



2024:KER:85356

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

MONDAY, THE 18TH DAY OF NOVEMBER 2024 / 27TH KARTHIKA,
1946

RP NO. 581 OF 2024

AGAINST THE JUDGMENT DATED 23.02.2024 IN OP (FC) NO.683
OF 2023 OF HIGH COURT OF KERALA

REVIEW PETITIONER/PETITIONER:

BY ADVS.
M.R.VENUGOPAL
DHANYA P.ASHOKAN (SR.)
S. MUHAMMAD ALIKHAN

RESPONDENT/RESPONDENT:

BY ADVS.
PRAVEEN.K.JOY
E.S.SANEEJ(K-224/2014)

THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON
22.10.2024, ALONG WITH RP.1003/2024 AND CONNECTED CASES,
THE COURT ON 18.11.2024 DELIVERED THE FOLLOWING:

R.P. No.581 of 2024
in OP(FC) 683 of 2023 & con cases

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

MONDAY, THE 18TH DAY OF NOVEMBER 2024 / 27TH KARTHIKA,

1946

RP NO. 1003 OF 2024

AGAINST THE JUDGMENT DATED 23.02.2024 IN OP (FC) NO.63 OF
2024 OF HIGH COURT OF KERALA

REVIEW PETITIONER/RESPONDENT:

BY ADVS.
M.R.VENUGOPAL
DHANYA P.ASHOKAN (SR.)
S. MUHAMMAD ALIKHAN
ANJANA S. RAJ

RESPONDENT/PETITIONER:

R.P. No.581 of 2024
in OP(FC) 683 of 2023 & con cases

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**BY ADVS.
PRAVEEN.K.JOY
E.S.SANEEJ(K-224/2014)**

**THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON
22.10.2024, ALONG WITH RP.581/2024 AND CONNECTED CASES,
THE COURT ON 18.11.2024 DELIVERED THE FOLLOWING:**

R.P. No.581 of 2024
in OP(FC) 683 of 2023 & con cases

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

MONDAY, THE 18TH DAY OF NOVEMBER 2024 / 27TH KARTHIKA,

1946

RP NO. 1005 OF 2024

AGAINST THE JUDGMENT DATED 23.02.2024 IN OP (FC) NO.108

OF 2024 OF HIGH COURT OF KERALA

REVIEW PETITIONER/RESPONDENT:

BY ADVS.
M.R.VENUGOPAL
DHANYA P.ASHOKAN (SR.)
S. MUHAMMAD ALIKHAN
ANJANA S. RAJ

RESPONDENT/PETITIONER:

R.P. No.581 of 2024
in OP(FC) 683 of 2023 & con cases

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**BY ADVS.
PRAVEEN.K.JOY
E.S.SANEEJ(K-224/2014)**

**THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON
22.10.2024, ALONG WITH RP.581/2024 AND CONNECTED CASES,
THE COURT ON 18.11.2024 DELIVERED THE FOLLOWING:**

R.P. No.581 of 2024
in OP(FC) 683 of 2023 & con cases

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C.R.

P.B.SURESH KUMAR & C.PRATHEEP KUMAR, JJ.

R.P. No.581 of 2024 in O.P.(FC) No.683 of 2023,
R.P. No.1003 of 2024 in O.P.(FC) No.63 of 2024
and
R.P. No.1005 of 2024 in O.P.(FC) No.108 of 2024

Dated this the 18th day of November, 2024

ORDER

P.B.Suresh Kumar, J.

The issues arising for consideration in these review petitions are closely interlinked and they are, therefore, disposed of by this common order. Parties are referred to in this order for convenience, as they appear in R.P.No.581 of 2024. The review petitioner is the petitioner in the original petition, from which the said review petition arises viz, O.P.(FC) No.683 of 2023. The respondent is the respondent therein and the former wife of the petitioner. The dispute relates to the custody of their minor child, Adwaith.

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2. The petitioner filed G.O.P. 1537 of 2016 before the Family Court, Thrissur, seeking orders declaring him as the guardian of the child. The said proceedings was disposed of based on a mediation settlement, in terms of which permanent custody of the child was given to the respondent, subject to the visitation rights of the petitioner. Subsequently, when the respondent entered into a second marriage and relocated to Canada to pursue higher studies entrusting the child with her parents in India, the petitioner filed I.A.No.20 of 2023 seeking orders granting permanent custody of the child to him by modifying the order passed in the proceedings, and I.A.No.40 of 2023, seeking orders permitting the petitioner to take the child to Dubai, where he is presently working, so as to enable the child to continue his education there. The petitioner also filed I.A.No.43 of 2023 seeking interim custody of the child pending disposal of I.A.Nos.20 and 40 of 2023.

