

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

WEDNESDAY, THE 22ND DAY OF DECEMBER 2021 / 1ST POU SHA, 1943

MFA NO. 150 OF 2021

AGAINST THE ORDER/JUDGMENT IN OPGW 1139/2017 OF VI ADDITIONAL
DISTRICT COURT, ERNAKULAM

APPELLANT/RESPONDENT:

K.S.NARAYANA ELAYATHU,
AGED 45 YEARS
S/O.LATE SANKARAN ELAYATH, KESAMANGALATH ILLOM,
EROOR DESOM, NADAMA VILLAGE, THRI PUNITHURA-682 306.

BY ADV PAUL K.VARGHESE

RESPONDENT/PETITIONER:

SANDHYA,
AGED 38 YEARS
D/O.SURYANARAYANAN, MULLAPPALLY ILLOM, PARAPPUKARA
VILLAGE, MUKUNDAPURAM TALUK, THRISSUR DISTRICT-680
310.

BY ADV C.R.REGHUNATHAN

THIS MISC. FIRST APPEAL HAVING COME UP FOR ADMISSION ON
14.12.2021, THE COURT ON 22.12.2021 DELIVERED THE FOLLOWING:

**A.MUHAMED MUSTAQUE &
SOPHY THOMAS, JJ.**

C.R

M.F.A (G&W) No.150 of 2021

Dated this the 22nd day of December, 2021

J U D G M E N T

Sophy Thomas, J.

This appeal has been preferred by the respondent in O.P (G&W) No.1139 of 2017, challenging the proceedings of the Additional District Judge-VI, Ernakulam dated 22.11.2021.

2. O.P (G&W) No.1139 of 2017 was filed by Smt.Sandhya, mother of minor girl Nivedya, against the respondent, who is the father of the minor and husband of the petitioner. Due to strained marital relationship, the petitioner and respondent were living separately and the minor child was staying with her mother. Plaintiff schedule property was owned by the maternal grandmother of the minor child, and it was settled in her favour as per settlement deed No.1766/2012 of SRO, Tripunithura. The petitioner-wife filed that O.P for declaring her as the guardian of the person and property of the minor Nivedya.

3. The respondent-husband challenged the jurisdiction of the Family Court in entertaining that petition. He contended that the

District Court is not having jurisdiction, as the entire right of the District Court, by virtue of the Guardian & Wards Act, has been taken over by the Family Court as per Section 7 (1) explanation (g) of the Family Courts Act, 1984.

4. The District Court, after hearing the rival contentions raised by the parties, found that, when custody of the property of a minor is involved, the jurisdiction is with the District Court and so, that court has jurisdiction to entertain that O.P. In this appeal, the respondent-husband is challenging that finding.

5. Heard learned counsel for the appellant and the respondent.

6. The question to be considered here is, whether the District Court is having jurisdiction to entertain a petition for appointment of guardian for the person and property of a minor.

7. Learned counsel for the appellant contended that, matrimonial relationship between the appellant and the respondent was dissolved on mutual consent on 31.12.2015. Even prior to that, his mother executed a settlement deed in favour of his minor child on 21.05.2012, reserving life interest for the appellant in the property and the house situated therein. The respondent-wife filed O.P (G&W) No.1139 of 2017 before the Additional District Court-VI, Ernakulam, for appointing her as the guardian of the person

and property of the minor child. According to the appellant, Section 7(1) explanation (g) of the Family Courts Act, 1984 takes away the jurisdiction of the District Court, and so, the O.P is not maintainable before that court. Moreover he has filed OP No.931 of 2019 before the Family Court, Muvattupuzha, for getting custody of the minor child and it is still pending.

8. Section 7 of the Family Courts Act, 1984, lays down that a family Court shall have, and exercise all jurisdiction exercisable by any District Court or any subordinate civil Court under any law for the time being in force, in respect of suits and proceedings of the nature referred to in the Explanation which, inter alia, includes, according to clause (g), a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor. Section 8 of the Family Courts Act, specifically says that where a family Court has been established for any area, no District Court or any subordinate civil Court referred to, shall, in relation to such area, have or exercise any jurisdiction in respect of such suits or proceedings referred to, in the Explanation which includes clause (g). (relied on ***Abraham G Karimpanal and others vs. Nil*** – AIR 2004 Kar.321).

9. So, there is no doubt with regard to the fact that, in a suit or proceeding in relation to the guardianship of the person or the

custody of, or access to, any minor, the jurisdiction of the District Court is taken away by the Family Courts Act as per Section 7(1) explanation (g) of the Family Courts Act, 1984. But, when the question involved relates to appointment of guardian in respect of the property of minor, the Family Court has no jurisdiction, as that dispute is not coming under explanation (g) to Section 7(1).

10. In ***Devi Lal Bhagat vs. Rekha Bhagat*** reported in 2008 (3) KLT SN 14 (C No.16), the Jharkhand High Court held that, on a bare reading of Section 7(1) explanation (g) of the Family Courts Act, 1984 and Section 9 of the Guardian & Wards Act, 1890, 'it is manifestly clear that the suits and proceedings including the suit or proceeding where any question of guardianship of the person of any minor or his custody or access to him arises, whether governed by any personal law or the provisions to the Guardians and Wards Act, would be cognizable only by the Family Court, if the matter arises within the area over which the jurisdiction is exercisable by the Family Court. The Family Court has no jurisdiction if the question involved relates to appointment of guardian in respect of the property of a minor whether under personal law or any other law for the time being in force. However, in such suits or proceedings where question of appointment of a guardian for both purposes namely person and property of a minor

is involved, the Family Court would have no jurisdiction, as Clause (g) of the Act does not include proceeding in relation to property of a minor'.

