



2024:KER:30685

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

&

THE HONOURABLE MR. JUSTICE P.M.MANOJ

THURSDAY, THE 11TH DAY OF APRIL 2024 / 22ND CHAITHRA, 1946

OP (FC) NO. 674 OF 2023

AGAINST THE ORDER DATED 02.11.2023 IN I.A No. 2 of 2022 in
OP NO.197 OF 2018 OF FAMILY COURT, THALASSERY

PETITIONER/RESPONDENT/PETITIONER:

THOMAS @ MANOJ E.J.

BY ADVS.
PRAVEEN.K.JOY
ABISHA.E.R(K/001032/2023)

RESPONDENT/PETITIONER/RESPONDENT:

INDU S



BY ADVS.
T.O.DEEPA (K/180/2008)
JAYKAR.K.S. (K/738/2003)
C.SIVADAS (K/798/2012)

SRI. T D SUSMITH KUMAR

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION
ON 11.04.2024, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



JUDGMENT

Raja Vijayaraghavan, J.

This petition is filed challenging Ext.P23 order dated 2.11.2023 in O.P.(G & W) No.197/2018 on the files of the Family Court, Thalassery. The aforesaid petition has been filed by the respondent herein seeking to modify the order of the custody of the child in O.P. No.197/2018 on the files of the said court. The above order was passed consequent to a compromise entered between the parties, requiring the mother to hand over the 3-year-old minor son of the petitioner to him on two Sundays in a month. After a period of one year from the date of order, the mother is to give custody of the child to the father on all Saturdays and Sundays.

2. The petitioner, after entering an appearance, challenged the very maintainability of the application. According to him, seeking compliance with the directions issued based on a compromise decree dated 3.7.2018, the petitioner has been moving heaven and earth. All the attempts of the petitioner to seek execution of the order were scuttled by the mother by adopting one mode or the other. To ensure compliance, the mother was arrested once and was released on



self-bond. He also highlighted the sequence of events from the commencement of proceedings to substantiate his contention that the attempt of the mother is to prevent the petitioner from having custody of the child as ordered under the compromise decree. It is stated that it is with a view to avoid the proceedings initiated against the respondent-mother for violation of the compromise decree that this application has been filed to protract the matter.

3. The respondent countered the contentions and pointed out that the child is suffering from various ailments including Attention Deficit/Hyperactivity Disorder. The child is undergoing behavioral therapy in order to ascertain the reasons for his mood swings. She has also produced certain medical records from various hospitals to substantiate her contention.

4. The learned Family Court considered the objections raised by the petitioner and was of the view that in a petition for custody of children, the order passed initially cannot be said to be final. It was also held that it was open to any of the parties to the proceeding to approach the court and seek modification of the order if there is any change of circumstances. As far as the genuineness of the allegations is concerned,



the same can be determined only after taking evidence. Holding so, it was held that the application seeking modification was perfectly maintainable.

5. Sri. Praveen Joy, the learned counsel appearing for the petitioner submitted that the order passed by the Family Court cannot be sustained. He would point out that though he was granted custodial rights, as per the compromise decree, he has not yet been handed over the custody of the child to date. By allowing the application seeking modification, the Family Court was merely condoning the contumacious conduct of the respondent. It is further submitted that the Family Court ought to have exercised powers conferred under the Act and insisted on compliance with the compromise decree rather than allowing the application seeking modification.

6. In response, Sri. T.D.Susmith Kumar for the respondent submitted that in matters concerning custody of the child, the doctrine of res judicata would not be applicable. While determining the question, as regards custody of the child, the paramount consideration would be given to the welfare and interest of the child and not the rights of the parents under the statute.



7. We have carefully considered the submissions advanced. This Court, by order dated 21.3.2024, directed the parties to be present in person along with the minor child. In terms of the directions issued, the parties have appeared in person. After interacting with the parties, we passed the following order, the relevant portion of which reads as under:

"4. During our interaction with the parties, we observed that the child displayed signs of distress and he was clinging on to the mother. He appeared to be having anxiety issues and was sobbing intermittently. Despite being 9 years old, the child appears to be troubled and kept on insisting that he does not want to be with his father.

