

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 23RD DAY OF NOVEMBER 2015/2ND AGRAHAYANA, 1937

OP (FC).No. 427 of 2015 ()  
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AGAINST THE ORDER/JUDGMENT IN IA.792/2015 IN OP 1430/2014 of FAMILY  
COURT,ERNAKULAM DATED 14-05-2015

PETITIONER(S)/PETITIONER:-:  
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SHIJIL M.I  
S/O.IBRAHIMKUTTY, MANKERIL HOUSE, VELLANGALLOOR P.O.  
BLOCK JUNCTION, MUKUNDAPURAM TALUK.

BY ADV. SRI.K.A.MANZOOR ALI

RESPONDENT(S)/RESPONDENT:-:  
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DALIYA A.J, AGED 22 YEARS  
D/O.DOLLY JOSEPH, AMBATTU HOUSE, MADPLATHURUTHU  
MOOTHAKKUNNAM P.O., N.PARAVUR - 683 513.

R1 BY ADV. SRI.T.M.RAMAN KARTHA

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 23-  
11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP (FC).No. 427 of 2015 ()  
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APPENDIX

PETITIONER(S)' EXHIBITS  
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EXHIBIT P1. TRUE COPY OF THE PETITION FILED BY THE PETITIONER BEFORE THE FAMILY COURT, ERNAKULAM AS O.P.NO.1430/2014.

EXHIBIT P2. TRUE COPY OF THE I.A.NO.792/2015 FILED BY THE PETITIONER IN THE ABOVE O.P.

EXHIBIT P3. TRUE COPY OF THE OBJECTION FILED BY THE RESPONDENT IN THE INTERIM APPLICATION.

EXHIBIT P4. TRUE COPY OF THE ORDER DATED 14.05.2015 IN I.A.NO.792/2015 IN O.P NO.1430/2014 OF THE FAMILY COURT ERNAKULAM.

RESPONDENT(S)' EXHIBITS  
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EXT. R1 TRUE COPY OF THE CERTIFICATE ISSUED BY THE VICAR OF ST.GEORGE CHURCH, DIOCESE OF KOTTAPURAM.

EXT. R2 TRUE COPY OF THE PASSPORT OF THE MINOR.

EXT. R3 TRUE COPY OF THE AADHAR CARD OF THE MINOR

EXT.R4 TRUE COPY OF THE PERSONAL RECORD MAINTAINED BY THE HOLY GRACE ACADEMY, MALA.

EXT.R5 TRUE COPY OF THE OP.NO.1441/2014 FILED BY THE RESPONDENT BEFORE THE FAMILY COURT, ERNAKULAM.

EXT. R6. TRUE COPY OF THE SETTLEMENT AGREEMENT ARRIVED AT IN MEDIATION ON 24.7.2013.

TRUE COPY

PS TO JUDGE.

C.K.ABDUL REHIM & MARY JOSEPH, JJ.

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OP(FC) No. 427 of 2015  
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Dated this the 23rd day of November, 2015

JUDGMENT

Abdul Rehim,J.

Challenge in this original petition which is instituted under Article 227 of the Constitution of India, is against Ext.P4 order, through which the Family Court, Ernakulam had disposed of IA.No.792/2015 in OP.No.1430/2014. Case before the Family Court was filed by the petitioner herein seeking for permanent custody of a minor child born out of the wedlock between the petitioner and the respondent. IA.No.792/15 is filed seeking interim custody of the child, pending disposal of the original petition. The court below had dismissed the application through the impugned order by observing that the compromise agreed between the parties during pendency of an earlier litigation specifies the conditions regarding custody of the child and since no overnight custody was provided to the petitioner therein, it cannot be granted. The court observed that there is no change

of circumstances warranting interference in the existing arrangement which was agreed upon by the parties. It is also observed that the child being of tender age and being a girl child the father cannot claim overnight custody. It is aggrieved by the said order this original petition is filed.

2. The respondent had entered appearance and filed a detailed counter affidavit. Heard; counsel appearing on both sides. The mediated agreement with respect to which reference is made in the impugned order is produced as Ext.R6 along with the counter affidavit. It would indicate that 4 cases which were pending before the Family Court, Ernakulam were settled through the mediation agreement arrived on 27.4.2013. It is true that said agreement provides for detailed arrangement for having visitation of the child by the petitioner during weekend, holidays and festive occasions etc. It is also true that the arrangements agreed upon has not permitted overnight custody of the child with the petitioner herein. But from Ext.P1, which is the original petition filed before the Family Court seeking permanent custody of the child, it is evident that the petitioner is agitating that there is a clear change of circumstances, which entitles him for

seeking permanent custody. In the interim application filed as Ext. P2 it is also alleged that the respondent is not complying with the conditions in the compromise. Evidently, the Family Court has not gone into such details being agitated. Question whether there is any change of circumstances existing and as to whether the interim arrangement made under the compromise agreement executed in the year 2013 requires reconsideration etc. are matters which ought to have been considered by the Family Court. But it is evident that the Family Court has not gone deep into such details. On the other hand, it is observed that there is no change of circumstances warranting interference. Moreover the observation made by the Family Court that the father cannot claim over night custody considering the tender age and the child being a girl kid, cannot find any basis. Learned counsel for the petitioner submitted that the child is at present aged 7 years and there was no complaint of whatsoever nature all along during the period when visitation right was exercised. Therefore such an observation was totally unwarranted, is the contention. Per contra, learned counsel for the respondent contended that there is a history of psychiatric complaint in the

family of the petitioner and it came to notice of the respondent that the petitioner is having abnormal behaviour, at times. It is also contended that the custody is sought for only with an intention to impose narrow religious sentiments and fundamentalist attitude on the child. Such contentions are strongly refuted by the petitioner, pointing out that he is working as a Sales Manager in an Automobile Dealership company and that the allegations of abnormal behaviour is totally false and baseless.

3. Considering the rival contentions we are of the opinion that the Family Court has not dealt with the matter in its right perspective. The Family Court ought to have considered that the original petition was instituted only in the year 2014, about one year after the arrangement made through the settlement, alleging that there is a change of circumstances which warrants modification of the arrangement regarding custody of the minor child. The reasons which are narrated to establish the change of circumstances is the crucial aspect which need to be considered. The fact that the petitioner was given visitation right all along, and that he is now seeking a modification to have over night

custody, are matters which need to be looked into. Of course, a decision in this regard can be taken based on consideration of the contentions raised from the side of the respondent. We are of the opinion that interest of justice can be achieved by remitting the matter for a fresh consideration by the Family Court.

4. Therefore the above original petition is allowed and Ext.P4 order, which is impugned herein, is hereby quashed. The Family Court is directed to pass fresh orders on IA.792/15 in OP.No.1430/2014, after affording reasonable opportunity of hearing to both sides. Considering the fact that the application is seeking custody of a minor, 'pendente lite', the Family Court will take all earnest efforts to dispose of the matter at the earliest, at any rate, within a period of one month from the date of receipt of a copy of this judgment.

C.K.ABDUL REHIM, JUDGE

MARY JOSEPH, JUDGE

Pmn/