3. When the petitioner preferred the above referred interlocutory applications, the respondent filed I.A.No.26 of 2023 seeking orders permitting her to take the child to Canada and I.A.No.27 of 2023 seeking orders

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modifying the visitation rights granted to the petitioner in terms of the order originally passed by the Court. The Family Court dismissed I.A.Nos.26 and 27 of 2023 and allowed I.A.Nos.20 and 40 of 2023 subject to the visitation rights of the respondent and her parents and also on condition that the child shall be taken to the place of employment of the petitioner, Dubai only in the ensuing academic year. I.A.No.43 of 2023 was closed on the same day in the light of the order passed on I.A.Nos.20 and 40 of 2023.

4. The petitioner filed O.P.(FC) No.683 of 2023 challenging the order passed by the Family Court in I.A.No.43 of 2023 with a prayer to modify the same and allow him to take the child to Dubai in the same academic year itself. The respondent filed O.P.(FC) No.63 of 2024 challenging the orders passed by the Family Court in I.A.Nos.20 and 40 of 2023 and O.P.(FC) No.108 of 2024 challenging the orders passed by the Family Court in I.A.Nos.26 and 27 of 2023.

5. This Court disposed of the original petitions by a common judgment, and the review of the said judgment is sought in these review petitions. The petitioner has grievance

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only against the order of the Family Court in I.A.No.43 of 2023 and consequently, he preferred only R.P.No.581 of 2024 initially, seeking review of the judgment in O.P.(FC) No.683 of 2023. The remaining review petitions were later filed by way of abundant caution, as it was apprehended that the petitioner may not be able to pursue R.P.No.581 of 2024 without seeking review of the orders passed in O.P.(FC) Nos.63 and 108 of 2024 also.

6. Heard the learned Senior Counsel for the petitioner as also the learned counsel for the respondent.

7. As noted, this Court disposed of the original petitions with a direction to the maternal grandparents to handover custody of the child to the petitioner and permitting him to take the child to Dubai to enable the child to continue his education at Dubai as an interim measure, clarifying that as and when the mother is able to take the child to Canada, she can move the Family Court with an application for custody. Paragraphs 2 and 3 of the order sought to be reviewed read thus:

“2. Having considered all the contentions advanced, we are of

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the opinion that it is in the best interest of the child that interim custody is granted to the father for the time being. The maternal grandparents shall produce the child before the Family Court, Thrissur on 02.03.2024. The interim custody shall be handed over to the father, who has agreed to come down on the said date, from the premises of the Family Court. The father shall be permitted to take the child to his work place on condition that all relevant details including the photostat copies of the passport, details of the residential address as well as clear details of the employment of the father and the school where admission is taken for the child are provided before the Family Court. The father shall also swear to an affidavit undertaking to remain bound by the orders of the Family Court, Thrissur and to abide by the orders passed by the said Court.

3. The mother is permitted to move the applications for VISA to take the child along with her to Canada as and when she completes her studies and has proper employment and is able to take the child subject to the satisfaction of the Family Court. It is made clear that the interim custody granted to the father is purely an interim measure and as and when the mother is able to take the child with her to Canada, she can move the Family Court with application for custody which shall be duly considered in accordance with law by the Family Court. The respondent shall also make available the passport of the child and the TC before the Family Court, Thrissur so that the father is enabled to take possession of the same and to take the child along with him.”

8. In the nature of the original petitions instituted before this Court, the issue that ought to have been

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considered was as to the correctness of the orders passed by the Family Court in I.A.Nos.20, 26, 27 and 40 of 2023, and the said issue was not considered by this Court. Further, in the light of the order passed by the Family Court in G.O.P. No.1537 of 2016 and the orders on the above interlocutory applications, the question whether either of the parties is entitled to interim custody of the child, had not arisen at all for consideration. Inasmuch as the issue that arose for consideration in the matters has not been adjudicated, and inasmuch as the order sought to be reviewed proceeds on the premise that what is required to be considered is the question as to the interim custody of the child, we have no doubt in our minds that the order is vitiated by an error apparent on the face of the record.

9. Be that as it may, the learned counsel for the respondent submitted that no relief has been granted by this Court to the respondent in O.P. (FC) Nos.63 of 2024 and 108 of 2024 and that she has accepted the decision in the said proceedings. According to the learned counsel, the petitioner cannot, therefore, have any grievance about the decisions in O.P. (FC) Nos.63 of 2024 and 108 of 2024. Coming to the

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decision in O.P (FC) 683 of 2023, the submission made by the learned counsel for the respondent is that inasmuch as the petitioner has accepted and acted upon the decision in the said original petition by receiving the custody of the child and taking him to his place of employment, the petitioner is estopped from seeking review of that judgment. In order to reinforce the said contention, it was also pointed out by the learned counsel for the respondent that the petitioner has instituted a proceedings before this Court under the Contempt of Courts Act to enforce the direction in the order in O.P. (FC) No.683 of 2023 that the respondent shall make available the Transfer Certificate of the child before the Family Court. The learned counsel has placed reliance on the decision of the Apex Court in **Budhia Swain v. Gopinath Deb**, (1999) 4 SCC 396, in support of the said argument.

