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 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

OP (FC).No. 475 of 2015 (R)

PETITIONER(S):

DIVYA, AGED 29 YEARS
W/O.MANOJ KUMAR, RESIDING AT SREE NIKETH HOUSE
KRISHNA NAGAR, POOTHOLE, THRISSUR-680 004.

BY ADVS.SRI.T.M.RAMAN KARTHA
SMT.SYAMA MOHAN

RESPONDENT(S):

MANOJ KUMAR GOVINDAN, AGED 36 YEARS
MALATHY MANDIRAM, 13/1153, RK PILLAI ROAD
THOPPUMPADY POST, ERNAKULAM, PIN-682 005.

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 07-12-2015, ALONG WITH OPFC. 499/2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

VS

OP (FC).No. 475 of 2015 (R)

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1 : **TRUE COPY OF THE ORIGINAL PETITION NO.382/2015 OF THE FAMILY COURT, THRISSUR, DT 20-3-2015.**

EXT.P2 : **TRUE COPY OF THE OBJECTION INT HE OP NO.382/2015 OF THE FAMILY COURT, THRISSUR DT 25-4-2015.**

EXT.P3 : **TRUE COPY OF THE PRELIMINARY ORDER IN THE OP NO.382/2015 OF THE FAMILY COURT, THRISSUR DT 14-5-2015**

EXT.P4 : **TRUE COPY OF THE IA NO.2143/2015 IN OP.NO.1042/2015 OF THE FAMILY COURT, ERNAKULAM DT 2-6-2015.**

EXT.P5 : **TRUE COPY OF THE ORDER IN IA.NO.2143/2015 IN OP.NO.1042/2015 OF THE FAMILY COURT, ERNAKULAM DT 10-8-2015.**

EXT.P6 : **TRUE COPY OF THE ORDER IN OP(FC)NO.380/2015 OF THE HON'BLE HIGH COURT OF KERALA DT 13-8-2015.**

EXT.P7 : **TRUE COPY OF THE COMMON ORDER DT 26-8-2015 IN IA.NO.2143/2015 & IA.NO.3323/2015 IN OP.NO.1042/2015 OF THE FAMILY COURT, ERNAKULAM DT 26-8-2015.**

EXT.P8 : **TRUE COPY OF THE IA.NO.3648/2015 IN IA.NO.2143/2015 IN OP.NO.1042/2015 OF THE FAMILY COURT, ERNAKULAM DT 10-9-2015.**

EXT.P9 : **TRUE COPY OF THE LIST OF DOCUMENTS IN IA.NO.2143/2015 IN OP.NO.1042/2015 OF THE FAMILY COURT, ERNAKULAM DT 10-9-2015.**

EXT.P10 : **TRUE COPY OF THE ORDER IN IA.NO.2143/2015 IN OP.NO.1042/2015 OF THE FAMILY COURT, ERNAKULAM DT 29-9-2015.**

EXT.P11 : **TRUE COPY OF THE IA.NO.3896/2015 IN IA.NO.2143/2015 IN OP.NO.1042/2015 OF THE FAMILY COURT, ERNAKULAM DT 29-9-2015.**

RESPONDENT(S)' EXHIBITS **NIL**

/TRUE COPY/

PA TO JUDGE

VS

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

O.P.(FC).Nos.475 & 499 of 2015

Dated this the 7th day of December , 2015

JUDGMENT

C.K.Abdul Rehim, J

Both these original petitions arise out of the same order passed by the Family Court, Ernakulam in I.A.No.2143/15 in O.P.No.1042/15. The parties in both the cases are common. Hence both these cases were heard together and disposed of through this common judgment.

2. O.P.(FC).No.475/15, is filed by the petitioner before the court below seeking directions for implementation of the order mentioned above, and for directing to hand over custody of the minor child to the petitioner. Alternatively, the petitioner is seeking directions to the Family court to enforce the said order by taking recourse to procedure contemplated under Section 25 of the Guardian and Wards Act, 1980. In O.P.(FC)No.499/15 the very same order is challenged by the respondent before the

court below.

