

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V
&
THE HONOURABLE MR. JUSTICE P.M.MANOJ
FRIDAY, THE 24TH DAY OF MAY 2024 / 3RD JYAISHTA, 1946
MAT.APPEAL NO. 294 OF 2024

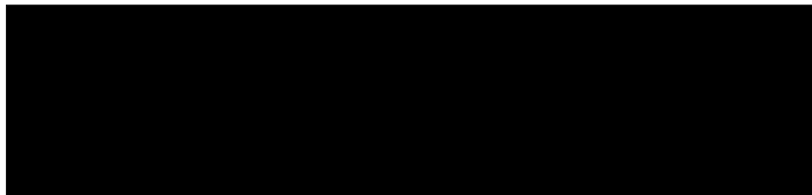
AGAINST THE JUDGMENT DATED 15.02.2024 IN OP NO.1502 OF 2019
OF FAMILY COURT, KOZHIKODE

APPELLANT/RESPONDENT:



BY ADVS. PRAVEEN K. JOY
FATHIMA SHALU S.
ARDRA ANIL
ALBIN VARGHESE
ABISHA.E.R
ANUPAMA NAIR
ADITHYA LAL
T.A.JOY
E.S.SANEEJ
M.P.UNNIKRISHNAN
N.ABHILASH
DEEPU RAJAGOPAL

RESPONDENT/PETITIONER:



BY ADVS.N.M.MADHU FOR PARTY RESPONDENT
C.S.RAJANI (K/2275/1999)

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON
24.05.2024, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

J U D G M E N T

Raja Vijayaraghavan, J.

This Mat. Appeal is preferred challenging the order dated 15.2.2024 in O.P.No.1502/2019 on the file of the Family Court, Kozhikode. The aforesaid petition was filed by the respondent seeking custody and declaration of guardianship of his minor daughter.

2. By the impugned order, the Family Court, taking note of the facts and circumstances, refused to grant the custody of the minor child and to appoint the father as the guardian. However, he was granted visitation right, contact rights, and custody as and when the petitioner, who is a sailor in the Merchant Navy, came on leave. The Family Court has accordingly granted the following reliefs to the respondent/father.

1. The petitioner/father is permitted to make audio or video call to the minor child on every Tuesdays and Fridays for 15 minutes in between 7 P.M and 8 P.M. of Indian Standard Time.
2. If the petitioner is here on leave respondent shall hand over the custody of the minor child on all Saturday from 8 A.M. till 8 P.M. of Sunday.
3. If the petitioner/father is here during Onam and Christmas holidays, the custody of the minor child is to be given to the

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petitioner for four days.

4. If the petitioner is here during summer holidays, respondent/mother shall hand over the custody of the minor child one week in the month of April and one week in the month of May.
5. Respondent/mother shall inform the petitioner regarding the entire aspects about the studies and other important matters of the child.

3. Being aggrieved by the directions issued, the petitioner/mother is before this Court.

4. Sri. Praveen K. Joy, the learned counsel for the petitioner, submitted that the Family Court erred in dismissing the petition for guardianship and permanent custody while simultaneously granting visitation and contact rights to the father. This decision, he contends, is unsustainable under the law. The court had correctly concluded that the mother was solely responsible for the child's care, and the child was happy, content and well-adjusted with her. Additionally, the Family Court acknowledged that the father works in the Merchant Navy and is at sea for 8-10 months each year. Considering these aspects, the Family Court determined that the mother was better suited to have custody and guardianship of the child. Given these findings, the counsel contends that there was no justification for the Family Court to grant overnight custody to the respondent/father. Furthermore, it was submitted that the child

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had been mentally disturbed and required counseling after witnessing the respondent's aggressive behavior towards the petitioner. Implementation of the Family Court's order would adversely affect the child's emotional and mental well-being, contends the learned counsel. The learned counsel concluded by emphasizing that in custody matters, the primary and paramount consideration must be the child's welfare.

5. Sri. N.M. Madhu, the learned counsel for the respondent, submitted that the respondent has not contested the Family Court's decision to deny his request for permanent custody and guardianship. The Family Court granted limited visitation rights and overnight custody during vacations for a few days. According to the learned counsel, the daughter is entitled to the care, affection, love, and protection of both parents. It would not be in the best interest of the growing child to lose social, physical, and psychological contact with either parent. The petitioner has no case that the respondent-father is unfit for visitation rights due to any character flaws, incompetence, or other justifiable reasons. The learned counsel argued that only in the most extreme circumstances should a parent be denied contact with their own child.

6. This Court, by order dated 8.4.2024, directed the parties to appear on 23.5.2024. We have engaged in a thoughtful interaction with both parties and the minor child. The child, aged approximately 11 years, conveyed

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to us that while she has no objection to daytime custody, she is reluctant to stay with her father for extended periods, including overnight custody. The petitioner harbors significant reservations regarding her child's company with the father.

