

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 20TH DAY OF NOVEMBER 2015/29TH KARTHIKA, 1937

OP (FC).No. 438 of 2015 (R)

PETITIONER:

RADHYA MERI PRIYADARSINI
D/O. K.J.RAPHY, KANNAMPUZHA HOUSE,
THRISSUR EAST P.O., KIZHAKKAMPATTUKARA DESOM,
PERINGAVU, THRISSUR, (MISTAKENLY TYPED RADHYA
MARY PRIYADARSINI)

BY ADVS.SRI.R.D.SHENOY (SR.)
SRI.LEGITH T.KOTTAKKAL
SRI.S.VINOD BHAT

RESPONDENT:

JOHN SIMIL K.A.
S/O. AUGUSTINE K.G.,
KANDANAMPARAMBIL HOUSE,
ERAMALLUR P.O., CHERTHALA, ALAPPUZHA DISTRICT.

R1 BY ADVS. SRI.S.SREEKUMAR (SR.)
SRI.N.M.MOHAMMED AYUB
SRI.P.MARTIN JOSE
SRI.THOMAS P.KURUVILLA
SRI.P.PRUJITH

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 20-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P-1:** COPY OF THE PETITION O.P. 648/2014 ON THE FILE OF FAMILY COURT, THRISSUR.
- EXT.P-2:** COPY OF THE OBJECTION FILED IN O.P 648/2014 OF THE FAMILY COURT, THRISSUR.
- EXT.P-3:** COPY OF THE AGREEMENT DATED 8.12.2013 BETWEEN THE PETITIONER AND RESPONDENT
- EXT.P-4:** COPY OF THE ORDER DATED 6.6.2014 IN IA 1579/2014 IN G.O.P NO.648/2014 OF FAMILY COURT, THRISSUR
- EXT.P-5:** COPY OF THE ORDER DATED 24.6.2014 IN O.P 1997/2013 OF FAMILY COURT, THRISSUR.
- EXT.P-6:** COPY OF THE ORDER DATED 19.2.2015 IN G.O.P 648/2014 OF FAMILY COURT, THRISSUR.
- EXT.P-7:** COPY OF THE PETITION O.P 213/2015 ON THE FILE OF FAMILY COURT, THRISSUR.
- EXT.P-8:** COPY OF PETITION IA 1293/2015 IN O.P 648/2014 OF FAMILY COURT, THRISSUR.
- EXT.P-9:** COPY OF COUNTER IN IA 1293/2015 IN O.P 648/2014 OF FAMILY COURT, THRISSUR.
- EXT.P-10:** COPY OF THE ORDER DATED 13.8.2015 IN IA 1293/2015 IN IA 1226/2015 IN OP 648/2014 OF FAMILY COURT, THRISSUR.

RESPONDENTS' EXHIBITS

- EXT- R1 (a) -** TRUE COPY OF THE JOINT PETITION IN OP No.1997/2013 DATED 23-12-2013 FILED BEFORE THE FAMILY COURT, THRISSUR.
- EXT- R1 (b) -** TRUE COPY OF THE RECEIPT DATED 23-12-2013 FOR RECEIPT OF GOLD ORNAMENTS AND CHEQUE.
- EXT- R1 (c) -** TRUE COPY OF THE G.O.P No.648/2014 FILED ON 03-05-2014 BEFORE THE FAMILY COURT, THRISSUR FOR CUSTODY OF THE CHILD.
- EXT- R1 (d) -** TRUE COPY OF THE ORDER IN MC No.134/2014 DATED 19-02-2015 OF FAMILY COURT, THRISSUR.

EXT- R1 (e) - TRUE COPY OF THE OP No.402/2014 DATED 19-02-2015 OF FAMILY COURT, THRISSUR.

EXT- R1 (f) - TRUE COPY OF THE JOINT PETITION AS OP No.213/2015 DATED 16-02-2015 FILED BEFORE THE FAMILY COURT, THRISSUR.