3. Issue involved is with respect to custody of a minor child namely 'Hrishikesh', born out of the wedlock between the parties herein, on 23.12.2010. The marriage between the parties was on 26.10.2009. They were staying together at Sharja. Due to severe matrimonial disputes, they are now living separated, since March 2013 onwards. The child was in the custody of the father at Sharja. Thereafter the child was taken to Kerala and admitted in a pre-school at Kochi. Initially the original petition was filed by the mother, before the Family court, Thrissur, as O.P.No.382/15, seeking permanent custody of the child. The said court had returned the case for presentation before the proper court having jurisdiction. Accordingly the case was re-presented before the Family Court at Ernakulam and numbered as O.P.(FC)No.1042/15. In I.A.No.2143/15 the mother sought for temporary custody of the child, pending disposal of the original petition. The said application was heard by the court below along with another application filed

by the mother as I.A.No.3323/15, in which interim custody was sought for during the 'Onam' holidays. Through a common order passed on 26.08.2015, the Family court held that the mother is not entitled for temporary custody pending disposal of the case. But she was permitted to have interim custody during 'Onam' holidays. The father was directed to hand over custody of the child to the mother on 27.08.2015 and the mother was allowed to retain custody till 31.08.2015. The above said order was issued on the basis of a finding that the child is staying at Sharja and that granting interim custody to the mother will affect his studies and that the future of the child cannot put to uncertainties, especially when his period of residential visa and identity card issued from UAE will expire on 19.11.2015.

4. Against the order of the Family court dated 26.08.2015, the mother had filed a review petition as R.P.No.3648/15, pointing out that, the findings to the effect that the child is at present studying at Sharja is factually incorrect. It was pointed out that, from the pleadings and

documents itself it is evident that the child is studying only at 'Apple Kids International Pre School' at Kochi. Hence it is contended that, the findings that the child is studying in Sharja and that for continuing his studies and for renewal of visa it is necessary for him to continue there, erroneous and is not supported by any materials. Stating that there is an error apparent on the fact of the of the record, the order dated 26.08.2015 is liable to be reviewed, was the contention.

5. The Family court had allowed the review petition and recalled the order passed in I.A.No.2143/15, dated 26.08.2015. A fresh order was passed in the said application on 29.09.2015, granting interim custody of the minor child to the mother, subject to visitation rights reserved in favour of the father, by permitting him to see the child whenever he comes to the native place on leave. The court below observed that the father can be given custody during the period of his leave, on moving application to that effect before the Family court. The fresh order passed in

I.A.No.2143/15, on 29.09.2015 is the subject matter of both these original petitions.

6. Contention of the petitioner(mother) in O.P.(FC) No.475/15 is that, even though the Family court had granted interim custody of the child with immediate effect, the father had failed to comply with the direction. Under such circumstances the mother had filed I.A.No.3896/15 before the court below praying for further directions to implement the order. But the Family court has not taken any effective steps. On 03.11.2015 the case was again adjourned for appearance of the parties. Hence the petitioner is approaching this Court seeking for enforcement of the order dated 29.09.2015.

7. Per contra, contentions of the petitioner(father) in O.P.(FC).No.499/15 is that, the order dated 29.09.2015 is highly illegal, improper and erroneous. It is pointed out that the order on the Review Petition and the order impugned were passed simultaneously, without affording any opportunity of hearing after reviewing the earlier order

dated 26.08.2015. Contention is that, once an order is reviewed by allowing an application under Order XLVII Rule 8, of Code of Civil Procedure, the court is at an obligation to consider the application afresh on merits, after affording opportunity to both sides to place their contentions and to place supporting documents if any. But according to the petitioner, no such opportunity was afforded by the court below, after recalling the earlier order. Hence the impugned order is assailed.

8. When the above cases were posted for consideration on different dates, after a preliminary hearing of the matter, this Court noticed that both sides are placing arguments based on welfare of the child. It became evident that the petitioner in O.P.(FC)No.499/15, who is the father of the child, is also now available at his native place, since he had quit the job at Sharja. Therefore it was felt that an interaction with the parties may be beneficial to persuade them to arrive at a reconciliation and reunion. Hence the parties were directed to appear along with the child on

09.11.2015. We had elaborate interactions with both the parties in the chambers on 09.11.2015. Even after much deliberations, we could not find any hope for reconciliation. Hence the cases were posted again for further hearing.

9. While the matter was taken up for further consideration on 17.11.2015, there arose a dispute between the parties on the aspect as to whether fresh opportunity of hearing was afforded or not, when I.A.No.2143/15 was disposed afresh on 29.09.2015. Hence it became necessary to verify the records of the Family court. Therefore the Registry was directed to call for original records of the Family Court in I.A.Nos.2143/15 and 3879/15 and R.P.No.3648/15, along with the proceedings sheet of the original petition. Accordingly, the above records were produced from the Family court. On that basis the cases were heard again on merits.

