.(G&W)No.477 of 2014. He has also filed another application as I.A.No.826 of 2014 seeking a modification of the interim order alleging that there is a change of circumstance, to the extent that there will not be anybody to look after the welfare of the child at the house of the respondent.

6. But the Family Court issued an order on 31.8.2015 directing the Station House Officer of Kallambalam Police Station to obtain custody of the minor child from a Hospital where he is admitted and to handover custody of the child to the respondent herein. It is evident that the said order was passed by the Family Court in I.A.No.1493 of 2015 which is an application filed by the

respondent herein seeking enforcement of the directions contained in the judgment of this court in O.P.(FC)No.363 of 2014. It is challenging the said order passed by the Family Court in I.A.1493 of 2015 that the petitioner had approached this court in O.P.(FC)No.410 of 2015.

7. Contention raised in O.P.(FC)No.410 of 2015 is to the effect that the Family Court went highly erred in ordering execution of the directions contained in the judgment in O.P.(FC)No.363 of 2014, without considering the question of jurisdiction (maintainability of the original petition). According to the petitioner, this court in the judgment in O.P.(FC)No.363 of 2014 had issued a specific direction to the Family Court to consider such question and, despite such a direction, the Family Court proceeded with steps for enforcement of the order regarding custody, is the complaint raised. But when the case, O.P.(FC)No.410 of 2015 came up for admission, this court expressed a prima facie opinion that the matter can be considered only on reporting compliance of the directions contained in the

judgment in O.P.(FC)No.363 of 2014. Confronted with such a situation, learned counsel for the petitioner in O.P.(FC) No.410 of 2015 made an undertaking before this court that the minor child will be produced before the Family Court, Attingal on 8.9.2015. On the basis of such an undertaking, indulgence of this court was sought for to order to keep in abeyance further steps pursuant to the order of the Family Court in I.A.No.1493 of 2015, and to keep in abeyance the warrant issued to the police officer. Accordingly this court had issued notice on admission to the respondent in O.P. (FC)No.410 of 2015 through special messenger, on 3.9.2015. The case was adjourned for further consideration to 10.9.2015, for reporting compliance of the undertaking made as above and ordering to keep in abeyance the execution of the order, till 08.09.2015.

8. On 10.9.2015 when the case is taken up for further consideration, counsel on both sides submitted that the child was handed over custody to the respondent on 8.9.2015. But it is brought to notice of this court that the

Family Court had closed the O.P.(G&W)No.477 of 2014, making the interim order passed by this court absolute. Based on the submissions made, we directed the Registrar (Subordinate Judiciary) to contact the Judge of the Family Court, Attingal over telephone to ascertain the position. The report submitted on the basis of instruction received from the Judge of the Family Court on 10.9.2015 would indicate that, the minor child was produced on 8.9.2015 in compliance with the undertaking made before this court and the child was handed over custody to the respondent on that day. With respect to details of further proceedings recorded on 8.9.2015, it is reported that interim order handing over of the child to the mother was made absolute and the further proceedings was dropped in the case.

9. When the case came up for further consideration on 11.9.2015, learned counsel for the respondent submitted that O.P.(G&W)477 of 2014 stands disposed of before the Family Court and hence the reliefs sought for in O.P.(FC) 410 of 2015 has become infructuous. Learned counsel for

the appellant sought time to verify the same. Subsequently, Mat.A.1072 of 2015 was filed before this court challenging the order passed by the Family Court, Attingal disposing O.P.(G&W)No.477 of 2014, on 1.9.2015.

10. The order impugned in Mat. Appeal No.1072/2015 would indicate that the Family Court had disposed of OP (G&W) No.477/2014 on 01-09-2015. It is mentioned in the order that the original petition was disposed of confirming the interim order passed by that court on 29-05-2014 which is modified by this court in the judgment in OP (FC) No.363/2014. This court is at a loss to understand as to how an original petition filed seeking declaration of permanent custody of a minor child, filed under the Guardian and Wards Act can be disposed of in such a manner. Evidently the order passed by the Family Court on 29-05-2014 is only an interim order granting temporary custody of minor child to the respondent herein, while disposing IA No.826/2014. It is true that the said order was challenged before this court in OP (FC) No.363/2014.

