

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

WEDNESDAY, THE 15TH DAY OF FEBRUARY 2023 / 26TH MAGHA, 1944

O.P.(FC) NO. 557 OF 2022

AGAINST THE ORDER DATED 10.08.2022 IN I.A.NO.2 OF 2021 IN
G.O.P.NO.156 OF 2021 OF THE FAMILY COURT,THRISSUR

PETITIONER:

ANEESH

AGED 43 YEARS,

S/O K.C.NARAYANAN NAIR, HOUSE NO. 18/5,

WARRIAM LANE, OLLUR, THRISSUR, PIN - 680306.

BY ADVS.

M.K.SUMOD

ABDUL RAOOF PALLIPATH

K.R.AVINASH (KUNNATH)

PRAJIT RATNAKARAN

VIDYA M.K.

THUSHARA.K

RESPONDENT:

ASWATHY

AGED 35 YEARS,

W/O ANEESH, KAIPRAVALAYIL VEEDU, VALAPPAD

POST,CHAVAKKAD TALUK, THRISSUR, PIN - 680567.

BY ADVS.

CHACKO C A

C.M.CHARISMA

THIS OP (FAMILY COURT) HAVING COME UP FOR FINAL
HEARING ON 07.02.2023, THE COURT ON 15.02.2023 DELIVERED
THE FOLLOWING:

JUDGMENT

P.G. Ajithkumar, J.

The petitioner filed G.O.P.No.156 of 2021 before the Family Court, Thrissur for a decree allowing him permanent custody of his minor son Abhay Krishna, aged 16 years. The minor was in the custody of the respondent-mother. The petitioner has filed I.A.No.2 of 2021 for an order directing the respondent to give interim custody of the child to him from Friday to Sunday every week. Ext.P5 is a copy of that petition. Respondent filed detailed objection contending that since the petitioner has been maintaining illicit relationship with another woman, he is not entitled interim custody of the child. It is further contended that considering the obesity and connected disableness of the child, no overnight custody can be given to the petitioner.

2. The Family Court heard both sides and interacted with the child, who was brought to the Family Court. The desire of the child was ascertained. The Family Court after taking into account the case set forth by both sides, and also

the opinion of the child, allowed I.A.No.2 of 2021 to the extent of allowing the petitioner to have visitation right from 10.00 a.m. to 12.00 noon on every second Saturday. The respondent was allowed to suggest a suitable place for visitation. The petitioner is aggrieved of the said arrangements and hence he filed this Original Petition under Article 227 of the Constitution of India

3. Considering the submissions of the learned counsel on either side, this Court on 17.10.2022 directed the Secretary, Taluk Legal Services Committee, Chavakkad to submit a report, after visiting the child, regarding his limitations for movement and such other circumstances. In obedience to the said direction, the Secretary, Taluk Legal Services Committee, Chavakkad went to the school, where the child is studying, and after personally verifying the physical condition of the child and conveniences available for his studies submitted a report, which was forwarded to this Court by the Chairman of the Taluk Legal Services Committee. On 28.10.2022, the learned counsel appearing on either side

submitted that the child was taken to a Mall at Valappad for enabling the petitioner to have interaction. In the light of the submissions of the learned counsel on either side and also the report of the Secretary of the Legal Services Committee, Chavakkad, on 03.11.2022 we directed the child to attend the proceedings of the Court online on 10.11.2022 at 5 p.m. In terms of that order, the child appeared online before the Court. Both petitioner and respondents also appeared. The proceedings were held *in-camera*.

4. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondent.

5. The petitioner and respondent were living as husband and wife till 2020. The petitioner alleges that without sufficient reason, the respondent along with the child left from his companionship. The respondent contends that the petitioner maintains an extramarital relationship with another woman and that is the reason why their cohabitation could not continue. The petitioner has filed G.O.P.No.156 of 2021 for

getting permanent custody of the child, who is now aged 16 years. He is studying in Std.X now in Bharathiya Vidyabhavan School, Valappad. The contention of the petitioner is that the respondent is not permitting him to visit the child.

