

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 5TH DAY OF OCTOBER 2015/13TH ASWINA, 1937

OP (FC).No. 460 of 2015 (R)

PETITIONER(S)/PETITIONER/PETITIONER/PETITIONER:

SAJIL.T.DEVADAS, AGED 41 YEARS
S/O.THACHAPPILLY DEVADAS, ENGANDIYOOR VILLAGE
CHAVAKKAD TALUK, THRISSUR
REPRESENTED BY PER OF ATTORNEY HOLDER SHEILA AGED 67 YEARS
W/O.THACHAPPILLY DEVADAS, ENGANDIYOOR VILLAGE
CHAVAKKAD TALUK, THRISSUR.

BY ADVS.SRI.RAJIT
SMT.V.VIJITHA
SRI.A.S.JEOTHI BASU

RESPONDENT(S)/RESPONDENTS/1ST RESPONDENT:

HONEY SABU,, AGED 38 YEARS
D/O.M.N.SABU, 'AGADA', MANGATTU VEEDU
NADAVARAMBU, VELOOKKARA, MUKUNDAPURAM
THRISSUR-680501.

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON
05-10-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP (FC).No. 460 of 2015 (R)

APPENDIX

PETITIONER(S) ' EXHIBITS

EXT.P1 A TRUE COPY OF THE ORDER DATED 12.06.2014 IN I.A.976/2014 IN
G.O.P.NO.425/2014

EXT.P2 A TRUE COPY OF THE ORDER DATED 13.04.2015 IN I.A.2151/2014 IN
G.O.P.NO.425/2014

EXT.P3 A TRUE COPY OF THE ORDER DATED 24.08.2015 IN I.A.1407/2015 IN
G.O.P.425/2014.

RESPONDENT(S) ' EXHIBITS NIL

//TRUE COPY//

P.A TO JUDGE

vdv

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

=====

O.P.(FC) No.460 of 2015

=====

Dated this the 5th day of October, 2015

JUDGMENT

Abdul Rehim, J.

The petitioner herein is the petitioner in G.O.P No.425 of 2014 on the files of the Family Court, Irinjalakkuda. The petitioner is represented herein through his power-of-attorney holder, who is his mother. The respondent herein, who is the wife of the petitioner, is the respondent before the Family Court. Marriage between the parties was on 11.12.2002 and two minor children, namely 'Abhinav' and 'Anagha' were born out of the wedlock. They are now aged 10 years and 4 years respectively. Marital relationship between the petitioner and the respondent remains strained and they are living separately. Original petition before the Family Court was filed by the petitioner seeking permanent custody of the minor children. The elder boy is suffering from a rare disease 'Duchenne Muscular Dystrophy (DMD)'. According to the petitioner, the boy is suffering

from progressive degeneration of muscles and there is every possibility of a premature death due to said illness, because the average life expectancy of a person affected with DMD is only around 17 years. It is stated that the respondent had left the matrimonial house along with children on 09.10.2013. Thereafter she had not even allowed the petitioner to see the son, who is sick. Under such circumstances the petitioner had approached the Family Court for getting custody of the children. The respondent filed counter affidavit stating that she had never objected the petitioner from visiting the children or interacting with them. It is alleged that, despite specific direction issued by the Family Court to produce the children before the Family Court, the respondent had not complied with such direction stating that the child is very sick and is unable to travel. Hence the court below had dispensed with the production of the children. Then the petitioner filed I.A No.976 of 2014 seeking temporary custody of the minor child atleast during week ends. The said application was considered and disposed of by the Family Court through Ext.P1 order. The Family Court found that the child is taking rest in a wheel chair at the residence of the respondent and

he is not even able to attend the class. The respondent informed that there is no restriction for the petitioner to come to her house and to see the children. The Family Court had perused the photographs of the elder child produced before the said court. It was noticed that the child has been put to plasters on both his legs and he is on wheel chair. Therefore, the request for interim custody was declined. But the petitioner was allowed to visit the child at the residence of the respondent on every alternative days between 10 a.m and 3 p.m. The respondent was also directed to make arrangements for enabling the petitioner to interact with his children during the above said time.

