

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

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

**WEDNESDAY, THE 9TH DAY OF DECEMBER 2015/18TH AGRAHAYANA, 1937**

**OP (FC).No. 536 of 2015 ()**  
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**(AGAINST THE ORDER IN I.A.NO.735/15 IN O.P.NO.46/2015 OF THE FAMILY COURT,  
OTTAPALAM)**  
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**PETITIONER(S):**  
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**SUHARABI, AGED 29 YEARS, D/O.KUNHIMUHAMMED,  
MACHINJERITHUMBIL VEEDU, ARIYOOR P.O.  
MANNARKKAD TALUK.**

**BY ADV. SRI.T.K.SANDEEP**

**RESPONDENT(S):**  
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**SALIH, AGED 40 YEARS, S/O.KUNJALAVI,  
ANTHURKUNDU VEEDU, ALANALLOOR P.O., MANNARKKAD TALUK  
PALAKKAD, PIN-678 582.**

**BY ADV. SRI.R.SREEHARI**

**THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON  
09-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**VS**

**OP (FC).No. 536 of 2015 ()**  
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**APPENDIX**

**PETITIONER(S)' EXHIBITS**  
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- EXT.P1:        A TRUE COPY OF THE ORIGINAL PETITION IN G.O.P. 46/2015 ON THE FILE  
                     OF FAMILY COURT, OTTAPPALAM DATED 17.01.2015.**
- EXT.P2:        A TRUE COPY OF AFFIDAVIT FILED ALONG WITH I.A.735/2015 IN  
                     G.O.P46/2015 OF THE FAMIIY COURT, OTTAPALAM DATED 04.08.2015.**
- EXT.P3:        A TRUE COPY OF THE COUNTER STATEMENT IN I.A.7835/2015 FILED BY  
                     THE RESPONDENT DATED AUGUST, 2015.**
- EXT.P4:        A TRUE COPY OF THE ORDER DATED 04.09.2015 IN I.A.735/2015 IN G.O.P  
                     46/2015 ON THE FILES OF FAMILY COURT OTTAPPALAM(ALONG WITH  
                     TYPED COPY).**

**RESPONDENT(S)' EXHIBITS**  
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**NIL**

**/TRUE COPY/**

**PA TO JUDGE**

**VS**

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

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**O.P.(FC) No.536 of 2015**  
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Dated this the 9<sup>th</sup> day of December, 2015

**JUDGMENT**

**C.K.Abdul Rehim, J**

In this original petition filed under Article 227 of the Constitution of India, the petitioner is challenging Ext.P4 order passed by the Family Court, Ottapalam in I.A.No. 735/15 in O.P.No.46/15. The original petition before the Family Court was filed by the petitioner herein seeking permanent custody of two minor children born out of his wedlock with the respondent. The children are aged 8 years and 5 years respectively. The parties to the matrimony got separated during 2014 and shortly thereafter the marriage was dissolved. Along with the original petition, the petitioner had filed I.A.Nos.688/15 and 735/15, seeking interim custody of the children pending disposal of the case and also seeking

permission for having interaction with the children. The above interlocutory applications were disposed of through a common order which is impugned herein. The court below declined to grant interim custody of the children to the petitioner, but permitted to have interaction with the children once in a month. It is aggrieved by the said order, the petitioner is approaching this Court invoking the supervisory jurisdiction vested under Article 227 of the Constitution of India.

2. In the impugned order, the court below took a view that, on interaction with the children they have expressed an opinion that the petitioner/mother had harassed them while given interim custody on an earlier occasion, by virtue of order passed in I.A.No.83/15. Further it is found that the children are being well maintained by the respondent and they are attending the School and Madrassa. The court below observed that the father is the natural guardian of the children and the burden of proving that the matter is capable of looking after the welfare of the

children lies on her. The allegation of the petitioner is that the respondent is not maintaining the children properly because he got re-married, was discarded by the court below on the basis of statements made by the children. At the same time, the court below observed that the children are of immature age and they are not capable of forming their own opinion. But it is observed that the court is bound to follow the views of the children because the elder child is matured enough to form his own opinion and expressed unwillingness to go along with the petitioner. Taking note of the circumstances as mentioned above, the court below had dismissed I.A.No.735/15 declining custody to the petitioner. Whereas, I.A.No.688/15 was allowed in part, permitting the petitioner to have interaction with the children once in a month in any of the Saturdays.

