

Don Paul vs Tisa Don

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Court : Kerala

Decided On : Oct-12-2023

Judge : Honourable Mr. Justice Amit Rawal, Honourable Mrs. Justice C.S. Sudha

Appeal No. : MA (EXE.)/7/2023

Appellant : Don Paul

Respondent : Tisa Don

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE AMIT RAWAL & THE HONOURABLE MRS. JUSTICE C.S. SUDHA THURSDAY, THE 12TH DAY OF OCTOBER 2023 / 20TH ASWINA, 1945 MA (EXE.) NO. 7 OF 2023 AGAINST THE ORDER/JUDGMENT IN EP 15/2023 DATED 31.05.2023 OF FAMILY COURT, KOTTAYAM AT ETTUMANOOR

APPELLANT/DECREE HOLDER/PETITIONER: DON PAUL AGED 40 YEARS S/O. PAUL PAUL, THENGUMPALLY HOUSE, MANJOOR P.O. MANJOOR VILLAGE, KOTTAYAM., PIN - 686603 BY ADVS. M.A.SULFIA THUSHARA C. PULICKEL ABDUL JALEEL.A RESPONDENT/JUDGMENT DEBTOR/RESPONDENT: TISA DON AGED 35 YEARS D/O. GEORGE KUIAKOSE, PALACKAL HOUSE,

BUS STAND ROAD, VAIKOM P.O. KOTTAYAM, PIN - 686141 BY ADVS. ABRAHAM P.GEORGE M.SANTHY(K/001410/1999) THIS MAT APPEAL (EXECUTION) HAVING COME UP FOR ADMISSION ON 12.10.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Amit Rawal, J.

1. The present Matrimonial Appeal has been filed against the order dated 31.05.2023 whereby the custody of the child was given to respondent-wife, the judgment debtor and execution petition was closed.

2. Learned counsel appearing on behalf of the petitioner-

husband submitted that the husband previously filed a matrimonial appeal bearing No.216/2019 against the judgment and decree dated 31.01.2019 in O.P.No.810/2015. As per the decree in the aforementioned OP, custody of the child who was 7 years old at the relevant point of time was denied but visitation right was protected. This Court vide judgment dated 11.01.2023 disposed of the appeal with the following directions:

11. The child being a girl of aged 7 years, she shall be in

the custody of the mother. No doubt, the father shall be afforded with sufficient opportunity to interact with the child, which will enable to maintain an emotional connect between

them. As held by the Apex Court in the aforesaid decision, love and affection from both parents are absolutely necessary for the proper upbringing of the child. In order to inculcate social and cultural values in the child also, the care and protection from both parents are necessary. Taking all such aspects into account, we find that the order of the Family Court allowing the respondent to retain custody of the child is not liable to

be interfered with. However, there shall be a direction regarding the entitlement of the appellant to have interim custody of the child. We direct that the appellant shall be allowed to have interaction with the child on every Saturday between 10.00 a.m. and 3.00 p.m. The appellant shall be given custody of the child for five days each during Onam and Christmas holidays. During the summer vacation, he shall be allowed to have custody of the child for 15 days. Periods of such custody shall be during the first half and second half alternately. The custody shall be given and taken back in the premises of the St.George Church, Thalayolaparambu. The appeal is disposed of

accordingly.

3. Thereafter, a review petition No.193/2023 was filed.

The Division Bench of this Court vide order dated 07.03.2023 modified the judgment dated 11.01.2023 in Matrimonial Appeal No.216/2019 with the following observations:

5. An order regarding custody of a child has to be passed

taking into account facts and circumstances of each case. Therefore, provision for video call is not an invariable rule. So absence of making a provision for video call in this case cannot be said to be an error apparent on the face of the record. However, considering the entire facts and circumstances of this case, we are of the view that a few modifications to the directions regarding the custody of the child in the judgment dated 11.01.2023 will be appropriate and amiable to the welfare of the child. The appellant can be allowed to have interaction with the child on every Saturday from 9 a.m. to 5 p.m. The appellant can also be allowed to make video calls on every Tuesday and Thursday for 10 minutes between 8.00 p.m. and 8.30 p.m. Period of custody of the child to be given to the appellant during Onam and Christmas holidays shall be the first five days of the holidays and during summer vacation shall be

the first 15 days of the vacation. With the aforesaid modifications to the judgment dated 11.01.2023 in Mat.Appeal No.216 of 2019, R.P.No.193 of

2023 is disposed of and R.P.No.211 of 2023 is dismissed.