10. No doubt, the right to seek vacation of a judgment may be lost by estoppel. Where one knowingly accepts the benefits of an order, he is estopped from denying the validity of the same. But, this is a rule which is applied to ensure equity, and the same cannot be applied in such a

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manner so as to violate the principles of what is right and of good conscience. It is apposite in this context to refer to a few paragraphs from the decision of the Delhi High Court in **Avenue Realities and Developers Private Limited v. Income Tax**, 2012 SCC OnLine Del 1895 which explains and reiterates the said proposition. The relevant paragraphs read thus:

“37. In America estoppel by acceptance of benefits is one of the recognised situations that would prevent a party from taking up inconsistent positions qua a contract or transaction under which it has benefited. *American Jurisprudence*, 2nd Edn., Vol. 28, pp. 677-80 discusses “estoppel by acceptance of benefits” in the following passage:

“Estoppel by the acceptance of benefits.—

38. Estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instrument, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.

39. As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.

40. This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience.”

The proposition aforesaid has been reiterated by the Apex Court in **Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.**, (2013) 5

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SCC 470 also. The pointed question, therefore, is whether it is equitable on the facts and circumstances of the case, to deny relief to the petitioner in R.P. No.581 of 2024.

11. As noticed, the order sought to be reviewed is vitiated by a patent error on the face of the record. Every order of custody, whether interim or permanent, could be varied on change of circumstances. As such, even the orders of the Family Court which were impugned before this Court in the original petitions are liable to be varied, if circumstances warrant, at a later point of time. In the said view of the matter, if the records of this Court in respect of a matter which would come up at a later point of time before the Family Court for consideration are not kept properly, the Family Court which is bound by orders of this Court may not be able to exercise its jurisdiction properly in subsequent proceedings. That apart, there is no question of estoppel against a party where an error is committed by the court itself and the court is under a bounden duty to correct its own mistake. Be that as it may, as noticed, the grievance of the petitioner concerns the right conferred by this Court to the respondent to prefer application

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before the Family Court seeking permission to take the child to Canada on completing her studies and on obtaining employment, and the direction in the order that the permission given to the petitioner to take the child to the place of his employment is subject to that right of the respondent. This, according to us, is a windfall that the respondent has obtained on account of an error committed by this Court for, having regard to the various orders passed by the Family Court hitherto, the respondent is not entitled to such a right. It is with a view to sustain the benefit of the said order which she is not otherwise entitled to, according to us, the doctrine of approbate and reprobate is raised by the respondent to get the review petition dismissed on that ground. We have no doubt in our minds that it is for the same purpose, the respondent is now taking the stand that she has accepted the decisions impugned in O.P.(FC) Nos.63 of 2024 and 108 of 2024. Needless to say, it will be inequitable on the facts and circumstances of this case to hold that the petitioner has lost the right to seek vacation of the order in O.P. (FC) No.683 of 2023 by estoppel.

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In the result, the review petitions are allowed and the order sought to be reviewed is recalled. List the original petitions for hearing as per roster. Inasmuch as the petitioner has taken advantage of the order in O.P.(FC) No.683 of 2023, which has now been recalled, the respondent would be free to seek appropriate interim orders in the original petitions.

Sd/-
P.B.SURESH KUMAR, JUDGE.

Sd/-
C.PRATHEEP KUMAR, JUDGE.

Ds 25.10.2024

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APPENDIX OF RP 581/2024

PETITIONER ANNEXURES

- Annexure I Certified copy of the judgment dated 23.02.2024 of this Hon'ble Court in OP (FC) 683/2023
- Annexure I True copy of the flight ticket dated 09/03/2024
- Annexure II True copy of the flight ticket dated 01/05/2024
- Annexure III True copy of the medical evaluation report dated 03/05/2024 of the power of attorney holder
- Annexure IV True copy of the flight ticket dated 11/05/2024
- Annexure V True copy of the IA 53/2024 dated 31/05/2024 in OP 1537/2016 on the files of Family Court, Thrissur

RESPONDENT ANNEXURES

- Annexure R 1 (b) the true photocopy of the relevant page of the passport of the minor child
- Annexure R 1 (c) true photocopy of the petition Numbered as IA No. 53/2024 in GOP No. 1537/2016 in Family Court, Thrissur
- Annexure R 1 (d) true photocopy of the objection in IA No. 53/2024 in GOP No. 1537/2016 in Family Court, Thrissur
- Annexure R 1 (e) true photocopy of the Judgment in COC No. 787/2024 dated 19.07.2024

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Annexure R 1 (f) true photocopy of the Work permit of
the respondent dated 23.07.2024 issued
by the Government of Canada

Annexure R 1 (g) true photocopy of the Job Offer letter
of the respondent dated 06.05.2024

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in OP(FC) 683 of 2023 & con cases

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APPENDIX OF RP 1003/2024

PETITIONER ANNEXURES

Annexure I	Certified copy of the judgment dated 23.02.2024 of this Hon'ble Court in OP (FC) 63/2024
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APPENDIX OF RP 1005/2024

PETITIONER ANNEXURES

Annexure I Certified copy of the judgment dated
23.02.2024 of this Hon'ble Court in OP
(FC) 108/2024