



2024/KER/21051

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

&

THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

THURSDAY, THE 14TH DAY OF MARCH 2024 / 24TH PHALGUNA, 1945

OP(FC) NO.163 OF 2024

OPGW NO.2182 OF 2023 OF FAMILY COURT, MAVELIKKARA

PETITIONER/PETITIONER/RESPONDENT :-

SHAMNAD A, AGED 37 YEARS
S/O.LATE ABDUL MAJEED, VANIKAPURA THEKKATHIL VEEDU,
VEEYAPURAM MURI, VEEYAPURAM VILLAGE,
KARTHIKAPALLY TALUK, ALAPPUZHA DISTRICT,
PIN - 690 514

BY ADVS.
T.M.ABDUL LATHEEF
VAISHNAV DEV

RESPONDENT/RESPONDENT/PETITIONER :-

HUDA N
NAZAR, EAZHICHINETHU VEEDU, KADATHUR P.O,
THAZHAVA VILLAGE, KOLLAM DISTRICT, PIN - 690 523

BY ADVS.
BASIL CHANDY VAVACHAN
CHARUTHA BHAIJU(K/000413/2018)
CHANDHANA BHAIJU(K/001122/2022)
BASIL SAJAN(K/2266/2022)
FATHIM NAVAS(K/785/2023)
GEORGIE SIMON(K/001374/2001)
KAVYA P.R.(K/1157/2023)
LEKSHMI PRIYA V.(K/1025/2024)
BASIL SCARIA(D/8405/2018)

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON
14.03.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



JUDGMENT
Dated this the 14th day of March, 2024

Anu Sivaraman, J.

Heard the learned counsel appearing on either side.

2. The learned counsel appearing for the petitioner contends that the petitioner is the father of two minor children and respondent is the mother. The marriage between the petitioner and the respondent was solemnized on 10.4.2016. Since there were disagreements between the parties, a Talaq Mubarath agreement was entered into between the parties and it was decided to end the marriage by mutual consent. Accordingly, the Mubarath agreement was executed by the parties and O.P.(MMA) No.53/2022 was filed before the Family Court, Chavara and by Ext.P2, the marriage between the parties was dissolved on the basis of the extra judicial Mubarath agreement executed on 17.9.2022.

3. The learned counsel for the petitioner submits that Ext.P1 Mubarath agreement specifically stated that the custody of the minors would be with the petitioner and that the respondent could not file any case for getting their custody.



However, it is submitted that thereafter, the respondent mother preferred Ext.P4 OP(G&W) No.2182/2023 before the Family Court, Mavelikkara seeking custody of the children. The petitioner submitted objections and raised a question of maintainability pointing out that since the Mubarath agreement had specifically included the custody of the children, a fresh OP filed by the respondent mother is in violation of the Mubarath agreement and that the OP, if any, could have been filed only before the Family Court, Chavara since the said court had accepted the agreement and rendered a judgment. The learned counsel would also rely on the provisions of Sections 7 and 39 of the Guardians and Wards Act and contend that it is only the Family Court, Chavara which would have the territorial jurisdiction to consider the OP.

4. Section 7 of the Guardians and Wards Act reads as follows:-

“7. Power of the Court to make order as to guardianship.-

(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made-

(a) appointing a guardian of his person or property or both, or



(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this Section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

5. It is the contention of the learned counsel for the petitioner that it is only when a guardian appointed by will or other instrument or appointed or declared by the Court is removed that another person can be appointed as guardian in his stead. It is submitted that Section 39 provides for the removal of guardian and a guardian can be removed only for the reasons as stated in the said section. It is submitted that since the petitioner has been appointed as guardian by the Mubarath agreement which has been accepted by the Court, the consideration of the OP by another court without any reason would be illegal.

6. The learned counsel for the respondent would, on the other hand, contend that Ext.P2 would show that the only



question considered by the Family Court, Chavara was with regard to the dissolution of the marriage between the parties. It is submitted that a petition had been filed for declaration of the matrimonial status of the parties and taking note of the Mubarath agreement executed on 17.9.2022, the marriage stood dissolved. It is submitted that there was no finding with regard to the custody of the children in Ext.P2 and that the OP(G&W) was filed before the Family Court, Mavelikkara in view of the fact that the petitioner herein has the custody of the children at present and that the children are ordinarily resident within the jurisdiction of the Family Court, Mavelikkara. It is submitted that even if the Family Court, Chavara had passed an order with regard to custody, that would not deprive the jurisdiction of the Family Court, Mavelikkara within whose jurisdiction, the children ordinarily reside to consider the question of custody.

