

**(2011) 06 KL CK 0239**

**High Court Of Kerala**

**Case No:** O. P. (EC.) No. 1856 of 2011

Kunhi Purayil Mukundan Naveen

APPELLANT

Vs

Anjalika Dinesh

RESPONDENT

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**Date of Decision:** June 8, 2011

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 3 Rule 1
- Constitution of India, 1950 - Article 227
- Criminal Procedure Code, 1973 (CrPC) - Section 125
- Family Courts Act, 1984 - Section 10, 13, 21, 23, 5
- Hindu Marriage Act, 1955 - Section 13(1)
- Kerala Family Courts Rules, 1989 - Rule 19, 20, 21, 22, 23

**Citation:** (2011) 3 ILR (Ker) 111 : (2011) 3 KLJ 269

**Hon'ble Judges:** M.L. Joseph Francis, J; K.M. Joseph, J

**Bench:** Division Bench

**Advocate:** T.D. Rajalakshmi and Sri R. Sreehari, for the Appellant;

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**Judgement**

1. Petitioner has filed this original petition under Article 227 of the Constitution seeking the following prayer

(a) to issue a writ of mandamus or other appropriate writ, order or direction directing the Family Court, Kannur to receive the OP filed on behalf of the petitioner through his Power of Attorney Holder and number the same without insisting appearance of the petitioner in person at the time of filing the petition by setting aside the order Exhibit P-3.

2. Briefly put, the case of the petitioner is as follows: Petitioner is the husband of the respondent. The marriage between the petitioner and the respondent was solemnized on 17-8-2008. The relationship between the petitioner and the respondent was totally at wreck and the cordial relationship with the respondent

was impossible. Petitioner filed an application u/s 13(1)(a) of the Hindu Marriage Act on the ground of cruelty. Ext. P-1 is the unnumbered petition. Petitioner is employed abroad. He filed Ext. P-2 petition purporting to be under Rule 22 of the Civil Rules of Practice, Kerala praying that he may be permitted to appear through a Power of Attorney Holder who is his father. The said prayer has been rejected. Ext. P-3 is the order written on the reverse side of the petition. On the basis of Ext. P-3, the office has also returned the unnumbered original petition as is evident from the endorsement on the reverse side of Ext. P-1.

3. We heard the learned counsel for the petitioner. Learned counsel for the petitioner would submit that the impugned order passed by the Family Court cannot be sustained. He would draw our attention to Section 10 of the Family Courts Act, 1984 which reads as under:

10. Procedure generally.--(1) Subject to the other provisions of this Act and the Rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court.

Learned counsel for the petitioner, further drew our attention to Rules 3 and 4 of the Family Courts (Kerala) Rules, 1989 made u/s 23 of the Family Courts Act, 1984 by the Government in consultation with the High Court of Kerala.

Rule 3 of the Family Courts (Kerala) Rules, 1989 provides that all proceedings instituted before the Family Court shall be by way of petition, however, in respect of applications under Chapter DC of the Code of Criminal Procedure, 1973, the provisions of that Code will apply.

Rule 4 reads as under:

4. Filing of Petitions.--Every petition or application shall be accompanied by as many clear authenticated copies thereof as there are respondents to be served and by three additional copies for the use of the Court and by such papers as are referred to in the petition or application. One copy of such petition or application shall be forwarded by the Chief Ministerial Officer of the Family Court to the Principal Counsellor.

Thereafter, the learned counsel for the petitioner further invited our attention to Rule 5 of the Family Courts (Procedure) Rules, 1989 made by the High Court in exercise of the powers conferred by Section 21 of the Family Courts Act, 1984. Rule 5 reads as follows:

5. Institution of proceedings.--(i) Every case will be instituted in the Court of the Principal Judge, or the Court of such other Judge as may be designated by the

Principal Judge (or by sending a plaint, petition or application by registered post acknowledgment due to such Judge).

(ii) The Court to which a case has been allocated will be indicated in the list to be displayed in the notice board of the Court where it was instituted. The list will indicate when the party instituting the case is required to appear before the Court to which the case is allocated to take further orders.

(iii) in all cases where a case has been commenced by filing a plaint, petition or application by registered post, intimation of the Court to which the case is allocated will be sent by registered post at the address given. If the party instituting a case does not appear on the first date of hearing before the Judge, he shall send a notice, both by post and in the ordinary way, to the party instituting the case intimating the next date of hearing.

Further, Rule 7 provides as follows:

7. Preliminary Examination.--(i) Before issuing any process to the opposite party the Judge shall scrutinise the plaint, petition or application, and may discuss the matter with the petitioning party and off such advice as he thinks fit and may defer the issue of the process for the time being. The Judge may associate any social welfare organisation or other persons mentioned in Section 5 of the Act for this purpose.

(ii) If the plaint, petition or application has to be proceeded with, the notice shall be issued to the respondent intimating the date and time fixed for appearance in person.

Rule 9 contemplates power with the Family Court to permit representation of the parties by a lawyer.