EXT- R1 (g) - TRUE COPY OF THE ORDER IN G.O.P No.648/2014 DATED 19-02-2015 OF FAMILY COURT, THRISSUR.

True copy

P.A. To Judge

AMG

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

O.P (FC) No. 438 OF 2015

DATED THIS THE 20th DAY OF NOVEMBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

In this original petition filed under Article 227 of the Constitution of India, the petitioner is challenging Ext.P10 order passed by the Family Court, Thrissur in IA No.1293/2015 in I.A No.1226/2015 in OP No.648/2014. The case before the Family Court was instituted by the respondent herein seeking for permanent custody of a minor child born out of the wedlock between the petitioner and the respondent. The disputes between the parties has got a chequered history. The marriage between the parties was solemnized on 30-04-2007 and the child was born on 18-10-2008. The matrimonial discord started in the year 2013 and the petitioner herein had left the house of the respondent on 12-10-2013. A compromise was arrived with respect to disputes related to the matrimonial relationship,

between the parties on 08-12-2013. As per terms of the compromise the parties have decided to file a joint application for divorce, which was agreed to be filed on 23-12-2013, subject to condition of the respondent returning gold ornaments of 81.166 sovereigns along with an amount of Rs.2,75,000/-. It was also agreed that the question regarding permanent custody of the minor child will be decided between the parties later on. However, as per the agreement it was decided that, the minor child will be left with the custody of the petitioner, till the disposal of the joint application for dissolution of the marriage, and thereafter temporary custody will be given to the respondent during the 2nd weekend of every month and during Onam, Christmas and Pooja holidays in accordance with the convenience of both the parties.

2. Evidently, based on the above said compromise arrived on 08-12-2013, a joint application for dissolution of the marriage under Section 10A of the Indian Divorce Act was filed before the Family Court, Thrissur as OP

No.1997/2013 on 23-12-2013. The petitioner herein had also issued a receipt on the same day acknowledging realization of the gold ornaments and for receipt of a cheque for payment of a sum of Rs.2,75,000/-. But the joint application for dissolution of the marriage filed by the parties was dismissed on 24-06-2014, for the technical reason that the statutory period of one year after the separation was not completed. It is revealed that, during pendency of the joint application for dissolution of the marriage, the respondent herein filed G.O.P No.648/2014 before the Family Court seeking for permanent custody of the minor child. The respondent had also filed IA No.1579/2014 seeking for interim custody of the minor child. The said interim application was dismissed by the Family Court through Ext.P4 order, after hearing both the parties. The Family Court found that, as per the compromise arrived on 08-12-2013 the respondent herein has no right to seek interim custody of the child, apart from the terms of interim custody provided under the said compromise, till a decision is taken

on the divorce petition. At the time when Ext.P4 order was passed the joint application for divorce was pending disposal before the Family Court.

3. It is evident that, on filing of G.O.P No.648/2014, the parties got set apart from the agreement dated 08-12-2013, regarding custody of the child. As a consequence the petitioner herein had also moved MC No.134/2014 seeking maintenance from the respondent for herself and the minor child, under Section 125 of Cr.P.C. She had also filed OP No.402/2014 seeking past and future maintenance from the respondent and his parents. While all these cases are pending, the parties have again arrived at a settlement on 16-02-2015. Accordingly Ext.P6 compromise petition was filed in G.O.P No.648/2014, as IA No.734/2015, under Order XXIII Rule 3 of the Code of Civil Procedure. Accordingly the Family Court had disposed of G.O.P No.648/2014 on 19-02-2015 based on the settlement, and on incorporating the terms of the compromise in the decree passed. Evidently, OP No.402/2014 as well as MC No.134/2014 were also

dismissed on the very same day after recording the settlement. It is evident from IA No.734/2015 (compromise petition) that the matrimonial disputes were amicably settled between the parties at the intervention of the mediators, and it was decided to move afresh for dissolution of the marriage through joint application to be filed. Inter alia, it was agreed upon that the respondent can be given permanent custody of the child, subject to condition that, temporary custody will be given to the petitioner during the month of April at the time of vacation and during the last 5 days of school vacation for Onam, Christmas and Pooja.