4. Learned counsel appearing on behalf of the petitioner-

husband submitted that the order passed by this Court in the review petition was not complied with necessitating the husband to institute contempt case No.881/2023. This Court vide order dated 05.04.2023 observed that the decree was executed and dismissed the petition with liberty to seek execution petition. It was further contented that the Trial Court misconstrued the orders aforementioned, ought not have closed the execution petition by handing over the custody of the child to the respondent-wife.

5. On the other hand, learned counsel appearing on behalf

of the respondent do not deny that the order challenged is non- speaking, there should have been a decree, rightly so there is a compliance of the orders of the court.

6. We have heard the learned counsel for the parties and appraised the paper book.

7. On perusal of the operative part of the Matrimonial

appeal and the modified order much less the observation recorded in the contempt petition permitting the parties to seek the execution, we are of the view that, Trial Court did not take into consideration the modified order passed by this Court whereby the custody of the child already been given to the father and the petitioner- decree holder had no other opportunity but to seek the execution of the same by filing execution petition in view of the observations recorded in the order dated 07.03.2023. But instead of adhering to such directions, the Trial Court, in our view, erroneously and capriciously closed the execution petition. The

order impugned reads thus:

The child produced after the court had raised taken

up in the chamber. The child entrusted back to the Judgment

Debtor. EP closed.

8. Without commenting further, we set aside the order and

allow the petition and direct the Trial Court to continue with the execution petition in accordance with law as per the observation recorded in the order dated 07.03.2023. Appeal stands disposed off. Sd/- AMIT RAWAL JUDGE Sd/- C.S. SUDHA JUDGE nak APPENDIX OF MA (EXE.) 7/2023 PETITIONER ANNEXURES ANNEXURE A1 THE TRUE COPY OF THE JUDGMENT DATED 11.01.2023 IN MAT APPEAL 216/2019 OF HONORABLE HIGH COURT ANNEXURE A2 THE TRUE COPY OF THE JUDGMENT DATED 05.04.2023 IN CON.CASE (C) NO. 881/2023 OF HONORABLE HIGH COURT ANNEXURE A3 THE TRUE COPY OF COURT PROCEEDINGS DATED NIL IN EP.NO.15/2023 ANNEXURE A4 THE TRUE COPY OF EA 7/2023 DATED APPELLANT ANNEXURE A5 THE TRUE COPY OF MOBILE TEXT MESSAGES FROM 01.04.2023 TO 10.06.2023 WHICH WAS SENT BY THE APPELLANT TO THE RESPONDENT ANNEXURE A6 THE TRUE COPY OF EP 15/2023 DATED FAMILY COURT KOTTAYAM, ETTUMANOOR RESPONDENT ANNEXURES ANNEXURE R (A) TRUE PHOTOCOPY OF THE EXTRACT OF TEXT MESSAGES ON 18.02.2023 BETWEEN THE PETITIONER AND RESPONDENT. ANNEXURE R (B) TRUE PHOTOCOPY OF THE TEXT MESSAGE DATED 25.03.2023 BETWEEN THE PETITIONER AND RESPONDENT. ANNEXURE R (C) TRUE PHOTOCOPY OF THE COMPLAINT LODGED BY THE RESPONDENT DATED 19.05.2023 BEFORE SHO KADUTHURUTHY POLICE STATION ANNEXURE R (C-1) TRUE TYPEWRITTEN COPY OF ANNEXURE R ANNEXURE R (D) TRUE PHOTOCOPY OF THE RECEIPT DATED 19.05.2023 ISSUED FROM KADUTHURUTHY POLICE STATION PETITIONER ANNEXURES ANNEXURE A7 THE TRUE COPY OF THE ORDER DATED HONORABLE HIGH COURT.

