

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 28TH DAY OF JULY 2015/6TH SRAVANA, 1937

OP (FC).No. 363 of 2014 (R)

AGAINST THE ORDER IN OP.NO.477/2014 OF FAMILY COURT, ATTINGAL

PETITIONER/PETITIONER:

NAVAS, AGED 34 YEARS,
S/O. SAINULABDEEN, RESIDING AT BAITHUL NOORU,
PEROOR.P.O., VELLALLOOR VILLAGE, CHIRAYINKEEZH TALUK.

BY ADVS.SRI.MAJEEDA S.
SRI.REJI.A.RASHEED
SRI.AJIKHAN.M
SRI.B.THARIF

RESPONDENT/RESPONDENT:

SURUMI
D/O. JAMEELA BEEVI, PUTHENPALATHU VEEDU
CHATHANTHARA.P.O., PATHANAMTHITTA DISTRICT
PRESENTLY RESIDING AT PULIPPARAYIL HOUSE
CHIRAKKADAVU EAST.P.O., KOTTAYAM DISTRICT.

BY ADV. SRI.K.A.HASSAN

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON
28-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP (FC).No. 363 of 2014 (R)

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1. TRUE COPY OF THE AGREEMENT DATED 13-11-13 EXECUTED BETWEEN THE PETITIONER AND RESPONDENT.

EXT.P2. TRUE COPY OF THE OP NO. 477/14 FILED BEFORE THE FAMILY COURT, ATTINGAL DATED 6-5-2014.

EXT.P3. TRUE COPY OF THE MARRIAGE CERTIFICATE OF THE RESPONDENT DATED 22-4-2014.

EXT.P4. TRUE COPY OF THE CERTIFICATE ISSUED AS PER THE RIGHT TO INFORMATION ACT DATED 20-5-2014 BY THE SU-INSPECTOR OF POLICE, (PUBLIC INFORMATION OFFICER), VECHOOCHIRA POLICE STATION.

EXT.P5. TRUE COPY OF THE INTERIM ORDER IN I.A. NO. 716/2014 IN OP NO. 477/2014 DATED 6-5-2014 OF THE FAMILY COURT, ATTINGAL.

EXT.P6. TRUE COPY OF THE WPCR. NO. 200/2014 FILED BEFORE THIS HON'BLE COURT DATED 9-5-2014.

EXT.P7. TRUE COPY OF THE INTERIM ORDER IN WPCRL.NO. 200/2014 DATED 13-5-2014 OF THIS HON'BLE COURT.

EXT.P8. TRUE COPY OF THE JUDGMENT IN WPCRL. NO. 200/2014 DATED 23-6-2014 OF THIS HON'BLE COURT.

EXT.P9. TRUE COPY OF THE I.A. NO. 830/14 IN O.P. NO. 477/14 ON THE FILE OF THE FAMILY COURT, ATTINGAL DATED 17-5-2014.

EXT.P10.TRUE COPY OF THE OBJECTION TO I.A.NO. 830/14 IN O.P. NO. 477/14 DATED 23-5-2014.

EXT.P11. TRUE COPY OF THE ORDER DATED 29-5-2014 IN I.A. NO. 826/2014 IN O.P. NO. 477/2014 OF THE FAMILY COURT, ATTINGAL.

RESPONDENT'S EXHIBITS:NIL

/TRUE COPY/

P.S TO JUDGE

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C.K. ABDUL REHIM & K. RAMAKRISHNAN, JJ.

.....
O.P.(F.C)No.363 of 2014
.....

Dated this the 28th day of July, 2015.

JUDGMENT

Ramakrishnan,J:

The petitioner in I.A.No.826/2014 in OP.No.477/2014 on the file of the Family Court, Attingal has filed this original petition challenging the order passed by the Family Court in that application under Article 227 of the Constitution of India.

2. It is alleged in the petition that the petitioner and the respondent were husband and wife and both belong to Muslim religion and while they were living together, the minor child by name Muthaleev @ Ali Hyder was born to them. Thereafter their relationship strained and they started residing separately and later the marriage was dissolved by pronouncing talaq. According to the petitioner, even at that time, the respondent had abandoned the child while he was aged only 1 ½ years and left with another person. But at the time of divorce, considering the welfare of the child and the age of the child, as per an agreement, the custody of the child was given to the mother. Thereafter, according to the petitioner, she had left

the child with her parents and converted to Hinduism and married another person and now she is living with that person. In the meantime, according to the petitioner, he got custody of the child. But, according to the respondent, the child was forcibly taken by the petitioner and a crime was registered in respect of the same and she moved this Court by filing a writ of habeas corpus as W.P.(Crl)No.200/2014 and as per Ext.P8 order interim custody of the child was handed over to the mother leaving open rights of the parties to decide custody of the child to the Family Court. Accordingly, the petitioner filed O.P.No.477/2014 for declaring him as the legal guardian and also permanent custody of the child and filed I.A.No.826/2014 for interim custody of the child. The Family Court by Ext.P11 order granted interim custody of the child to the mother/respondent with visitorial rights to the petitioner on the first Saturday of every month between 10 a.m and 4 p.m in the premises of the Family Court, Pathanamthitta and this order is being challenged by the petitioner by filing this petition.