2. It is alleged herein that the petitioner could not make any visit to the children because of the hostile attitude of the respondent, who is not permitting the petitioner to have peaceful interaction with the children. Subsequently the petitioner left abroad to continue his employment. It is stated that the respondent has not even allowed the petitioner to contact the children over telephone. It is also mentioned that the respondent is residing in a rented apartment at Chelakkara, which is about 55 Kms away from

her parental house at Mukundapuram. Allegation is that the respondent used to travel between Chelakkara and Mukundapuram on every week end, ignoring the health condition of the elder child. Under the above mentioned circumstances, the mother of the petitioner as his power-of-attorney holder had moved the Family Court in I.A No.2151 of 2014 praying for interim custody of the children. The Family Court was pleased to allow the said application through Ext.P2 order, permitting the mother of the petitioner to visit the residence of the respondent for seeing her grandchildren and for having interaction with them, on every alternative days between 10 a.m and 4 pm. The respondent was directed to make arrangements for enabling the mother to interact with the minor children during her time of visit.

3. It is alleged that the respondent had violated Ext.P2 order by denying the mother of the petitioner to have any free interaction with the children. The petitioner was put to a position that he was denied of any updates of the health condition of the child. Under such circumstances, the petitioner again moved the Family Court with yet another interim application filed as I.A No.1407 of 2015,

seeking interim custody of the minor child. The said application was moved through the mother of the petitioner in her capacity as power-of-attorney holder. The respondent herein had resisted the said application. But the court below observed that, necessary arrangements for visitation of the children by the petitioner as well as by his mother had already been granted. Therefore it is found that there is no reason to pass any different order giving custody to the petitioner. The Family Court found that there is no change of circumstances for enabling the petitioner (grand mother) to get custody of the minor children. The interim application was disposed of through Ext.P3 order. This writ petition is filed seeking to set aside Ext.P3 order and also seeking direction to the Family Court to dispose of G.O.P No.425 of 2014, on merits, after allowing opportunity to the petitioner to contest the case.

4. While considering the issue involved, this court takes note of the fact that, the petitioner is abroad at present. When the petitioner had moved application seeking interim custody of the minor children, he was permitted to have visitation on alternative days at the house of the respondent. Before he petitioner had left

India, he had never approached the Family Court with any complaint regarding denial of such visitation permitted, or seeking any assistance of the court for implementation of the directions. Evidently, after the petitioner had left India, another application was moved seeking interim custody of the children by the paternal grandmother, and also seeking permission to the petitioner to have interaction with the children over telephone. In the said application the Family Court had permitted visitation right to the grandmother and also permitted interaction of the petitioner with the children over telephone. The petitioner had never approached the Family Court raising any complaint regarding violation of the terms of Exts.P1 and P2 interim orders. Nor any petition was filed seeking for enforcement of such orders. That being the position, the third interim application now moved by the mother of the petitioner, without any specific reason for seeking interim custody of the minor children has no legal basis. The court below had rightly rejected it finding that the petitioner is abroad and that the mother has already been granted with permission to have visitation on the children, on every alternative days. It is rightly observed by the Family Court that

there exists no change of circumstances warranting modification of Ext.P2 order.

5. We take note of the fact that the minor children are now in the custody of their mother. It is also evident that the elder boy is suffering from a serious disease and is not in a position to move independently, other than on wheel chair. The petitioner, who is the father, is now working abroad and he is not available in India. By virtue of Exts.P1 and P2 orders both the petitioner and his mother were already granted with visitation rights on every alternative days at the residence of the respondent. We find no reason to hold that the mother of the petitioner is the more suitable person than the respondent to have entrusted with interim custody of the minor children. There is no change of circumstances put forth before the Family Court to modify Exts.P1 and P2 orders. Hence the Family Court had rightly rejected the third interim application, I.A No.1407 of 2015. There is no circumstances warranting exercise of supervisory jurisdiction vested on this court under Article 227 of the Constitution of India. If the petitioner has got any case that the respondent had violated the terms of Exts.P1

or P2 orders, it will be left open to him to approach the Family Court seeking enforcement of such orders.

Hence the original petition fails and the same is hereby dismissed. However, we make it clear that the petitioner will be at liberty to approach the Family Court again if there is any material change in the circumstances, seeking custody of the minor children.

Sd/-
C.K .ABDUL REHIM, JUDGE

Sd/-
MARY JOSEPH, JUDGE

vdv