

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

TUESDAY, THE 15TH DAY OF FEBRUARY 2022 / 26TH MAGHA, 1943

OP (FC) NO. 290 OF 2020

AGAINST THE ORDER IN OP 30/2020 OF FAMILY COURT, PATHANAMTHITTA

PETITIONER/S:

NISHA HANEEFA
AGED 30 YEARS
W/O.ABDUL LATHEEF, RESIDING AT ALANKARATHU
PUTHENVEETIL, KULASEKHARAPATHY, KUMBAZHA MURI,
PATHANAMTHITTA VILLAGE, PATHANAMTHITTADISTRICT.

BY ADVS.
D.KISHORE
SMT.MEERA GOPINATH
SRI.R.MURALEEKRISHNAN (MALAKKARA)

RESPONDENT/S:

1 ABDUL LATHEEF
AGED 40 YEARS
S/O.ABDUL AZEEZ, RESIDING AT ALANKARATHU
PUTHENVEETIL, KULASEKHARAPATHY, KUMBAZHA MURI,
PATHANAMTHITTA VILLAGE, PATHANAMTHITTA DISTRICT, PIN-
689653.

2 ABDUL AZEEZ,
AGED 70 YEARS
S/O.ABDUL SHAREEF, RESIDING AT ALANKARATHU
PUTHENVEETIL, KULASEKHARAPATHY, KUMBAZHA MURI,
PATHANAMTHITTA VILLAGE, PATHANAMTHITTA DISTRICT, PIN-
689653.

3 FATHIMA BEEVI,
AGED 64 YEARS
W/O.ABDUL AZEEZ, RESIDING AT ALANKARATHU
PUTHENVEETIL, KULASEKHARAPATHY, KUMBAZHA MURI,
PATHANAMTHITTA VILLAGE, PATHANAMTHITTA DISTRICT, PIN-
689653.

BY ADVS.
SRI.M.V.RAJENDRAN NAIR
SMT.M.A.ZOHRA

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON
15.02.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

A.MUHAMED MUSTAQUE & SOPHY THOMAS, JJ.

O.P.(F.C).No.290/2020 “C.R.”

J U D G M E N T

Dated this the 15th day of February , 2022

A.Muhamed Mustaque, J.

PRELUDE: This original petition provides some insight into the powers of the Family Court. The Family Courts Act, 1984 was enacted for the establishment of the Family Courts to promote conciliation and speedy settlement of disputes relating to marriage and family. Over the years, our experience shows that the Family Court has been functioning in like manner of an ordinary Civil Court. Trained minds in adversarial litigation, from amongst both lawyers and Judges, have stereotyped the understanding of the powers and nature of functions of the Family Court. The Family Courts are not able to realise the very objective of its

function and the nature of power that can be exercised by them. The Family Courts are unique in the dispute resolution system in India. The unique feature has not gained the attention of the adjudicators, lawyers or litigants. The focus of the adjudication of the Family Courts is on the parties and not on the disputes. Forgetting this functional objective, the Family Court continues to act as an adjudicator of a normal Civil Court. This has resulted in a combative approach for litigants in all disputes before the Family Courts. The litigants before the Family Courts are aloof from the process. The lawyers continue to dominate the process and procedure. This edifice, built in and around the Family Court kept the litigant at bay, observing the process and procedure reflected through the orders or from the websites. The lawyers continue to deal with the cases, with rules of law and procedure, as exactly as they follow in an ordinary Civil Court. The presiding officer remains a neutral umpire, watchfully eyeing on the rules and procedure, to give a

verdict. The sad plight of the functioning of the Family Court, often, is portrayed before this Court by challenging the orders, invoking Article 227 of the Constitution. The very purpose of restricting the challenge to the final order has been lost as the Family Court is more engrossed in passing interim orders focusing on rights, obligations or disputes rather than focusing on the parties before them. Dissatisfaction with the administration of justice in the Family Courts is writ large on the face of many orders challenged before this Court. If the law and procedure override the system we follow, necessarily, it is bound to recapitulate in a hierarchical challenge. With this prelude, we shall now proceed to decide on the question posed before us regarding the foundational function of the Family Courts in India, "Do Family Courts have to remain as a neutral umpire of the real dispute between the parties?". We must answer it in negative, no doubt judges of Family Courts have to be impartial or neutral, but proceedings or processes are

not ordained to be away or aloof from making enquiry to find the truth of the real dispute.