6. During our interaction, the child expressed the desire to stay with his mother, the respondent. Child has obesity and limitations to move freely. It is seen that he has to use wheelchair often for his movements. From the report of the Secretary, Taluk Legal Services Committee, it is seen that special arrangements were made in the school to suit his convenience. The respondent needs to reach the school at noon to help the child in his daily pursuits. The learned Judge, Family Court, after personally seeing and interacting with the child, took the view that overnight custody could not be given to the petitioner in the present circumstances.

7. In ***Yashita Sahu v. State of Rajasthan [(2020) 3 SCC 67]*** the Apex Court held that law is well settled by a

catena of judgments that, while deciding matters of custody of a child, primary and paramount consideration is the welfare

of the child. If the welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child. The child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigations between two spouses, more often than not, the parents who otherwise love their child, present a picture as if the other spouse is a villain and he or she alone is entitled to custody of the child. The court must therefore be very wary of what is said by each of the spouses.

8. In **Yashita Sahu** (supra) the Apex Court noticed that a child, especially a child of tender years requires the love, affection, company, and protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care,

affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation and every re-union may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with custody matters must while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights. A child has a human right to have the love and affection of both parents and courts must pass orders

ensuring that the child is not totally deprived of the love, affection and company of one of her/his parents.

9. In the light of the law laid down in the aforesaid decision, the welfare of the child has to be given predominance. Since he is grown up and able to take rational decision in his personal matters, too much importance cannot be given to the parents' demands. Of course, while the child is staying with the mother, the father has to be allowed to have interaction with the child. It is essential that the child maintains an emotional bondage and warmth with both parents which helps his proper upbringing. Considering the physical condition of the child and the special needs and conveniences required for his day-to-day affairs, we hold that giving overnight custody of the child to the petitioner is not conducive and in the interest of the child.

10. In such circumstances, the order of the Family Court dated 10.08.2022 is not liable to be set aside. However, the time allowed for visitation can be modified. The appellant is allowed to have interaction with the child from 10.00 a.m.

till 12.00 noon on every second and fourth Saturdays. The respondent shall decide the venue for interaction taking into account convenience and preference of the child and intimate the petitioner in advance.

The Original Petition is disposed of accordingly.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr

APPENDIX OF OP (FC) 557/2022**PETITIONER EXHIBITS**

EXHIBIT P1 TRUE COPY OF THE INTERLOCUTORY ORDER IN CMP1700/2020 IN MC27/2020 DATED: 08/07/2020 OF THE JUDICIAL MAGISTRATE OF THE FIRST CLASS, KODUNGALLUR

EXHIBIT P2 TRUE COPY OF THE PETITIONER'S STATEMENT OF ACCOUNT STARTING FROM 03/04/2020 TO 30/08/2022

EXHIBIT P3 TRUE COPY OF THE RECEIPT DATED: 02/06/2021 ISSUED BY THE BHARATHEEYA VIDYABHAVAN SCHOOL, VALAPPAD

EXHIBIT P4 TRUE COPY OF THE TRANSACTION RECEIPT DATED: 24/05/2022 AND ISSUED BY THE SOUTH INDIAN BANK, VALAPPAD

EXHIBIT P5 TRUE COPY OF THE AFFIDAVIT AND THE PETITION IN IA 2/2021 OF GOP156/2021 OF THE FAMILY COURT, THRISSUR

EXHIBIT P6 TRUE COPY OF THE COUNTER STATEMENT FILED BY THE RESPONDENT HEREIN IN IA 2/2021

EXHIBIT P7 TRUE COPY OF THE ORDER IN IA 2/2021 IN GOP 156/2021 DATED: 10/08/2022 OF THE FAMILY COURT, THRISSUR