



2023:KER:54326

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

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THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

FRIDAY, THE 25<sup>TH</sup> DAY OF AUGUST 2023 / 3RD BHADRA, 1945

OP (FC) NO. 445 OF 2023

AGAINST THE ORDER IN I.A NO.3/2022 IN I.A NO.1/2022 IN OP

1141/2017 OF FAMILY COURT, KOZHIKODE DATED 21.06.2023

PETITIONER/PETITIONER:

`X'

BY ADVS.  
JAMSHEED HAFIZ  
K.K.NESNA  
T.S.SREEKUTTY

RESPONDENT/RESPONDENT:

`Y'

BY ADV BHADRA KUMARI K.V.

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON  
25.08.2023, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:



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'C.R.'

**J U D G M E N T****A. Muhamed Mustaque, J.**

This original petition arises out of an order passed by the Family court, Kozhikode in an application filed by the mother for the return of the younger child. The younger child born in the wedlock was given to the custody of the father pursuant to Ext.P3 order. It is to be noted that the original petition itself was filed by the father and at a later stage, he not pressed the original petition. In that, an interim application was filed by the mother to get back the custody of the younger child. There are two legal issues germane for consideration.

2. whether the Family Court could have allowed a father to not press the original petition. According to us, this is a serious issue touching upon the jurisdiction of the Court. Though the Court is acting on the petition filed by the father, Court could not have closed it without ensuring that the welfare of the child is protected. It is to be noted that the Court had also passed an order, pending proceedings, giving custody of the younger child to the father. In the *parens-patriae*



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jurisdiction in which the Court stepped into, the Court has duty to see that child's interest is protected, especially when Court passes orders in the matter. The present dilemma arises before the Family Court when the mother has filed an application to return the younger child. We note that the issue should have addressed all questions relating welfare of the children in the matter. The matter has been pending since 2017. Many years lapsed and many orders have been passed, including by this Court also. We are of the view that the original petition itself has to be considered including the petition filed by the mother for return of the younger child.

3. We note, in the wrangling between the mother and the father, often interest of the children is not properly represented in such matter. In this matter the father happens to be a lawyer. He has shown smartness in this case by not pressing the original petition especially he knows that an interim order has been passed giving custody in his favour. The petitioner has a case that the consistent disappearance of the mother in the Court and non-prosecution of the case by her resulted in dismissing the original petition as not pressed. We record the said submission. Be that it may, the Court could not have allowed the request of the petitioner to



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dismiss the original petition especially when such an order has been passed giving interim custody of the minor child to the father.

4. We see that there are POCSO cases registered against the maternal grandparents. This indicate that, in the process, the interests of the children is sidestepped. We are of the view that the children in this matter should be represented by an independent counsel. We had the advantage of hearing Adv.Parvathi Menon, Project Coordinator, VRC, yesterday in a similar matter and she suggests appointing an independent counsel for the children in such matters to protect their welfare. Therefore, we are of the view that the Family Court, before proceeding further in this matter shall appoint a counsel through District Legal Services Authority, Kozhikode to represent the children independently. The District Legal Services Authority, Kozhikode is directed to find a suitable lawyer, who can render *pro bona* services and also to seek assistance of child psychologist to support the lawyer.

5. This original petition is therefore disposed of directing the Family Court to consider and dispose of the matter afresh. The matter shall be concluded within



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three months.

Registry shall forward a copy of this judgment to the Kerala State Legal Services Authority.

Sd/-

A.MUHAMED MUSTAQUE  
JUDGE

Sd/-

SOPHY THOMAS  
JUDGE

PR



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**APPENDIX OF OP (FC) 445/2023**

## PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF THE O.P. NO. 1141/2017 FILED BY THE PETITIONER HEREIN BEFORE THE FAMILY COURT KOZHIKODE DATED 31.01.2017
- Exhibit P2 TRUE COPY OF THE COUNTER FILED BY THE RESPONDENT IN O.P. NO. 1141/2017 BEFORE THE FAMILY COURT KOZHIKODE DATED 31.01.2017
- Exhibit P3 TRUE COPY OF THE COMMON ORDER IN IA.1068/2019 AND IA. 1148/2019 IN O.P. NO. 1141/2017 PASSED BY THE FAMILY COURT, KOZHIKODE DATED 11.10.2019
- Exhibit P4 TRUE COPY OF THE COMMON JUDGMENT IN OP(FC) 176/2019 AND OP(FC) 649/2019 DATED 12.12.2019 OF THE HON'BLE HIGH COURT OF KERALA
- Exhibit P5 TRUE COPY OF THE PROCEEDINGS PAPER OF THE FAMILY COURT, KOZHIKODE IN O.P. NO. 1141/2017
- Exhibit P6 TRUE COPY OF THE IA. 1/2021 IN O.P. NO. 1141/2017 BEFORE THE FAMILY COURT, KOZHIKODE FILED BY THE RESPONDENT DATED 09.02.2021
- Exhibit P6a TRUE COPY OF THE COUNTER IN IA. 1/2021 IN O.P. NO. 1141/2017 BEFORE THE FAMILY COURT, KOZHIKODE FILED BY THE RESPONDENT DATED NIL
- Exhibit P7 TRUE COPY OF THE IA. 3/2022 IN IA. 1/2021 IN O.P. NO. 1141/2017 BEFORE THE FAMILY COURT, KOZHIKODE FILED BY THE PETITIONER DATED 15.10.2022
- Exhibit P7a TRUE COPY OF THE COUNTER TO THE I.A



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3/2022 IN I.A 1/2021 IN O.P NO.  
1141/2017 BEFORE THE FAMILY COURT  
KOZHIKODE FILED BY THE PETITIONER  
DATED 13.12.2022

Exhibit P8

TRUE COPY OF THE ORDER IN IA. 3/2022  
IN IA. 1/ 2021 IN O.P. NO. 1141/2017  
PASSED BY THE FAMILY COURT, KOZHIKODE  
DATED 21.06.2023