2. The brief facts of the case are as follows:

The petitioner in O.P.No.30 of 2020 on the file of the Family Court, Pathanamthitta, is the petitioner herein. The claim is for realisation of patrimony and recovery of gold ornaments. The Family Court, suspecting collusive effort between the husband and wife as against the father and mother of the husband ordered an enquiry as follows:

The 2nd and 3rd respondents are directed to take steps to the VO concerned, Tahsildar and SP to file report whether the petitioner and 1st respondent are residing separately or together, if residing separately from which date they are separated, adjourned to 17.04.2020.

The claim is against the husband and the in-laws. The in-laws of the petitioner contended that the petitioner and the husband colluded together. The present petition is only to counter the action of the second respondent who is the father

of the husband, who revoked the settlement deed executed in favour of the husband.

3. We shall now advert to the powers of the Family Court to understand the nature, scope and powers of the Family Court under the Family Courts Act.

3(i). Section 9 mandates the Family Court to make efforts for settlement in the first instance.

9. Duty of Family Court to make efforts for settlement.-- (1) In every suit or proceeding, endeavour shall be made by the Family Court in the first instance, where it is possible to do so consistent with the nature and circumstances of the case, to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceeding and for this purpose a Family Court may, subject to any rules made by the High Court, follow such procedure as it may deem fit.

(2) If, in any suit or proceeding, at any stage, it appears to the Family Court that there is a reasonable possibility of a settlement between the parties, the Family Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such a settlement.

(3) The power conferred by sub-section (2) shall be in addition to, and not in derogation of any other power of the Family Court to adjourn the proceedings.

3(ii). Section 10 deals with the procedure to be followed by a Family Court. Section 10 reads thus:

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.

(2) Subject to the other provisions of this Act and the rules, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) or the rules made thereunder, shall apply to the proceedings under Chapter IX of that Code before a Family Court.

(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other.

In this context, the power referred under Section 10(3) would be a relevant factor for further elucidation.

3(iii). It is also important to refer to the power of the Family Court under Section 14. Section 14 reads thus:

14. **Application of Indian Evidence Act, 1872.**-A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872).

4. A combined reading of Sections 9, 10 and 14 would clearly bring out the point that the Family Court is not the mirror of an ordinary Civil Court. The powers of the Family Court can be summarized as follows:

(i) Adjudicative power following the rules of procedure as applicable under the adversarial system.

(ii) Proactive role for settlement of disputes between the parties.

(iii) Inquisitorial power to enquire into the truth of the matter.

5. The above enumerated powers are only for the Family Court. That distinguishes it from an ordinary Civil Court. More interestingly, it is to be noted that as reflected from Section 10(3), the Family Court is given the power to lay down its own procedure with a view to arrive at

settlement, or to enquire into the truth of the facts alleged. The power to choose the mode of procedure itself sufficiently indicates that the Family Court is not bound by any strictness of procedure of law as referred in the Code of Civil Procedure, the Indian Evidence Act, Criminal Procedure Code etc. What is essential in a dispute before the Family Court is that the Family Court is only to devise procedure for fair conclusion of the proceedings. If the Family Court is able to adhere to the "fairness", the decision or order of the Family Court cannot be questioned in a higher Court. The Family Court is given complete freedom in devising fair procedure for speedy resolution of disputes before the said Court.

6. The role of the presiding officer in the Family Court needs to be stressed herein. As already adverted to, in all matters, what is required by the Family Court is a fair approach in dealing with the cases before it. In many of the matters like custody, maintenance, matrimonial status etc.,

the responsibility of the Court is to find out the truth. The focus of the enquiry is to be on the objectives to be secured rather than focusing on the subjective element of the dispute. The very purpose of entrusting family disputes to the Family Court from ordinary Civil Court is to focus not on the rights and obligations of the disputants but on the interest of the parties and welfare of the subject of the dispute. It is also to be remembered that the disputes amenable before the Family Court sometimes may require to follow the rules of adversarial litigation. But that does not mean that the Family Court Judge is restrained from conducting enquiry related to the truth as, in an inquisitorial model. To find out the truth, the Family Court does not require the consent of the parties. If fairness is reflected in any of the approaches, such an approach is clothed with legal protection.

7. The Delhi High Court in **Kusum Sharma v. Mahinder kumar Sharma** [2015 SCC OnLine Del 6793] considered the

power of the Family Court to elicit truth and observed that it is the duty of the Court to ascertain the truth regarding the true income of the parties and to pass appropriate orders in accordance with merits. It is further stated that truth is the foundation of justice; dispensation of justice based on truth is an essential feature of the justice delivery system. No doubt, our Family Court has the power to elicit and find out truth, and the responsibility lies on the Family Court Judge to find out truth, adhering to fair principles.