4. After disposal of O.P No.648/2014 on 19.02.2015, the petitioner herein had filed I.A No.1293/2015 seeking modification of the arrangement regarding interim custody of the minor child, by modifying the compromise order passed in O.P No.648/2014. In the affidavit filed in support of the application, it is stated that she was persuaded to arrive at the compromise only because while participating in a counselling she was advised that there would be a

chance for reunion if custody of the child is given to the respondent for some time. It is stated that she had never intended to part with permanent custody of the minor child. According to the petitioner, the compromise petition was signed not with proper knowledge or consent and it was only on the basis of the advise received during the time of counselling, that she had put her signature in the compromise. If the compromise is implemented, it will cause irreparable legal injuries to her, because she cannot live without company of the minor child and any separation of the child from her custody will cause severe mental shock and agony. Hence it is prayed that permanent custody of the minor child may be given to the petitioner.

5. The respondent had filed objections in I.A No.1293/2015. The Family Court, after elaborate consideration of the matter, found that there is no change in the circumstances warranting modification of the compromise order passed on 16.02.2015. However it was clarified that, on proof of any change of circumstances the

order can be varied at any point of time. For arriving at such a conclusion the court below found that the parties are well educated and they have entered into the compromise on understanding their respective position, based on a free consent and decision. It was observed that the bundle of evidence adduced before the court with respect to the facilities available in the school near to the residence of the petitioner as well as the contentions based on the working hours of the respondent and his remote chance of getting transfer etc., were the circumstances which existed even on 16.02.2015, when the compromise was arrived. Those are not factual matrix arisen within ten days thereafter, in order to hold that there is a change of circumstances, is the finding. The court discarded the contention that there was no consent of the petitioner for signing the compromise. The petitioner is assailing the above findings on various grounds.

6. Mr. R.D.Shenoy, learned Senior counsel appearing on behalf of the petitioner raised vehement arguments

canvassing the position that, the Family Court is exercising the 'parens patriae' jurisdiction and it ought to have considered only the welfare of the minor child, as the paramount consideration, rather than sticking on to the terms of the compromise, bearing in mind that any order with respect to custody of a minor child can only be in the nature of a temporary arrangement which can be modified at any time. It is also contended that, in the case of custody of a minor child the court ought to have accepted any terms of the compromise only after evaluating such terms based on considerations of welfare of the child, depending on the circumstances prevailing. The acceptance of any of the terms of the compromise, which will be in adverse to the interest of the child, ought to have been rejected, is the contention. He had placed much reliance on the decision of the hon'ble Supreme Court in **Gaurav Nagpal V. Sumedha Nagpal ((2009) 1 SCC 42)**. The apex court in the said case observed that, the word 'welfare' used in Section 13 of the Hindu Marriage Act has to be

construed liberally and must be taken in its widest sense. The moral and ethical welfare of the child must also be weighed with the court, as well as its physical well being. Though provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its 'parens patriae' jurisdiction arising in such cases. Absolute right of the parents over the destinies and the lives of their children, in the modern changed social conditions, must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. It is further observed in the said decision that, if the minor is of any age to exercise the choice, the court will take his wishes into consideration. Any incidental

aspect which has a bearing on the question may also to be adverted to in determining whether it will be for the best interest of the child to grant custody to the father or mother. The court may properly consult with the child if it has sufficient judgment.

7. Learned Senior Counsel also contended that the non-interference in the matter by the court below, based on the findings that there is no change in the circumstances to modify the compromise order passed on 15-02-2016, cannot be sustained, because the compromise decree will not operate as res judicata under Section 11 of the Code of Civil Procedure. In this regard reliance was placed on the decision of a learned Judge of this court in **Suseela V. Kuttikrishnan (1998 (2) KLT 188)**. It is held therein that a decree passed on compromise is not a decision of the court and therefore the compromise decree does not operate as res judicata under Section 11 of the Code of Civil Procedure. The compromise decree, even if it is taken as admitted by the appellant for the sake of discussion, will not

operate as res judicata against instituting the present suit, is the finding rendered therein.