7. Having considered the contentions advanced, we notice that pursuant to a judgment rendered by us, the question of jurisdiction had been specifically considered by the Family Court, Mavelikkara. It was found that the OP is



presently filed by the mother seeking to declare her as a guardian of the minors and to get custody of the minors. Further, it was noticed that the petitioner and the respondent had approached the Family Court, Chavara seeking a declaration of their marital status and the application was accepted and the marriage was dissolved, taking note of the Mubarath agreement executed by them. It is stated that the judgment of the Family Court, Chavara did not consider the question of custody and that even in case, such an order was rendered on the custody, the Family Court where the children reside does not lose jurisdiction to consider the question of custody.

8. In the instant case, it is an admitted fact that the petitioner and consequently the children are residing within the jurisdiction of the Family Court, Mavelikkara. The question decided by the Family Court, Chavara was only with regard to the marital status of the parties. The order impugned in the OP only decides the question of maintainability and all other issues with regard to the changed circumstances and the necessity for a change in any agreement entered into between the



parties are still at large to be considered by the Family Court, Mavelikkara.

In view of the provisions of Section 9 of the Guardians and Wards Act and Section 7 of the Family Courts Act, we are of the opinion that the finding in the impugned order cannot be said to be illegal as to warrant any interference by this Court in this proceedings. The OP(FC) is, therefore, dismissed without prejudice to the contentions of the parties which are left open to be agitated in the OP.

**Sd/-
ANU SIVARAMAN
JUDGE**

**Sd/-
C. PRATHEEP KUMAR
JUDGE**

APPENDIX OF OP (FC) 163/2024

PETITIONER EXHIBITS :-

- Exhibit P1 COPY OF MUBARATH AGREEMENT WHICH EXECUTED ON 17.09.2022
- Exhibit P2 COPY OF JUDGMENT DATED 4.9.2023 IN O.P (MMA) 53/2022 OF FAMILY COURT, CHAVARA
- Exhibit P3 COPY OF PROGRESS REPORT ISSUED THE SCHOOL AUTHORITIES IN RESPECT OF THE ELDER SON OF THE PETITIONER
- Exhibit P4 COPY OF THE PETITION SUBMITTED BY THE RESPONDENT BEFORE THE FAMILY COURT, MAVELIKKARA AS OP (G&W) NO. 2182/2023 DATED 5/12/2023
- Exhibit P5 COPY OF PETITION IN I.A.NO. 1/2023 IN OP (G&W) NO. 2182/2023 WAS ALSO FILED FOR GIVING THE TEMPORARY CUSTODY OF THE CHILDREN DATED 5/12/2023
- Exhibit P6 COPY OF THE MAINTAINABILITY PETITION IA NO. 2/2024 FILED BY THIS PETITIONER IN OP (G&W) NO. 2182/2023 BEFORE THE FAMILY COURT, MAVELIKKARA DATED 6.1.2024
- Exhibit P7 COPY OF THE JUDGMENT PASSED IN O.P (FC) NO. 27/2024 IS DATED 30.1.2024.
- Exhibit P8 COPY OF THE FIR HOLDING CRIME NO. 18/2024 DATED 17.1.2024 REGISTERED BY THE POLICE, VEEYAPURAM
- Exhibit P9 COPY OF THE NOTICE DATED 29.1.2024 WITH NO. CWC/ALAPPUZHA O.P.NO.87, 88 /24
- Exhibit P10 TRUE COPY OF THE COMPLAINT DATED 29.01.2024 FILED BY THE RESPONDENT TO CWC, ALAPPUZHA
- Exhibit P11 TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER TO CWC, ALAPPUZHA DATED 7.2.2024
- Exhibit P12 TRUE COPY OF THE PROCEEDINGS IN O.P NO.87, 88/2024 OF CHILD WELFARE COMMITTEE, ALAPPUZHA



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RECEIVED THROUGH RTI DATED 26.2.2024.

Exhibit P13 TRUE COPY OF ORDER IN I.A.NO.2/2024 IN O.P (G&W)
2182/2023 DATED 22.2.2024

Exhibit P14 TRUE COPY OF THE I.A. NO.4/2024 O.P (G&W)
2182/2023 DATED 27.2.2024