5. The respondent mother asserts that the child suffers from Attention Deficit/Hyperactivity Disorder (ADHD) along with anxiety issues, compounded by additional medical concerns.

6. While the petitioner acknowledges the child's behavioral challenges, he contends that the child requires comprehensive treatment from qualified medical professionals, which he asserts is currently lacking. Fundamentally, the contention is that the Family Court should have enforced its initial order prior to entertaining the respondent wife's application.

7. Having observed the child, we are persuaded to prima facie observe that an abrupt transfer of custody to the father at this stage would be profoundly distressing and traumatic for the child. Consequently, we have requested the respective counsels to ascertain their willingness to engage the child with specialists such as a



Developmental Pediatrician/Pediatric Neurologist/ Child Psychologist, with the aim of enabling the child to grow up with peace, happiness and well being.

8. We have no doubt in our mind that the protracted custody dispute and recurrent court appearances to enforce previous orders have evidently taken a toll on the child, who appears deeply traumatized. Unless both the father and mother, embroiled in conflict, conscientiously endeavor to cease their disputes until the child stabilizes, there exists a risk of inflicting irreparable harm upon the child's psyche.

9. The learned counsel appearing for both sides submitted that they shall get inputs from their parties and inform their decision on the next posting date.

10. In that view of the matter, as an interim measure, Ext.P23 order passed by the Family Court shall be kept in abeyance for a period of ten days."

8. We have taken up the matter today. The learned counsel appearing for the respondent submitted that the child is being seen by the doctors attached to the Kannur Medical College and the Mattannur Medical Mission Hospital and treatment is going on. We have also perused the medical records that were handed over.

9. Having considered the submissions advanced and the peculiar facts of the instant case, we are of the view that the stand taken by the learned Family Court while rejecting the preliminary objection as regards the maintainability of the application filed by the mother seeking



modification is not liable to be interfered with. In **Dr. Ashish Ranjan**¹, the Apex Court had occasion to observe that the mutual settlement reached between the parties cannot come in the way of the well-established principles in respect of the custody of the child and therefore, a subsequent application for custody of a minor cannot be thrown out at the threshold as being not maintainable. It was also held that the doctrine of res judicata is not applicable in matters of child custody. The Apex Court went on to hold as follows in paragraphs 15 to 19 of the judgment:

“15. In *Rosy Jacob v. Jacob A. Chakramakkal* [(1973) 1 SCC 840] , this Court (three-Judge Bench) considered the nature of custody of a minor under the provisions of the Guardians and Wards Act, 1890 and application of doctrine of res judicata/estoppel in respect of the same and held as under :

“18. The appellant's argument based on estoppel and on the orders made by the court under the Divorce Act with respect to the custody of the children did not appeal to us. All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based on

¹ *Dr. Ashish Ranjan v. Anupama Tandon and Another* [(2010) 14 SCC 274]



consent decrees, cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation.”

16. The aforesaid judgment was reconsidered by this Court (two-Judge Bench) in *Dhanwanti Joshi v. Madhav Unde* [(1998) 1 SCC 112] , and after quoting the ratio of the said judgment, held as under : (SCC p. 122, para 21)

“21. ... However, we may state that in respect of orders as to custody already passed in favour of the appellant the doctrine of *res judicata* applies and the Family Court in the present proceedings cannot re-examine the facts which were formerly adjudicated between the parties on the issue of custody or are deemed to have been adjudicated. There must be proof of substantial change in the circumstances presenting a new case before the court. It must be established that the previous arrangement was not conducive to the child's welfare or that it has produced unsatisfactory results.”