The application filed by the petitioner praying that the Power of Attorney Holder may be permitted to represent the petitioner was filed under Rule 22 of the Civil Rules of Practice. It reads as under:

22. Party appearing by agent.--(1) When a party appears by an agent other than a pleader, the agent shall, before making any appearance or application, or doing any act before the Court, file in Court the power of attorney, or other written authority thereunto authorising him or a properly authenticated copy thereof; or, in the case of an agent carrying on a trade or business on behalf of a party without a written authority, an affidavit stating the residence of his principal, the trade or business carried on by the agent on his behalf and the connection of the same with the subject-matter of the suit, and that no other agent is expressly authorised to make such appearance, or application or do such act.

(2) The Judge may thereupon record in writing that the agent is permitted to appear and act on behalf of the party and until the said permission is granted, no appearance, application or act of the agent shall be recognised by the Court.

4. Learned counsel for the petitioner would also rely on the judgment of the Full Bench of this Court reported in *Satyabhama v. Ramachandran* 1997 (2) KLT 503 (F.B.). There in, the Court was dealing with the question whether the Family Court acts as a Civil Court or Criminal Court while disposing of applications filed u/s 125 of the Code of Criminal Procedure. He would also rely on Order 3 of Code of Civil Procedure, 1908. Order 3 provides for recognized agents and pleaders. Order 3 inter alia reads as under:

1. Appearances, etc. may be in person, by recognized agent or by pleader.-- Any appearance, application or act in or to any court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader (appearing, applying or acting, as the case may be) on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

Thereafter, the words "Recognized agents" is referred to as persons holding powers of attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties.

5. The learned counsel for the petitioner would also rely on the judgment of the Division Bench of this Court reported in *Abdul Salam v. Mariyumma* 2007 (1) KLT 713. That was a case which arose u/s 13 of the Family Courts Act. The husband filed a petition represented by his father, the power of attorney holder to set aside the ex parte order passed against him and to prosecute the petition through the power of attorney holder. Therein, the Court inter alia held as follows:

...When the party was away abroad, necessarily his duly constituted power of attorney holder can represent him for the purpose of prosecuting the case and to seek to set aside the ex parte order. Those should have to be decided on merit. In case, the presence of the husband is required for counseling or conciliation, necessarily at that time his presence can be insisted.

2. Permission to be represented in a suit by a duly constituted power of attorney does not disable in any manner, the court to pursue efforts for settlement of a case as provided in Section 9 of the Family Courts Act, 1984. Of course, in terms of Section 13 no party shall be entitled as of right to be represented by a legal practitioner. Right to be represented by a legal practitioner in a case and to be represented to prosecute or defend a case through a power of attorney holder when the incumbent is out of India, are different. The respondent has no case that the father of her husband, the duly constituted power of attorney, is a legal practitioner. In case the petitioner/husband does not appear in person for settlement talk or conciliation, upon direction by the Family Court or fails to attend counselling on the dates notified by the counsellor, nothing prevents the court to

take action against him on such default as provided in Rule 25 of the Family Courts (Kerala) Rules, 1989.

6. However, we notice the judgment of a Single Judge of this Court in *Karunakaran v. Vasanthi* 2009 (1) KLT 768. Therein, the learned Single Judge conducted a survey of the provisions including the Rules which we have also extracted and thereafter the learned Single Judge held as follows:

The Family Court is not to straightaway issue process on the filing of every application/complaint; it is to apply its mind, it is to apply its mind, discuss the matter with the petitioning party, and offer such advice as is necessary. At any rate, even issue of process for the first time is only optional. If necessary, issue of process can be deferred. Efforts to avoid unnecessary litigation and attempt harmony can even precede the issue of process and only thereafter need the court issue process in an appropriate case. The role of the court in this new jurisprudence of harmonious resolution of dispute is eloquently conveyed in the above rule to start with.

16. If the court decides to issue process under Rule 7 of the High Court Rules, under Rule 8 and 9 of the Rules process is issued specifying a date of appearance for the parties. On such date, the parties have to appear before court. On such day the proceedings are to be placed before the Judge of the Family Court. Rule 19 to 23 of the Rules deal with the role of the court at that stage. Under Rule 19 of the Rules the matter is to be placed for directions before the Judge of the

Family Court. The Judge is to keep apart a day in a week for issue of such directions. On that day along with the parties Counsellors are also expected to attend the Court. The parties must be present before the Court and are to be directed by the court to consult the specified Counsellor. The selection of the Counsellor must also be after due application of mind. This is very clear from Rule 19 to 23 of the Rules.

17. Then starts the process of counselling. The procedure thereof is prescribed broadly in Rule 24 to 38 of the Rules....