11. Further contention was raised that there was no proper agreement by the parties with respect to the compromise and that the appellant was forced to sign the agreement without proper consent, full knowledge and willingness. It was also contended that there was no proper agreement of compromise executed in order to attract Order XXIII Rule 3A of Code Civil Procedure. In this regard, reliance was placed on a decision of this court in **Kunhavulla V. Janu Amma and another (1986 KLT SN 52 case No.87)**. A learned Judge of this court observed that, there must be an agreement by parties to have the suit or any part of it decided by an oath taken by one of them in court or elsewhere. There must be a written agreement signed by both of them setting forth the terms of the oath and the place where it is to be taken. The agreement will have to be accepted by the court. Oath must be taken in the manner proposed. If these formalities are complied with the

court will have to decide the case in accordance with the agreement. Contention of learned Senior Counsel is that, there is no proper agreement executed in complying the requisite formalities and hence no much sanctity can be adhered on the compromise decree passed in OP No.648/2014, based on IA No.1226/2015 filed as a compromise petition.

9. Heard; counsel appearing for the respondent, who had filed a detailed counter affidavit. It is pointed out that in Ext.P8 interim application, IA No.1293/2015, the relief sought for is to modify the compromise decree and to declare that the petitioner herein is entitled to have permanent custody of the minor child. The provision under which Ext.P8 application was filed is Section 7 of the Family Courts Act. The averments contained in the affidavit filed in support of the application would indicate that contention of the petitioner that the compromise petition was signed and the case was settled only on the basis of advice given by a Counsellor, that if the minor is given custody to the

respondent there will be a possibility of re-establishing the matrimonial life and cohabitation. It is stated that, since the petitioner could not live separated from the child, it is necessary to modify the compromise decree. It is evident that IA No.1293/2015 is filed not seeking any modification with respect to the arrangement of custody of the minor child on the basis that there occurred a change of circumstances, after passing of the compromise decree. On a perusal of the interim application it is evident that the said application is filed on the basis that the compromise was arrived without full consent and willingness of the petitioner. On the other hand, there is no much contention that the permanent custody given to the respondent will be in any manner detrimental to the interest and welfare of the minor child. The only contention mentioned is that, subsequent to signing of the compromise and subsequent to the decree passed by the Family Court, the petitioner realized that she could not live without the company of the child. Under such circumstances the impugned order

passed by the Family Court rejecting the said application is totally justifiable. It is categorically observed by the Family Court that there exists no change of circumstances than the one which existed on 16-02-2015, within a period of one month and 10 days. The court below discarded the contention that, the compromise was entered without full consent, willingness and knowledge of the petitioner. This court do not find any materials available to prove such a contention. Therefore the petitioner had failed in establishing any situation which warrants the court below to set aside or nullify the compromise decree passed. There exists no question of considering the welfare or interest of the child in deciding the issues involved in IA No.1226/2015. In other words, there was no occasion for the court below to consider exercise of parens patriae jurisdiction in the disposal of the application. Hence the legal aspects canvassed before this court has no relevance on the factual situation.

9. Under the above mentioned circumstances, this court do not find any valid ground existing to interfere with Ext.P10 order passed by the Family Court, Thrissur. However, we make it clear that the above findings will not preclude the petitioner from approaching the Family Court with any appropriate petition seeking modification with respect to custody of the minor child, based on any valid grounds, because as held in various legal precedents any order passed by the competent court with respect to custody of a minor child, whether it is final or interim, is in the nature of having no finality and such order will be always subject to modification, if there exists valid reasons. Hence, reserving rights of the petitioner if any available as mentioned herein above, the original petition is hereby dismissed.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

MARY JOSEPH, JUDGE.

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P.A. to Judge