17. In *Jai Prakash Khadria v. Shyam Sunder Agarwalla* [(2000) 6 SCC 598] and *Mausami Moitra Ganguli v. Jayant Ganguli* [(2008) 7 SCC 673], this Court held that it is always permissible for the wards to apply for the modification of the order of the court regarding the custody of the child at any stage if there is any change in the circumstances. (See also *Vikram Vir Vohra v. Shalini Bhalla* [(2010) 4 SCC 409]

18. It is settled legal proposition that while determining the question as to which parent the care and control of a child should be given, the paramount consideration remains the welfare and interest of the child and not the rights of the parents under the statute. Such an issue is required to be determined in



the background of the relevant facts and circumstances and each case has to be decided on its own facts as the application of doctrine of stare decisis remains irrelevant insofar as the factual aspects of the case are concerned. While considering the welfare of the child, the "moral and ethical welfare of the child must also weigh with the court as well as his physical well-being". The child cannot be treated as a property or a commodity and, therefore, such issues have to be handled by the court with care and caution, with love, affection and sentiments applying human touch to the problem. Though, the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its parens patriae jurisdiction arising in such cases. (Vide *Gaurav Nagpal v. Sumedha Nagpal* [(2009) 1 SCC 42])

19. The statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor. (Vide *Elizabeth Dinshaw v. Arvand M. Dinshaw* [(1987) 1 SCC 42] , *Chandrakala Menon v. Vipin Menon* [(1993) 2 SCC 6] , *Nil Ratan Kundu v. Abhijit Kundu* [(2008) 9 SCC 413] , *Shilpa Aggarwal v. Aviral Mittal* [(2010) 1 SCC 591] and *Athar Hussain v. Syed Siraj Ahmed* [(2010) 2 SCC 654])"

10. The Apex Court has lucidly explained the legal principles concerning child custody, emphasizing that the welfare and interests of the child are paramount in such decisions. The Courts have the authority to modify custody orders if there are changes in circumstances that affect the well-being of the child. Even when orders are based on agreement/



understanding between parents, they can be revisited if the situation changes and it's deemed necessary for the welfare of the child. The main focus is always on ensuring the best possible environment for the child, rather than strictly adhering to the rights of the parents or past judicial decisions. The well-being of the child encompasses not only their physical health but also their moral and ethical welfare.

11. In that view of the matter, we do not find any reason to interfere with the order passed by the Family Court, which is impugned in this proceeding.

This Original Petition is dismissed.

Sd/-

**RAJA VIJAYARAGHAVAN V
JUDGE**

Sd/-

**P.M.MANOJ
JUDGE**

APPENDIX OF OP (FC) 674/2023

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF THE ORDER DATED 20.03.2018 IN MC 173/2017 ON THE FILES OF THE FAMILY COURT, THALASSERY.
- Exhibit P2 TRUE COPY THE JUDGEMENT DATED 7-12-2018 IN CC NO.1297/2017 ON THE FILES OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT, MATTANNUR OBTAINED FROM E COURTS WEB SITE.
- Exhibit P3 A TRUE COPY OF THE MEMORANDUM OF MEDIATION AGREEMENT DATED 24-05-2018 ARRIVED AT BETWEEN THE PETITIONER AND THE RESPONDENT AT THE DISTRICT MEDIATION CENTRE, THALASSERY ALONG WITH ENGLISH TRANSLATION.
- Exhibit P4 A TRUE COPY OF THE COMMON JUDGMENT DATED 03.07.2018 IN OP 810/2017 AND OP (G&W) 197/2018 ON THE FILES OF THE FAMILY COURT, THALASSERY.
- Exhibit P5 A TRUE OF THE DECREE DATED 03.07.2018 IN OP (G&W) 197/2018 ON THE FILES OF THE FAMILY COURT, THALASSERY.
- Exhibit P6 TRUE COPY OF THE JUDGMENT DATED 26.03.2019 IN OP 546/2018 ON THE FILES OF THE FAMILY COURT, THALASSERY.
- Exhibit P7 TRUE COPY OF THE JUDGEMENT DATED 8-03-2022 IN THE MAT APPEAL 272/2020 ON THE FILES OF THIS HON'BLE COURT.
- Exhibit P8 TRUE COPY OF THE PROCEEDINGS SHEET OF EP 17/2022 COVERING THE PERIOD 10-05-2022 TO 10-02-2023 ON THE FILES OF THE FAMILY COURT, THALASSERY.