3. During the pendency of the proceedings, it appears that grandparents with whom the child was at that time had

appeared before this Court and handed over custody of the child to the petitioner herein and as per order dated 8.8.2014 custody of the child was given to the father. But it is seen from the subsequent order dated 18.11.2014 that the child was produced by the grandparents on the basis that the child was handed over to them by the petitioner on the basis of an oral agreement and as suggested by this Court the custody of the child was given to the parents of the respondent. But on that day neither the petitioner nor the respondent were present. So this Court has directed the custody to be kept with the parents of the respondent until further orders. Thereafter as per order dated 21st November, 2014, the parents of the respondent are directed to produce the child on the next hearing date and accordingly on 26th November, 2014 the child was handed over to the petitioner by the grandparents. The petition filed by the grandparents to get themselves impleaded seeking temporary custody of the child was disposed of by this Court directing the grandparents to file an application before the Family Court as they were not parties to the original proceedings. Now as per the orders of this Court, the child is with the father.

4. It is on the basis of the submission made by the

counsel for the petitioner that if the mother of the child is present in court, the entire dispute can be resolved by referring the matter for mediation and accordingly, the matter was referred for mediation but the matter was not settled in the mediation.

5. Heard counsel for the petitioner and the respondent.

6. Counsel for the petitioner submitted that considering the background of the respondent and also some observations made by the court below regarding the antecedents of the respondent, the court below should not have granted interim custody of the minor child to the mother during the pendency of the proceedings and the court below has moved away of the observations made by this Court in the habeas corpus proceedings and on that basis that the custody of the child was given to the mother. Further, she is now converted to Hinduism and married a Hindu and it is not safe to leave the child with such parents. Further, a case was registered on the basis of the statement given by the present husband of the respondent against the grandparents and in such circumstances, it is not safe to leave the child with the mother. Further, both were working and the mother will not get time to look after the

child. On the other hand, if the child is given to the petitioner, he will be able to look after the child as his second wife as well as his mother will be able to look after the child and they will be more affectionate to the child than the mother. Further the respondent had converted to another religion. Under the personal law she is not entitled to get custody of the child and the petitioner will be entitled to get custody of the child.

7. On the other hand counsel for the respondent submitted that as per law only the welfare and interest of the child alone need be considered for considering the question of custody of the child. Considering the fact that child is of tender age and the best person to look after the child is mother and the present husband will look after the child as his own and there is no difficulty for them to look after the child especially when the petitioner also married again and instead of giving custody of the child to another, it is better that the mother can be given interim custody till the matter is disposed of by the Family Court.

8. On going through the discussions made above and also the circumstances narrated, it is an admitted fact that both the petitioner and the respondent have married after

dissolution of their earlier marital tie. Further, the court below had considered the circumstances under which the petitioner had come into possession of the child and also found that the allegations made in the criminal case or the observations made by this Court in the writ petition etc are matters to be considered on the basis of the evidence later.

9. Further, it is settled law that merely because the parents of the child are remarried or even married a person belongs to another religion is not a ground to deny custody of the child to any of the parents and even the personal law will have to give way regarding the custody of the child when it has to be considered by the court as per the provisions of the Guardian and Wards Act, that will prevail over the personal law and courts will have to consider the welfare of the child and interest of the child alone for the purpose of considering the question of interim custody. Further it is also settled law that till the child attains the age of 7 years, the best person to look after the child is mother unless circumstances were brought to the notice of the court that custody of the child with the mother will be detrimental to the interest of the child. In this case none of the circumstances alleged by the counsel for the

petitioner are sufficient to infer by this Court for giving custody to the mother will be detriment to the interest of the minor child. So under the circumstances we feel that court below was perfectly justified in coming to the conclusion that considering the age of the child who was only 1 ½ years at that time and as per the provisions of the Guardian and Wards Act, the mother will be the best person to look after the child and rightly handed over the custody of the child to the mother and we do not find any reason to interfere with the interim custody ordered by the court below regarding the custody of the child during the pendency of the proceedings invoking the supervisory jurisdiction under Article 227 of the Constitution of India.

10. If the petitioner has got any grievance regarding any change of circumstances which warrant any modification in the order, he is at liberty to move the Family Court for that purpose and that court is at liberty to consider and pass appropriate orders in that application. Further, if any objection has been raised regarding the territorial jurisdiction of the court in entertaining the petition, that also be considered by the Family Court and pass appropriate orders in accordance with

law without delay. The petitioner is directed to hand over custody of the child to the mother on or before 5.8.2015. Further, we feel some modification can be made regarding the visitorial rights of the petitioner. The petitioner can be given visitorial right of the child on alternate weekends and the respondent shall produce the child before the Family Court, Pala at 10 a.m on those Saturdays and the petitioner shall return the child at 4 p.m on those Sundays before the Family Court, Pala. The officer in charge of the Family Court during that period is directed to enter the same in the registers maintained in that court for that purpose regarding the handing over and return of the custody in the register periodically.

With the above modifications of the order passed by the court below, this original petition is disposed of.

Office is directed to communicate a copy of this order to both the Family Courts immediately.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

K. RAMAKRISHNAN, JUDGE.

cl

/true copy/

P.S to Judge