8. The Family Courts Act also envisages the establishment of institutions or organisations engaged in social welfare to assist the parties. This is with the objective to protect the welfare of the family or to help the Family Court in arriving at expedient and efficacious resolution of the disputes before it. As seen from Sections 5 and 12 of the Family Courts Act, such measures as referred therein will have to be taken to protect the welfare of the family or for

the resolution of the disputes. In many of the matrimonial disputes, assistance of professional doctors qualified in psychiatry, endocrinology, psychologists, etc. would help to resolve the disputes. These statutory provisions appear to have not been followed in the State. The Government has framed Rules in this regard. Rule 56 of the Family Court (Kerala) Rules, 1989 and Rules 4 and 7 of the Family Courts (Kerala) Additional Rules, 1990 would contemplate the institutional forum of assistance through experts or professionals. All these statutory provisions clearly would indicate that apart from the resolution of disputes in the manner indicated therein, the Family Court needs to embark upon enquiry to protect the welfare of the family. Many of the disputes can be resolved other than by taking measures to promote the welfare of the parties; by assisting parties to arrive at a mutually agreed settlement. Unidentified personality disorders, behavioural problems, hormonal imbalances may sometimes cause a rift in marital

relationships. In the absence of medical expert's assistance, the parties may not be in a position to identify their problems. If the court resolves to render assistance to rectify or cure such problems of the parties with medical experts, the parties themselves may choose to resolve the disputes. We have hardly found any such steps being taken by the Family Courts in the State. It is appropriate, the Registrar (District Judiciary) files a report before this Court as to the existence of such assistance in the Family Court as mandated under the statutory provisions in Sections 5 and 12 of the Family Courts Act and also under the Rules referred therein.

9. Coming back to this case, we have no doubt that the Family Court was justified in passing an order to find out the truth through public officials. No prejudice will be caused if the real facts are brought before the Court. If it was a collusive effort, certainly it is a matter which requires consideration, before the conclusion of the proceedings. We

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find no reason to interfere with the impugned order as no jurisdictional error is committed by the Family Court. The order is consistent with the power. We, therefore, dismiss this original petition. No costs.

10. The Registrar (District Judiciary) shall file a report before this Court by next posting in regard to the matters referred to in para.8. Post on 6/4/2022 for perusing the report.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

Sd/-

SOPHY THOMAS, JUDGE

smp/ms

APPENDIX OF OP (FC) 290/2020

PETITIONER EXHIBITS

- EXHIBIT P1 TRUE COPY OF THE O.P.NO.30/2020 ON THE FILE OF FAMILY COURT, PATHANAMTHITTA.
- EXHIBIT P2 TRUE COPY OF THE AFFIDAVIT AND PETITION IN I.A.NO.1/2020 IN O.P.NO.30/2020 ON THE FILE OF FAMILY COURT, PATHANAMTHITTA.
- EXHIBIT P3 TRUE COPY OF THE OBJECTION FILED BY RESPONDENTS 2 AND 3 TO EXHIBIT P2.
- EXHIBIT P4 TRUE COPY OF THE ORDER DATED 17.03.2020 IN O.P.NO.30/2020 ON THE FILE OF FAMILY COURT, PATHANAMTHITTA.

RESPONDENTS EXTS.

- EXHIBIT R2 (a) TRUE COPY OF THE ORDER NO.C4/8613/2019/K.DIS/DT. 6/12/2019 OF MAINTENANCE TRIBUNAL AND RDO ADOOR
- EXHIBIT R2 (b) TRUE COPY OF THE FIR NO.0056/2020 DT 10/1/2020 REGD BY PATHANAMTHITTA POLICE STN
- EXHIBIT R2 (c) TRUE COPY OF THE ORDER NO.DCPTA/813/2020-B3 DT.23/10/2020 OF THE MAINTENANCE APPELLATE TRIBUNAL, PATHANAMTHITTA
- EXHIBIT R2 (d) TRUE COPY OF THE ORDER DT.19/1/2021 IN IA 1769/2019 IN OS 435/2019 OF MUNSIFFS COURT, PATHANAMTHITTA.
- EXHIBIT R2 (e) TRUE COPY OF INTERIM ORDER IN WPC 2529/2021 DT 1/2/2021