- Exhibit P9 THE EXTRACT OF THE PROCEEDINGS OF EP NO.17/2022 FROM 10-05-2022 TO 13-11-2023 ON THE FILES OF THE FAMILY COURT, THALASSERY AVAILABLE IN E-COURTS WEBSITE.
- Exhibit P10 TRUE COPY OF THE ALLEGED MEDICAL CERTIFICATE DATED 24-05-2022 PRODUCED BY THE RESPONDENT BEFORE THE FAMILY COURT, THALASSERY.
- Exhibit P11 TRUE COPY OF THE AFFIDAVIT AND PETITION DATED 19-05-2021 IN EA 97/2022 FILED BY THE RESPONDENT BEFORE THE FAMILY COURT, THALASSERY.
- Exhibit P12 TRUE COPY OF THE ORDER DATED 29-06-2022 IN EA 97/2022 IN EP NO.17/2022 ON THE FILES OF THE FAMILY COURT, THALASSERY.
- Exhibit P13 TRUE COPY OF THE JUDGEMENT DATED 25-08-2022 OF MAT APPEAL 534/2022 ON THE FILES OF THIS HON'BLE COURT.
- Exhibit P14 TRUE COPY OF THE ORDER DATED 17-09-2022 IN EP NO.17/2022 ON THE FILES OF THE FAMILY COURT, THALASSERY.
- Exhibit P15 TRUE COPY OF THE REPORT DATED 29.10.2022 GIVEN BY THE SHRERISTADAR, FAMILY COURT THALASSERY TO THE HON'BLE JUDGE OF THE FAMILY COURT, THALASSERY ALONG WITH ENGLISH TRANSLATION.
- Exhibit P16 TRUE COPY OF THE ORDER DATED 3-11-2022 IN EA 91/2022.
- Exhibit P17 TRUE COPY OF THE AFFIDAVIT AND PETITION DATED 03.11.2011 FILED BY THE RESPONDENT ON 5-11-2022 AND WAS NUMBERED AS EA 96/2022 IN EP 17/2022.
- Exhibit P18 TRUE COPY OF THE COMPLAINT DATED 26-11-2022



ALONG WITH ENGLISH TRANSLATION.

- Exhibit P19 TRUE COPY OF THE ORDER DATED 14.12.2022 IN CRL MC NO.1594/2022 ON THE FILES OF THE SPECIAL JUDGE FOR THE TRIAL OF OFFENCES UNDER POCSO ACT, THALASSERY.
- Exhibit P20 TRUE COPY OF THE JUDGMENT DATED 23-03-2023 IN CRL MC NO.247/2023 ON THE FILES OF THE HONORABLE HIGH COURT.
- Exhibit P21 A TRUE COPY OF THE AFFIDAVIT AND PETITION FILED BY THE RESPONDENT IN IA NO.2/2022 IN OP (G&W) 197/2018 ON THE FILES OF THE HON'BLE FAMILY COURT, THALASSERY.
- Exhibit P22 TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE PETITIONER TO EXHIBIT P21 THAT IS IA NO.2/2022 IN OP (G&W) 197/2018 ON THE FILES OF THE HON'BLE FAMILY COURT, THALASSERY.
- Exhibit P23 TRUE COPY OF THE ORDER DATED 02.11.2023 IN IA 2/2022 IN OP (G&W) 197/2018 ON THE FILES OF THE HON'BLE FAMILY COURT, THALASSERY.
- Exhibit P24 TRUE PHOTOCOPY OF THE PHOTOGRAPHS OF THE PETITIONER AND THE CHILD RAYAN JOE MANOJ