

(2024) 11 KL CK 0078

High Court Of Kerala

Case No: Review Petition Nof.581, 1003, 1005 Of 2024 In Original Petition (FC) No.683 Of 2023, 63, 108 Of 2024

Amith T.S.Vs Divya M.S.

APPELLANT

Vs

RESPONDENT

Date of Decision: Nov. 18, 2024

Hon'ble Judges: P.B.Suresh Kumar, J; C.Pratheep Kumar, J

Bench: Division Bench

Advocate: M.R.Venugopal, Dhanya P.Ashokan, S. Muhammad Alikhan, Praveen.K.Joy, E.S.Saneej

Final Decision: Allowed

Judgement

P.B.Suresh Kumar, J.

1. The issues arising for consideration in these review petitions are closely interlinked and they are, therefore, disposed of by this common order.

Parties are referred to in this order for convenience, as they appear in R.P.No.581 of 2024. The review petitioner is the petitioner in the original

petition, from which the said review petition arises viz, O.P.(FC) No.683 of 2023. The respondent is the respondent therein and the former wife of the

petitioner. The dispute relates to the custody of their minor child, Adwaith.

2. The petitioner filed G.O.P. 1537 of 2016 before the Family Court, Thrissur, seeking orders declaring him as the guardian of the child. The said

proceedings was disposed of based on a mediation settlement, in terms of which permanent custody of the child was given to the respondent, subject

to the visitation rights of the petitioner. Subsequently, when the respondent entered into a second marriage and relocated to Canada to pursue higher

studies entrusting the child with her parents in India, the petitioner filed I.A.No.20 of 2023 seeking orders granting permanent custody of the child to him by modifying the order passed in the proceedings, and I.A.No.40 of 2023, seeking orders permitting the petitioner to take the child to Dubai, where he is presently working, so as to enable the child to continue his education there. The petitioner also filed I.A.No.43 of 2023 seeking interim custody of the child pending disposal of I.A.Nos.20 and 40 of 2023.

3. When the petitioner preferred the above referred interlocutory applications, the respondent filed I.A.No.26 of 2023 seeking orders permitting her to take the child to Canada and I.A.No.27 of 2023 seeking orders modifying the visitation rights granted to the petitioner in terms of the order originally passed by the Court. The Family Court dismissed I.A.Nos.26 and 27 of 2023 and allowed I.A.Nos.20 and 40 of 2023 subject to the visitation rights of the respondent and her parents and also on condition that the child shall be taken to the place of employment of the petitioner, Dubai only in the ensuing academic year. I.A.No.43 of 2023 was closed on the same day in the light of the order passed on I.A.Nos.20 and 40 of 2023.

4. The petitioner filed O.P.(FC) No.683 of 2023 challenging the order passed by the Family Court in I.A.No.43 of 2023 with a prayer to modify the same and allow him to take the child to Dubai in the same academic year itself. The respondent filed O.P.(FC) No.63 of 2024 challenging the orders passed by the Family Court in I.A.Nos.20 and 40 of 2023 and O.P.(FC) No.108 of 2024 challenging the orders passed by the Family Court in I.A.Nos.26 and 27 of 2023.

5. This Court disposed of the original petitions by a common judgment, and the review of the said judgment is sought in these review petitions. The petitioner has grievance only against the order of the Family Court in I.A.No.43 of 2023 and consequently, he preferred only R.P.No.581 of 2024 initially, seeking review of the judgment in O.P.(FC) No.683 of 2023. The remaining review petitions were later filed by way of abundant caution, as it was apprehended that the petitioner may not be able to pursue R.P.No.581 of 2024 without seeking review of the orders passed in O.P.(FC) Nos.63 and 108 of 2024 also.

6. Heard the learned Senior Counsel for the petitioner as also the learned counsel for the respondent.

7. As noted, this Court disposed of the original petitions with a direction to the maternal grandparents to handover custody of the child to the petitioner

and permitting him to take the child to Dubai to enable the child to continue his education at Dubai as an interim measure, clarifying that as and when

the mother is able to take the child to Canada, she can move the Family Court with an application for custody. Paragraphs 2 and 3 of the order sought

to be reviewed read thus:

“2. Having considered all the contentions advanced, we are of the opinion that it is in the best interest of the child that interim custody is granted to the father

for the time being. The maternal grandparents shall produce the child before the Family Court, Thrissur on 02.03.2024. The interim custody shall be handed over to the

father, who has agreed to come down on the said date, from the premises of the Family Court. The father shall be permitted to take the child to his work place on

condition that all relevant details including the photostat copies of the passport, details of the residential address as well as clear details of the employment of the

father and the school where admission is taken for the child are provided before the Family Court. The father shall also swear to an affidavit undertaking to remain

bound by the orders of the Family Court, Thrissur and to abide by the orders passed by the said Court.

3. The mother is permitted to move the applications for VISA to take the child along with her to Canada as and when she completes her studies and has proper

employment and is able to take the child subject to the satisfaction of the Family Court. It is made clear that the interim custody granted to the father is purely an

interim measure and as and when the mother is able to take the child with her to Canada, she can move the Family Court with application for custody which shall be

duly considered in accordance with law by the Family Court. The respondent shall also make available the passport of the child and the TC before the Family Court,

Thrissur so that the father is enabled to take possession of the same and to take the child along with him.”