7. Learned counsel for the petitioner also relied on the judgment in [S.M. Syed Amina Beevi Vs. Thaika Sahib Alim and Another](#), rendered by a Single Judge of the Madras High Court. Therein the Court relied on Order 3 of the CPC and the Court inter alia held as under:

...Personal appearance, though, not initially required, becomes absolutely necessary after the appearance of the respondent to the proceedings. I am of the view that the petitioner shall be at liberty to present the application through a recognized or an authorised agent other than the legal practitioner as contemplated under Order 3, Rule 1 of the Code of Civil Procedure, and the Family Court at the same time is entitled to insist upon the personal appearance of the petitioner or any party concerned for the matter for all subsequent or further stages of the hearing after

the appearance of the respondent or from the stage of hearing even when the respondent fails to appear or remains ex parte to the proceedings. Subject to the above declaration of the position of law regarding the procedure to be followed and the duties and obligations of the petitioner to make personal appearance in Court before the Family Court, as and when so stipulated or directed or indicated by that Court the petitioner shall have the right to present the papers through a recognized agent other than a legal practitioner, as contemplated under 0.3, Rule 1 of the Code of Civil Procedure.

The Court took the view that the petitioner is entitled to have the papers filed or represented through a recognized agent in terms of Order 3, Rule 1 of the Code of Civil Procedure.

8. We have already noted that Section 10 of the Family Courts Act provides that subject to the other provisions of this Act and the Rules, the provisions of CPC would apply to procedure before the Family Court and the Family Court is deemed to be a Civil Court with all powers of Civil Court. Order III is part of Civil Procedure Code. It permits acts which may be done through a recognized agent unless otherwise expressly provided. No doubt, Rule 9 of the Family Courts (Procedure) Rules, 1989 provides for permission being granted to the parties to be represented by a lawyer in cases where the cases involves complicated questions of law or fact and if the Court is of the view that the party in person will not be in a position to conduct his case adequately or for any other reasons.

9. Rule 5 of the Family Courts (Procedure) Rules, 1989 in fact provides that the case may be instituted by sending the plaint, petition or application by registered post acknowledgment due to Judge. The Court to which a case has been allocated will be indicated in the list to be displayed in the notice board of the Court and the list will indicate when the party instituting the case is required to appear before the Court to which the case is allocated to take further orders. No doubt, in the Rules made by the High Court, Rule 7 specifically provides that the Judge shall scrutinize the plaint, petition or application and that he may discuss the matter with the petitioning party and offer such advice as he thinks fit and he may defer the issue of the process for the time being. The Judge may associate any social welfare organization or other persons mentioned in Section 5 for the purpose. Therefore, the Rules made by the High Court under the Family Courts Act in our view will prevail over any other Rules to the contrary. While it may be open to the party to present the petition either personally or even through a power of attorney holder when the matter is taken for preliminary examination the Family Court Judge has the power to insist upon personal appearance and to defer the issuance of summons to the opposite party. It is open to him as already noted to associate any social welfare organization or other persons mentioned in Section 5 of the Act for the purpose. This is the procedure which may in appropriate cases be employed by the Family Court for the fulfillment of the object of the Act to dissuade the party from persevering in the litigation. But,

as far as this case is concerned, the impugned order Ext. P-3 reads as follows:

Heard. The request of the Power of Attorney Holder to permit him to conduct the case on behalf of the Original Petitioner is refused since the case relates to Matrimonial dispute. Hence the application is rejected.

It is on the strength of the same, that the unnumbered OP was returned to the petitioner.

10. After bearing in mind the law brought to our notice and the legal provisions also having bearing on the subject which we have adverted to we are of the view that the impugned order of the Family Court cannot be sustained. Merely because it is a matrimonial dispute it does not mean that a party cannot institute proceedings through a duly constituted power of attorney holder. Having regard to the conspectus of provisions including Rule 7 of the Family Courts (Procedure) Rules, 1989 which also we have adverted to, the Family Court undoubtedly may have the power to defer issuance of notice to the opposite party in this case also and insist upon personal appearance at later stages also. In fact, learned counsel for the petitioner submits that if the Family Court on examination of the case finds it fit to advise the party or discuss the matter with him and to defer the issuance of notice for the time being, the petitioner is prepared to come. But, at the outset, without going into these aspects merely stating that it is a matrimonial case the refusal to entertain the application to permit the petitioner to be represented by his father as power of attorney holder cannot be sustained. We would think that the petitioner is fully justified in approaching this Court under Article 227. There has been illegality committed in refusing to entertain the application to allow the petitioner to be represented by a power of attorney holder on the ground that it is a matrimonial case. As observed by the Division Bench of this Court in *Abdul Salam v. Mariyumma* 2007 (1) KLT 713 and the Single Bench of this Court in *Karunakaran v. Vasanthi* 2009 (1) KLT 768 we would think that subject to the power of the Family Court to direct appearance of parties at any stage, the Family Court ought to have permitted the petitioner in this case to be represented by the power of attorney holder. We also notice that the power of attorney is not an Advocate as such. We also make it clear that permitting the petitioner to institute proceedings by a power of attorney will not detract from the power of the court to insist on personal appearance at any subsequent stage as contemplated in law.

11. We allow the Original Petition, set aside Ext. P-3 order and direct the Family Court, Kannur to take up I.A.No. 195/2011 and the unnumbered O.P. produced as Ext. P-1 before this Court and take a decision thereon in the light of the observations made in this judgment. The petitioner will file the returned papers for the aforesaid purpose.