

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

OP (FC).No. 436 of 2014 (R)

PETITIONER(S)/PETITIONER:

**SHERLY XAVIER, AGED 40 YEARS
W/O. XAVIER, C/O. MARY MAMACHAN
RESIDING AT KUNNEVELI HOUSE, OULAVIPU P.O., CHERTHALA
ALAPPUZHA DISTRICT.**

**BY ADVS.SRI.D.M.SAJEEVAN
SMT.G.SANGEETHA**

RESPONDENT(S)/RESPONDENT:

**XAVIER V.J., AGED 42 YEARS
S/O. JOSEPH, VADAKKEVEETIL HOUSE, H.NO. 6/321
MATTANCHERY P.O., A.B.SALEM ROAD, JEW TOWN
KOCHI-682002
NOW WORKING AT CONTAINER SOLUTIONS COMPANY LLC
P.O.BOX-49867, DUBAI, U.A.**

**R1 BY ADV. SRI.ROY THOMAS (PATHANAMTHITTA)
ADV. SRI.K.V.BINOD**

**THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 15-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

VS

OP (FC).No. 436 of 2014 (R)

APPENDIX

PETITIONER(S)' EXHIBITS

- EXHIBIT P1- THE TRUE COPY OF THE PETITION IN OP.NO.1710/2010 ON THE FILE OF THE HON'BLE FAMILY COURT, ERNAKULAM.**
- EXHIBIT P2- THE TRUE COPY OF THE I.A.NO. 160/2014 IN O.P.NO. 1710/2010 ON THE FILE OF THE HON'BLE FAMILY COURT, ERNAKULAM.**
- EXHIBIT P3- THE CERTIFIED COPY OF THE ORDER DATED 14-8-2014 IN I.A.NO. 160/2014 IN O.P.NO. 17190/2010 ON THE FILE OF THE HON'BLE FAMILY COURT, ERNAKULAM.**
- EXHIBIT P4- THE TRUE COPY OF THE SETTLEMENT AGREEMENT IN M.C.NO. 21/2010 ON THE FILE OF THE LEARNED JUDICIAL FIRST CLASS MAGISTRATE'S COURT-II, KOCHI.**
- EXHIBIT P5- THE TRUE COPY OF THE ORDER DATD 28-2-2011 IN M.C. 21/2010 ON THE FILE OF THE LEARNED JUDICIAL FIRST CLASS MAGISTRATE COURT-II, KOCHI.**

RESPONDENT(S)' EXHIBITS

NIL

/TRUE COPY/

PA TO JUDGE

VS

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

O.P.(FC)No.436 of 2014

Dated this the 15th day of December, 2015

JUDGMENT

C.K.Abdul Rehim, J

Challenge in this original petition filed under Article 227 of the Constitution of India is against an order passed by the Family court, Ernakulam in I.A.No.160/14 in O.P.No.1710/10. The petitioner herein is the respondent before the court below in O.P.No.1710/10 which is instituted by the respondent herein, seeking for dissolution of the marriage existing between them. I.A.No.160/14 is filed by the petitioner seeking to reopen the evidence and to recall the respondent herein, who was examined as PW1, for the purpose of cross examination. In the affidavit filed in support of the said application it is stated that, the case was originally posted to 29.11.2013, from which date it was advanced to 04.11.2013 at the request of the respondent. On the said

day, a joint trial petition was filed to try the case along with O.P.No.1569/13. It is stated that on 04.11.2013 the court below had advanced the case and allowed the joint trial petition, which was ordered in the absence of the petitioner. It is further stated that, the Advocate Commissioner who was appointed to record the evidence had given notice to the counsel for the petitioner posting the case for evidence on the next day, i.e., on 05.11.2013. According to the petitioner, her counsel had informed the Advocate Commissioner about the inconvenience on 05.11.2013 and also requested to grant two days time for producing documents. But the evidence of the respondent was recorded on 05.11.2013 itself. Therefore, the petitioner could not cross examine him on that date. Hence the application to reopen the evidence and to recall the witnesses was filed.

2. The court below while considering I.A.No.160/14 observed that, the petitioner herein had failed in making use of the opportunity afforded to cross examine the respondent. It is observed that, if the respondent is recalled, he has to come from abroad in order to attend the

Family court. Taking note of such circumstances and the heavy expenses which need to be incurred by the respondent for presenting himself before the court for further cross-examination, the court below had allowed the application subject to condition of payment of cost of Rs.10,000/-. The Family court had directed that, out of the amount of Rs.10,000/- ordered as cost, a sum of Rs.5,000/- shall be paid to the District Mediation Centre and the balance amount of Rs.5,000/- shall be paid to the respondent herein. It is aggrieved by imposition of the cost of Rs.10,000/-, the above original petition is filed.

3. Heard; counsel appearing on both sides.

4. Prima facie, we are not satisfied that there exists any circumstances warranting interference of this Court by invoking the supervisory jurisdiction vested under Article 227 of the Constitution of India, which is visitatorial in nature. The imposition of cost ordered by the court below, after considering the entire circumstances prevailing, is only a decision taken in exercise of its discretionary powers and judicial wisdom. It cannot be said that the court had committed any error of jurisdiction. More over, it is evident

that there was failure on the part of the petitioner in cross-examining the witness on 05.11.2013 or in making any application before the Advocate Commissioner seeking adjournment of the case for cross-examination of the respondent to any other date. Hence, evidently there occurred lapses on the part of the petitioner. Learned counsel appearing for the respondent submitted that the respondent has to incur heavy expenses for appearing before the court again, for the purpose of cross-examination.

5. Even though we are not moved by the submissions made on behalf of the petitioner in order to negative the order impugned herein, it is brought to our notice that the petitioner is a lady living separately from her husband and having no independent income of her own. It is pointed out that an application seeking maintenance filed before the Family court was settled and the respondent had agreed to make payment of monthly maintenance at the rate of Rs.4,000/-. Considering the financial condition of the petitioner, we are inclined to modify the order to the extent of reducing her burden for payment from cost of Rs.10,000/- to Rs.5,000/-.

6. Hence the above original petition is hereby disposed of by modifying Ext.P3 order passed by the Family court, Ernakulam in I.A.No.160/15 in O.P.No.1710/10 to the extent of limiting the cost to Rs.5,000/-, which the petitioner will deposit before the court below, within a period of three weeks from today. The Family court shall reopen the evidence and recall PW1, once payment of cost as directed above is noticed. The amount of cost shall be paid to the respondent, whenever he appears for further cross-examination.

Considering the fact that the original petition is of the year 2010 and that the trial of the said case is almost over, the Family court will take all earnest endeavour to dispose of the case at the earliest possible, at any rate, within a period of three months from the date of receipt of a copy of this judgment.

Sd/-

C.K.ABDUL REHIM, JUDGE

Sd/-

MARY JOSEPH, JUDGE

VS