

(2013) 02 KL CK 0091

High Court Of Kerala

Case No: Matrimonial Appeal No. 219 of 2012

Rajan Menon

APPELLANT

Vs

Bindu U.

RESPONDENT

Date of Decision: Feb. 14, 2013**Acts Referred:**

- Hindu Marriage Act, 1955 - Section 13B, 26

Citation: (2013) 1 ILR (Ker) 931 : (2013) 1 KHC 798 : (2013) 2 KLJ 7 : (2013) 2 KLT 38**Hon'ble Judges:** Pius C. Kuriakose, J; P.D. Rajan, J**Bench:** Division Bench**Advocate:** G.S. Reghunath, Sri K. Rajesh Kannan, Sri A.S. Shammy Raj and Sri P. Shanes, for the Appellant; P. Bhaskaran and Sri V.K. Nandakumaran, for the Respondent**Final Decision:** Allowed

Judgement

Pius C. Kuriakose, J.

Under challenge in this appeal preferred by the appellant who is the husband of the respondent is the order of the Family Court, Thrissur in I.A. No. 6580/2011 in O.P. No. 238/2005. The prayer in the above I.A. filed by the appellant was to modify that final Order dated 30-9-2005 passed by the Family Court in O.P. No. 238/2005 and to issue appropriate directions so as to enable the appellant to enjoy visitation right over the appellant's minor daughter by name Pooja who has been entrusted to the permanent custody of the respondent mother. The court below did not become inclined to allow the application mainly for two reasons. The first reason was that the final order in O.P. No. 238/2005 was passed by the court below on a joint petition filed by the parties u/s 13B of the Hindu Marriage Act and that the said order only dissolves the marriage between the parties by a decree of divorce. That order does not contain any direction regarding the custody of the child. Hence, according to the court below, "there is nothing to be modified by this court". Yet another reason, which weighed the court below, is that the child admittedly resides at Malappuram along with its mother, a place within the territorial limits of Family

Court, Malappuram. Accordingly, the court below closed the I.A. giving liberty to the appellant to move the Family Court, Malappuram for getting appropriate directions regarding the custody of the child. Being aggrieved, the appellant has preferred this appeal on various grounds. Sri G.S. Raghunath, learned counsel for the appellant draw our attention to a judgment of another Bench of this Court in [Jasmine Vs. Kunhumon P.V.K.](#), to which one among us [PCK(J)] was party. It was submitted on the basis of that judgment that an application by any party in respect of custody of a minor in a finally disposed O.P. is maintainable in law. Learned counsel referred to Section 26 of the Act. According to the learned counsel this is a case where while passing the order in O.P. 238/05 the Family Court should have noticed paragraph 6 of the joint petition which is not in dispute at all and made a provision for visitation right for the petitioner.

2. The learned counsel for the respondent submitted that the impugned order does not suffer from any infirmity. He submitted that the child is presently ordinarily residing within the limits of Malappuram Family Court which means that the Thrissur Family Court which passed the impugned order does not have territorial jurisdiction to pass any order regarding the custody of the child. The petitioner cannot have any legitimate grievance about the impugned order as the petitioner has been permitted to initiate proceedings before the Malappuram Court.

3. In reply Sri Raghunath submitted that it is not open for the respondent to urge that the Thrissur Court does not have territorial jurisdiction to deal with custody matters. The Thrissur Court itself granted permanent custody of the child to the respondent knowing fully well that the child is ordinarily residing at Malappuram. The permanent custody was given exercising the power u/s 26. The power to exercise permanent custody will certainly include power to grant visitation rights.

4. We have given our anxious consideration to the rival submissions addressed at the Bar. We have carefully gone through the impugned order and the records which are available before us. Section 26 of the Hindu Marriage Act provides as follows:

Custody of children.--In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

5. According to us, the expression "any proceeding" under the Act takes within its ambit proceedings for dissolution of marriage also. It is on the basis of a joint

petition u/s 13B of the Hindu Marriage Act that the original order in O.P. 238/05 was passed by the Presiding Officer of the Family Court. In para 6 of the above joint petition to which the respondent and her counsel are signatories it is stated as follows:

The above said daughter of the petitioners named Pooja is now residing with 1st petitioner and in this regard it is mutually agreed that hereafter the said daughter will reside with the first petitioner and she will be living with the 1st petitioner at the place where the 1st petitioner is residing and the first petitioner will be maintaining her properly. The 2nd petitioner will be at liberty to see her and have company of her at the residence of the 1st petitioner shown above or at such place within Kerala if the residence of the 1st petitioner is changed, on any mutually agreed day during Onam, X'mas and Summer vacation. Such change of address has to be intimated to the 2nd petitioner or his parents sufficiently early. The 2nd petitioner may have telephonic conversation with the child on alternate Sundays or Saturdays or when some urgency arises.

6. Permanent custody of the child was given to the respondent in view of what was stated in paragraph 6. It is unfortunate that the Family Court noticed only one part of paragraph 6 and omitted to notice the latter part which says that the petitioner will have visitation rights on the child. Section 26 of the Hindu Marriage Act does enable the Family Court to make just and proper provisions in the decree with respect to custody, maintenance and education of minor children in any proceeding including proceedings for dissolution of marriage between the parents. In fact, the Family Court, Thrissur in its final order dated 30-9-2005 dissolving the marriage between the parents of Pooja, entrusted permanent custody of Pooja with her mother. It was invoking powers of section 26 that permanent custody of the minor was given to the mother. Invoking the very same powers visitation rights could have been given to the appellant father, especially as in the latter part of paragraph 6 of the joint petition filed u/s 13B, there is clear agreement providing for enjoyment of temporary custody and visitation rights by the father. The question of territorial jurisdiction should not have deterred the Family Court, Thrissur in this case where notwithstanding the absence of territorial jurisdiction permanent custody of the minor was given by the Family Court, Thrissur itself. The result of the above discussion is as follows:

The impugned order is set aside. I.A. No. 6579/11 is allowed. The Order dated 30-9-2005 passed in O.P. 238/05 is modified. The respondent is directed to entrust temporary custody of the minor Pooja to the petitioner during alternate days of Onam vacation, Christmas vacation and Summer holidays (day time only) so that not only the petitioner but also his parents who are the grand parents of the child can have company of the child during such periods of temporary custody.

Appeal is allowed. No costs.