8. In the nature of the original petitions instituted before this Court, the issue that ought to have been considered was as to the correctness of the

orders passed by the Family Court in I.A.Nos.20, 26, 27 and 40 of 2023, and the said issue was not considered by this Court. Further, in the light of the order passed by the Family Court in G.O.P. No.1537 of 2016 and the orders on the above interlocutory applications, the question whether either of the parties is entitled to interim custody of the child, had not arisen at all for consideration. Inasmuch as the issue that arose for consideration in the matters has not been adjudicated, and inasmuch as the order sought to be reviewed proceeds on the premise that what is required to be considered is the question as to the interim custody of the child, we have no doubt in our minds that the order is vitiated by an error apparent on the face of the record.

9. Be that as it may, the learned counsel for the respondent submitted that no relief has been granted by this Court to the respondent in O.P. (FC)

Nos.63 of 2024 and 108 of 2024 and that she has accepted the decision in the said proceedings. According to the learned counsel, the petitioner

cannot, therefore, have any grievance about the decisions in O.P. (FC) Nos.63 of 2024 and 108 of 2024. Coming to the decision in O.P (FC) 683 of

2023, the submission made by the learned counsel for the respondent is that inasmuch as the petitioner has accepted and acted upon the decision in the

said original petition by receiving the custody of the child and taking him to his place of employment, the petitioner is estopped from seeking review of

that judgment. In order to reinforce the said contention, it was also pointed out by the learned counsel for the respondent that the petitioner has

instituted a proceedings before this Court under the Contempt of Courts Act to enforce the direction in the order in O.P. (FC) No.683 of 2023 that the

respondent shall make available the Transfer Certificate of the child before the Family Court. The learned counsel has placed reliance on the decision

of the Apex Court in *Budhia Swain v. Gopinath Deb*, (1999) 4 SCC 396, in support of the said argument.

10. No doubt, the right to seek vacation of a judgment may be lost by estoppel. Where one knowingly accepts the benefits of an order, he is estopped

from denying the validity of the same. But, this is a rule which is applied to ensure equity, and the same cannot be applied in such a manner so as to

violate the principles of what is right and of good conscience. It is apposite in this context to refer to a few paragraphs from the decision of the Delhi

High Court in *Avenue Realities and Developers Private Limited v. Income Tax*, 2012 SCC OnLine Del 1895 which explains and reiterates the said

proposition. The relevant paragraphs read thus:

“37. In America estoppel by acceptance of benefits is one of the recognised situations that would prevent a party from taking up inconsistent positions qua a contract or transaction under which it has benefited. American Jurisprudence, 2nd Edn., Vol. 28, pp. 677-80 discusses “estoppel by acceptance of benefits” in the following passage:

“Estoppel by the acceptance of benefits.”

38. Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.

39. As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.

40. This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience.”

The proposition aforesaid has been reiterated by the Apex Court in *Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem*

Development Corpn. Ltd., (2013) 5 SCC 470 also. The pointed question, therefore, is whether it is equitable on the facts and circumstances of the case, to deny relief to the petitioner in R.P. No.581 of 2024.

11. As noticed, the order sought to be reviewed is vitiated by a patent error on the face of the record. Every order of custody, whether interim or

permanent, could be varied on change of circumstances. As such, even the orders of the Family Court which were impugned before this Court in the

original petitions are liable to be varied, if circumstances warrant, at a later point of time. In the said view of the matter, if the records of this Court in

respect of a matter which would come up at a later point of time before the Family Court for consideration are not kept properly, the Family Court

which is bound by orders of this Court may not be able to exercise its jurisdiction properly in subsequent proceedings. That apart, there is no question of estoppel against a party where an error is committed by the court itself and the court is under a bounden duty to correct its own mistake. Be that as it may, as noticed, the grievance of the petitioner concerns the right conferred by this Court to the respondent to prefer application before the Family Court seeking permission to take the child to Canada on completing her studies and on obtaining employment, and the direction in the order that the permission given to the petitioner to take the child to the place of his employment is subject to that right of the respondent. This, according to us, is a windfall that the respondent has obtained on account of an error committed by this Court for, having regard to the various orders passed by the Family Court hitherto, the respondent is not entitled to such a right. It is with a view to sustain the benefit of the said order which she is not otherwise entitled to, according to us, the doctrine of approbate and reprobate is raised by the respondent to get the review petition dismissed on that ground. We have no doubt in our minds that it is for the same purpose, the respondent is now taking the stand that she has accepted the decisions impugned in O.P.(FC) Nos.63 of 2024 and 108 of 2024. Needless to say, it will be inequitable on the facts and circumstances of this case to hold that the petitioner has lost the right to seek vacation of the order in O.P. (FC) No.683 of 2023 by estoppel. In the result, the review petitions are allowed and the order sought to be reviewed is recalled. List the original petitions for hearing as per roster. Inasmuch as the petitioner has taken advantage of the order in O.P.(FC) No.683 of 2023, which has now been recalled, the respondent would be free to seek appropriate interim orders in the original petitions.