Even though this court declined interference, certain modifications were allowed with respect to the visitation right of the petitioner. But the said arrangement made with respect to interim custody cannot be taken as a ground for the Family Court to refrain from its obligation to conduct trial of the case and to finally dispose the case on merits based on the evidence on record. Further, it is not discernable as to how could the Family Court dispose of the original petition on 01-09-2015, when the warrant issued in IA No.1493/2015 on the previous day, i.e: on 31-08-2015, was pending and when it was reported that the petitioner has not complied with the order and handed over custody of the child to the respondent. It is difficult to believe that when the interim arrangement made by that court remained not complied with, and when specific direction issued by this court in OP (FC) No.363/2014 to handover the child to the respondent on or before 05-08-2015 stood not complied with, the Family Court had disposed of the original petition itself. This court is persuaded to make such an observation

especially because the report submitted through intimation to this court would indicate that the further proceedings in the original petition was dropped only on 08-09-2015, after handing over custody of the child to the respondent, based on the undertaking made by the petitioner before this court in OP (FC) No.410/2015. Evidently, there is a total illegality, irregularity and impropriety committed by the court below in the matter of disposal of OP (G&W) No.477/2014, which require explanation. This court is of the firm opinion that the Family Court should not have disposed of the original petition without adjudicating the same on merits and without conducting any trial of the case.

11. Under the above mentioned circumstances Mat. Appeal No.1072/2015 is hereby allowed and the impugned order of the Family Court in OP (G&W) No.477/2014 dated 01-09-2015 will stand set aside. The Family Court is directed to restore OP (G&W) No.477/2014 on the files and to proceed further for the disposal of the case in accordance with law, after conducting trial of the case.

12. With respect to OP (FC) No.410/2015 is concerned, the petitioner is raising a contention that he had filed IA No.1552/2015 seeking to consider the question of jurisdiction of the Family Court, Attingal to entertain the original petition. It is to be noticed that the original petition was instituted by the petitioner himself. Hence there is no meaning in the petitioner challenging jurisdiction of that court in entertaining the case. However, if the petitioner is of the opinion that the case is instituted before a wrong court having no territorial jurisdiction in the subject matter, it is for the petitioner to seek return of the case for representation before the proper court having jurisdiction. If any such application is filed by the petitioner it is obligatory on the part of the Family Court to consider the question of jurisdiction and to take an appropriate decision on the said application, after affording opportunity of personal hearing to the respondents. Hence the Family Court is directed to consider application if any filed in this regard, before proceeding with the trial of the case.

13. With respect to interim custody of the minor child, it is ordered that the terms of the order passed by the Family Court in IA No.826/2014 dated 29-05-2014, which stands modified through the judgment of this court in OP (FC) No.363/2014, dated 28-07-2014 will prevail and will continue till the disposal of the original petition by the Family Court. Counsel appearing on both side submitted that production of the child before the Family Court at Pala as order in OP (FC) No.363/2014 will be highly inconvenient for both of them, considering the long distance to travel. Hence it is suggested that the child can be produced before the police station at Vettuchira, Ranni in Pathanamthitta District at 10 a.m. on alternate Saturdays and the petitioner will return the child at that place itself at 4 p.m. on the succeeding Sundays. Hence the said interim order will stand modified only with respect to the venue.

14. However, taking note of the observations contained in the judgment in OP (FC) No.363/2014, the parties are given liberty to seek modification of the said

arrangements, if it is established that there is a substantial change in the circumstances prevailing, which would entitle either of the party to seek for such a modification.

15. The Family Court will take all earnest efforts to dispose of the case at the earliest possible. The OP (FC) No.410/2015 will stand disposed of subject to the above observations and directions.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

MARY JOSEPH, JUDGE.

SI/AMG/Vdv

True copy

P.A. to Judge