11. A Single Bench of this Court had occasion to consider a similar issue in **Anitha Abraham vs. Jacob Oommen** reported in 2003 (1) KLT 417, in which this Court found that the Family Court has no jurisdiction to entertain an application to appoint a person as guardian of the property of the minor. The judgments in **Susila Naik vs. Judge, Family Court, Rourkela** (AIR 1988 Ori. 61) and in **Kamal V.M Allaudin vs. Raja Shaikh** (AIR 1990 Bom. 299) were also relied upon by the learned Single Judge to reach that conclusion.

12. In the case in hand, the mother of the minor child approached the District Court for appointing her as the guardian of the person and property of the minor Nivedya. Learned counsel for the appellant submitted that the appellant had filed O.P No.931 of 2019 before the Family Court, Muvattupuzha, for getting custody of the child under Section 7(1) explanation (g) of the Family Courts Act and it is pending consideration of that court. But, in O.P (G&W) No.1139 of 2017, the respondent is praying for declaring her as the guardian of the person and property of the minor. Since Family Court has no jurisdiction to entertain a petition for guardianship of

the property of the minor, no doubt, the jurisdictional District Court has to entertain that petition.

13. Section 7 of the Guardian & Wards Act, 1980 empowers the jurisdictional District Court to appoint a guardian of the person or property or both of a minor or to declare a person to be such a guardian, if the court is satisfied that, it is for the welfare of the minor. Section 8 of the Guardian & Wards Act sets out the class of persons on whose application alone, the court can exercise the power vested in it by Section 7. The court is exercising *parens patriae* jurisdiction to ensure the welfare and well-being of the minor.

14. Now let us see whether the District Court can entertain a suit or proceeding in relation to the guardianship of the person or the custody of, or access to any minor when the jurisdiction of the District Court is taken away by the Family Court, as per Section 7(1) explanation (g) of the Family Courts Act. The Family Courts are set up for the settlement of family disputes, to exclusively provide within the jurisdiction of the Family Courts, the matters relating to matrimonial relief including nullity of marriage, judicial separation, divorce, restitution of conjugal rights or declaration as to the validity of marriage or as to the matrimonial status of any person, the property of the spouses or of either of

them, declaration as to the legitimacy of any person, guardianship of a person or the custody of any minor, maintenance etc. etc. as seen from the statement of objects and reasons in the bill presented for the enactment of the Family Courts Act. The nature of suits and proceedings coming within the jurisdictional competence of a Family Court is enumerated in Section 7 of the Family Courts Act. When parties to a marriage or an erstwhile marriage seek guardianship of the person or the custody of, or access to their minor children, it is exclusively a suit or proceeding coming under explanation (g) to Section 7(1) of the Family Courts Act, and then the jurisdiction of a District Court or Subordinate Civil Court is taken away as per Section 8 of the Family Courts Act which reads thus:

“8. Exclusion of jurisdiction and pending proceedings.-Where a Family Court has been established for any area,-

(a) no district court or any subordinate Civil Court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),-

(i) which is pending immediately before the establishment of such Family Court before any District Court or subordinate Court referred to in that sub-section or, as the case may be, before any Magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established,

shall stand transferred to such Family Court on the date on which it is established”.

15. In the case in hand, the mother of the minor child approached the District Court to appoint her as the guardian of the person and property of the minor daughter Nivedya. The relief for appointing her as the guardian of the person of the minor is exclusively coming under explanation (g) to Section 7(1) of the Family Courts Act and so, the jurisdiction of the District Court with respect to that relief is taken away by the jurisdictional Family Court. The respondent/father has already filed a petition before the Family Court for getting custody of the minor daughter. If the District Court also is proceeding for appointment of guardian of the

person of the minor, it may result in conflicting decisions. So, as far as the dispute between parties to an erstwhile marriage regarding guardianship of the person, or the custody of, or access to their minor child, the jurisdiction of the District Court is taken away by the Family Court. The fact that a court cannot appoint a guardian of the person, is no bar for appointing a guardian of the property. Since the question regarding guardianship of the person of the minor between the parents of the minor is to be decided by a Family Court, the District Court cannot decide on that issue, especially when the proceedings initiated by the appellant for getting guardianship and custody of the minor child is pending consideration before a Family Court. In case of overlapping jurisdiction, it may result in contradictory orders, which may affect the welfare and well-being of the child, which is of paramount consideration. In suits or proceedings of the nature coming under explanation (g) to Section 7(1), the Family Court alone will get jurisdiction and the jurisdiction of the District Court is ousted, going by Section 8 of the Family Courts Act.

16. As far as the impugned proceedings of the District Court dated 22.11.2021 is concerned, with respect to the jurisdiction to entertain the petition for appointing guardian for the property of the minor, there is no illegality or impropriety which warrants our

interference. But, with respect to the appointment of guardian of the **person** of the minor, the District Court has no jurisdiction, as it is a dispute squarely coming under explanation (g) to Section 7(1) of the Family Courts Act. So, to that extent, the proceedings of the District Court is liable to be set aside. The District Court can proceed with the O.P for appointing guardian for the property of the minor, and not for the person of the minor.

This appeal is allowed in part to that extent. The District Court is directed to dispose the case, as expeditiously as possible. The parties shall suffer their respective costs.

Sd/-

**A.MUHAMED MUSTAQUE
JUDGE**

Sd/-

**SOPHY THOMAS
JUDGE**

smp