3. Contention of learned counsel appearing for the petitioner is that, the court below went highly erred in taking a decision solely on the basis of the interaction made with the children and based on the complaint raised by them

against the mother. It is contended that the court below ought to have considered the fact that the children are of tender-age and their opinion was clearly on the basis of the influence exerted by the respondent, with whom the children were staying. It is pointed out that, both the children were in the custody of the petitioner till December 2014 and there was no problem at all for both the children to have their stay with the petitioner. It is contended that both the children are of tender-age and they require love, care, protection and affection from the side of the mother. Hence the interim custody ought to have been granted, is the contention. It is also argued that the visitation right provided by the court below is too insufficient to have any proper interaction with the children.

4. Facts enumerated would reveal that both the children are now in the custody of the father/respondent. It is admitted that the father had re-married and he is living with his second wife. At the same time, there is an allegation that the mother had an illicit relationship with an

Autorikshaw Driver. However, it is to be observed that, rather than the legal entitlement for custody of the children under the law, what is to be looked into is the welfare of the children, which is to be given paramount importance. As observed by the court below, the children are now studying in a School and Madrassa and handing over of the custody of the children to the petitioner on a permanent basis, even pending disposal of the case, would definitely affect their studies. However, denial of the custody to the mother solely based on an opinion expressed by the children cannot be accepted. The children are of tender-age and they were living with the father. There is every possibility that the respondent/father had instructed them to express an opinion when interacted by the court below. The children, who are at their tender-age, also need love, affection and care of the mother. At the same time, if the children are not willing to go along with the mother, they could not be compelled for the same also. Hence in the interest of justice, this Court is of the opinion that the mother needs to be permitted to build

up acquaintance and affection with the children and interim custody during holidays can be considered after the mother developing healthy relationship with the children. In order to achieve the above purpose, we are of the opinion that the visitation right now provided by the court below is too insufficient. Hence this Court is of the considered opinion that the order impugned requires modification and the petitioner shall be provided with adequate facility for having acquaintance and visitation with the children. It is also necessary to reserve her liberty to move for modification of the interim arrangements if the original petition is not disposed of within a reasonable time.

5. Under the above mentioned circumstances, the above original petition is allowed in part. Dismissal of I.A.No.735/15 denying interim custody of the children to the petitioner, pending disposal of the original petition, is hereby upheld. The order passed in I.A.No.688/15 is modified to the extent of permitting the petitioner to have visitation right (accessibility) with respect to both the children on the 1<sup>st</sup>

and 4<sup>th</sup> Saturday of every month from 11 A.M., till 4 P.M. For the said purpose, the respondent is directed to produce the children before the Family court, Ottappalam before 11 A.M., on every 1<sup>st</sup> and 4<sup>th</sup> Saturday. The Chief Ministerial Officer shall hand over the children to the petitioner/Mother, after entering the same in the Register maintained for the said purpose. The petitioner is permitted to take the children outside the premises of the court, within the city limits of Ottappalam and shall entrust back the children before 4 P.M. on the same day. The Chief Ministerial Officer shall hand over back the children to the respondent after entering the same in the Register kept for the said purpose.

6. The above said arrangement shall be maintained from 26<sup>th</sup> December, 2012 onwards and shall continue till the end of March 2016. The Family court is directed to expedite the proceedings in O.P.No.46/15 and shall take all earnest efforts to dispose of the matter before the end of March 2016. In case the original petition is not disposed of within the said time, the petitioner will be at

liberty to approach the Family court seeking modification of the interim arrangement and to seek overnight custody of the children during holidays and vacation. Needless to observe that if any such petition is filed, the same shall be considered by the Family court and appropriate decisions shall be taken in accordance with the facts and circumstances prevailing as on the said date.

The original petition is disposed of as above.

Sd/-

**C.K.ABDUL REHIM, JUDGE**

Sd/-

**MARY JOSEPH, JUDGE**

VS