10. Even though much arguments were raised by counsel on either side on the aspect of the welfare of the child and had placed various supportive rulings, we are of

the considered opinion that an adjudication on the question of entitlement for custody need not be undertaken at present in these cases, because a more crucial and relevant contention regarding denial of proper opportunity before the court below is being seriously agitated.

11. Contention of learned counsel for the petitioner in O.P.(FC).No.499/15 is that, R.P.No.3648/15 was heard by the court below on 25.09.2015 and it was posted for orders to 29.09.2015. In the meanwhile, the petitioner/father had filed I.A.No.3879/15 seeking to reopen the hearing on R.P.No.3645/15 and to afford a fresh hearing. But the Family court had allowed R.P.No.3648/15 on 29.09.2015 and set aside (recalled) its order in I.A.No.2143/15, dated 26.08.2015. According to the petitioner in O.P.(FC).No.499/15, a fresh order in I.A.No.2143/15 was passed on the same day itself, without affording any further opportunity of hearing. The above contention was strongly disputed by learned counsel appearing for the petitioner in O.P.(FC).No.475/15.

According to him the fresh order in I.A.No.2143/15 was passed on 29.09.2015, after allowing the Review Petition on 25.09.2015. It was contended that I.A.No.2143/15 was heard on 25.09.2015 itself and it was posted for orders on 29.09.2015. A type written copy of the proceedings of the Family court in O.P.No.1042/15 was handed over across the bar, in support of the above contention. It is only to verify correctness of the above controversy, the records were called for, as conceded by both sides.

12. On a perusal of the records it is evidence that, R.P.No.3648/15 was filed on 11.09.2015. It was originally posted for objection and hearing to 29.09.2015. But the hearing on the Review Petition was advanced based on order passed in I.A.No.3688/15. Accordingly, R.P.No.3648/15 was posted for counter and hearing to 25.09.2015, as per order passed on 23.09.2015. The proceedings noted by the Family court on R.P.No.3648/15, on 29.09.2015 is as follows;

> *"Heard on request of the parties. The petition is filed only to review the order as there is a*

finding that child is studying abroad. Both parties would contend that child is studying at Kochi. Hence the application is allowed. The order dated 26.08.2015 is reviewed."

13. The proceedings noted by the court below on I.A.No.2143/15 would indicate that, after passing of the order on 26.08.2015, the said application was further considered only on 29.09.2015, on the basis of the order of review passed in R.P.No.3648/15 on 29.09.2015. The proceedings noted in I.A.No.2143/15 on 29.09.2015 is as follows; *"The order dated 26.08.2015 is reviewed. Heard. For orders"*. There is another endorsement made on the same day to the effect that, *"petition allowed vide separate orders"*. But we noticed that there are over wittings and corrections with respect to dates noted beneath the above said orders, wherein the learned Judge had put his initials. So also, there is a discrepancy with respect to the dates noted on the proceedings in R.P.No.3645/15. The date noted beneath the order is 25.09.2015, whereas the dated noted on the left hand side is 29.09.2015.

14. It is pertinent to note that, an application was filed by the father, as I.A.No.3879/15, on 29.09.2015. In the said application it is stated that the Review Petition was heard on 25.09.2015, despite adjournment sought for on behalf of the petitioner, stating that he is in Sharja on the said that date and that he could not file any objections/counter in the Review Petition. It is also mentioned in the affidavit filed in support of I.A.No.3879/15 that all the documents produced before the Family Court, Thrissur are not received on the files of the Family Court, Ernakulam, and those documents are relevant for a proper adjudication of the case. Further statement in the affidavit is that, after hearing the Review Petition on 25.09.2015, it was posted for orders to 29.09.2015. It was pointed out that, the other side (mother) had filed a list of documents, copy of which was served only on 26.09.2015. The petitioner has got strong objections in accepting those documents. Hence it is prayed for a re-opening of the Review Petition for further hearing. But endorsements of the court below contained in

IA.No.3879/15 would indicate that, the court below had considered the IA only on 30.09.2015 and directed the same to be called on 03.11.2015. On 03.11.2015, the said IA was dismissed observing that "*there is no IA.No.3645/15 in the case on hand, hence this application is rejected*". Evidently, the request for fresh hearing of the Review Petition was not considered by the court below on any date prior to 29.09.2015.