7. We have considered the submissions advanced. We find that the Family Court while rejecting the prayer for guardianship and permanent custody has granted contact rights and overnight custody of the child for a few days during vacation and as and when the father comes on leave. Admittedly, the respondent is a sailor and he comes on leave only for a few months during the year.

8. In **Yashita Sahu**¹, the Apex Court emphasized that the welfare of the child is the primary and paramount consideration in custody matters. Technical objections should not impede this welfare. The court must consider the best interests of the child, rather than the views of one parent alone. Custody battles often portray one parent as a villain, which can harm the child. Therefore, courts must carefully evaluate the statements of both parents. The Apex Court noted that a child of tender years needs the love, affection, company, and protection of both parents, which is a basic human right. Parental conflicts should not deprive the child of care from either parent. Frequent separation and reunion can traumatize the child, so courts must meticulously

¹ Yashita Sahu v. State of Rajasthan [2020 KHC 6045]

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weigh all circumstances before determining custody arrangements. Even if custody is granted to one parent, the other should have sufficient visitation rights to maintain the child's social, physical, and psychological contact with both parents. Denial of contact should occur only in extreme cases with reasons provided. Courts must clearly define the specifics of visitation rights to ensure the child retains the love and affection of both parents. In **Vasudha Sethi and others v. Kiran V. Bhaskar and another**², the Apex Court held that when the court alters custody from one parent, it should generally grant visitation rights to the other parent, barring compelling reasons. This is because the child benefits from the company of both parents. Visitation rights are granted for the welfare of minors and to ensure they can maintain relationships with both parents, not merely to protect parental rights. The court emphasized that the child's well-being and welfare must take precedence over the individual rights of the parents. In **Rohith Thamma Gowda v. State of Karnataka**³, it was held that in the matter involving the question of custody of a child, it has to be borne in mind that the question 'What is the wish/desire of the child' is different and distinct from the question 'What would be in the best interest of the child'. Certainly, the wish/ desire of the child can be ascertained through interaction but then, the question as to 'what would be in the best interest of the child' is a matter to be decided by the court taking into account all the relevant

² [AIR 2022 SC 476]

³ [AIR 2022 SC 3511]

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circumstances. It was further held that while considering the claim for custody of a minor child, unless very serious, proven conduct should make one of them unworthy to claim for custody of the child concerned, the question can and shall be decided solely by looking into the question as to, 'what would be the best interest of the child concerned.

9. The precedents above emphasize that in matters of child custody, the primary and paramount consideration is always the welfare of the child. Technical objections should not hinder decisions when the child's welfare is at stake. The court must adopt a holistic view, considering the perspectives of both parents, and focus on what is truly in the best interest of the child, avoiding biases that arise from parental disputes. The child's well-being is central, and the love, affection, and company of both parents are essential, forming a basic human right for the child. The Court's duty and responsibility in custody disputes is to ensure that both parents maintain a healthy relationship with the child. Non-custodial parents should have sufficient visitation rights to prevent the child from losing social, physical, and psychological contact with either parent. Only in extreme circumstances should one parent be denied contact, and reasons must be clearly stated if this occurs. Courts are responsible for defining the nature, manner, and specifics of visitation rights to safeguard the child's continuous connection with both parents. The child's need for both parents' company takes precedence over the individual rights of the

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parents. In assessing custody, the court distinguishes between the child's wishes and what is genuinely in the child's best interest, taking into account all relevant circumstances.

10. In the light of the principles above, we have carefully evaluated the contentions and also the directions issued by the learned Family Court. We are of the view that all relevant aspects have been taken care of by the Family Court bearing in mind that the welfare of the child is the foremost concern. The Family Court has also upheld the right of the child to the love, care, and affection of both parents. In that view of the matter, we find no reason to interfere with the well-considered order passed by the Family Court.

11. Before parting, we would like to observe that in child custody battles, parents often engage in constant conflicts and hostile behaviour towards each other, inadvertently convincing the child that the other parent is the antagonist. This harmful dynamic and the habit of spewing venom at each other poison the child's perception, creating an environment where the child feels compelled to choose sides and view one parent in a negative light. Such action of the fighting parents is unhealthy and deplorable, as it undermines the child's sense of security and stability, fostering feelings of confusion, guilt, and emotional distress. The child who becomes embroiled in parental conflicts suffers long-lasting psychological effects. It is crucial for parents to recognize the detrimental impact of their disputes on their children and strive to present a

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united front, prioritizing the child's need for love and support from both parents.

This petition is dismissed.

sd/-

**RAJA VIJAYARAGHAVAN V
JUDGE**

sd/-

**P.M.MANOJ
JUDGE**

PS/25/5/2024