15. Inference which can be drawn out from the records and circumstances is that, the Review Petition was heard on 25.09.2015 and it was posted for orders to 29.09.2015. But the court had wrongly endorsed it as allowed on 25.09.2015 itself. The parties and counsel were under the impression that the Review Petition is posted for orders to 29.09.2015. On 29.09.2015 the court below re-opened I.A.No.2143/15. A fresh order in that application was passed on the same date itself. The court below had omitted to take note of I.A.No.3879/15 filed, in between. Further it is evident that the additional documents, which

were not available while passing the earlier order on 26.08.2015, were considered and marked while disposing the matter afresh on 29.09.2015, without noticing the objections in accepting such documents and without considering the contention that all the documents filed before the Thrissur court are not available on the records.

16. Learned counsel for the petitioner in OP(FC) 499/2015 contended that, if the court sets aside an order by allowing an application under Order XLVII Rule 8 CPC, the court is at an obligation to re-consider the matter as if it is a fresh application, because the original order stands non-est. He had placed reliance on a decision of this court in **Bhargavi Amma vs. Sankara Panicker (1961 KHC 386).** It is held therein that, the result of the grant of an application for review is to vacate the order already passed. Rule 8 insists that when an application for review is granted the case has to be reheard. Relying on a decision of the High Court of Bombay it is held that once the review is granted the whole matter is reopened and there has to be a

fresh decree or order elaborating the decisions on either way. It is held that, it is now settled position that the decision rendered to grant of an application for review would amount to vacate the original order. The opposite theory that, on such occasion the order is only held in suspense, was not accepted.

17. In a recent decision in **Kizhakkekara Thomas vs. State of Kerala and another (2011 (3) KHC 819)** this court held that, once a review is granted the original order becomes non-existent, and then it is the function of the court to pass fresh orders in the matter.

18. With respect to the legal position there cannot be much dispute that once the review petition is allowed, the application is to be heard afresh. In the case at hand, the review petition was actually allowed or in other words the parties were made known as it allowed, only on 29.9.2015. On 29.9.2015 itself the interim application for custody was disposed of afresh. The parties are at controversy as to whether a hearing was conducted on

IA.No.2143/15 on 29.9.2015 or not, after allowing the review. However, it is evident that on 29.9.2015 itself the petitioner in OP.No.499/15 had filed IA.No.3871/2015 seeking for a rehearing on the Review Petition. It was complained that all the documents which were produced before the Family Court, Thrissur were not available for consideration . The production of the additional documents by the petitioner in OP(FC).475/15 was also opposed. But it is evident that additional documents were marked as Exts. A1 to A8. So also, additional documents, Ext. B6 to B12 were also marked in the order which is now impugned.

19. Under the above mentioned circumstances this court is convinced that there occurred some procedural irregularity in the matter of passing the fresh order in IA.2143/2015. We are of the opinion that a fresh consideration, of the said application, with due advertence to the contentions based on the documents relied on by either side, will serve the ends of justice. Needless to observe that the Family Court will take note of all the

relevant aspects regarding custody of the child, bearing in mind the paramount consideration, which is the welfare of the child.

20. In the result, OP(FC) No.499/15 is allowed and Ext. P14 order passed by the Family Court in IA.2143/2015 in OP 1042/2015, dt. 29.9.2015 is hereby quashed. The Family Court is directed to pass fresh orders on IA.No.2143/2015, after affording opportunity of hearing to both sides.

21. Considering the fact that the issue is relating to interim custody of a minor child of a tender age, it is necessary to have an early disposal of the matter. Hence the Family Court is directed to dispose of the application at the earliest, at any rate within 2 weeks from the date of receipt of a copy of this judgment.

22. The Registry is directed to re-transmit the records along with a copy of this judgment to the Family Court, Ernakulam, through a messenger deputed for the said purpose.

In view of the order passed in OP.(FC)

No.499/2015 the relief in the other case, OP.(FC) No.475/2015, has become infructuous. Hence the said case is hereby dismissed.

Sd/-
C.K.ABDUL REHIM, JUDGE

Sd/-
MARY JOSEPH, JUDGE

VS/Pmn