

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

TUESDAY, THE 21ST DAY OF MARCH 2023 / 30TH PHALGUNA, 1944

O.P.(FC) NO. 104 OF 2023

AGAINST THE ORDER DATED 17.02.2023 IN I.A.NO.3 OF 2022 IN

O.P.NO.884 OF 2023 ON THE FILES OF THE FAMILY COURT,

KUNNAMKULAM

PETITIONERS:

- 1 SAJNA.P.J.
AGED 30 YEARS, D/O. PAZHAMBULLYPARAMBIL JAMAL,
VALAPPAD VILLAGE, KOTHAKULAM, S N ROAD DESOM,
CHAVAKKAD TALUK, THRISSUR DISTRICT, PIN -
680567.
- 2 SAINA,
AGED 50 YEARS,
W/O.PAZHAMBULLYPARAMBIL JAMAL, VALAPPAD
VILLAGE, KOTHAKULAM, S N ROAD DESOM, CHAVAKKAD
TALUK, THRISSUR DISTRICT, PIN - 680567.
- 3 JIBIN,
AGED 23 YEARS, S/O. PAZHAMBULLYPARAMBIL JAMAL,
VALAPPAD VILLAGE, KOTHAKULAM, S N ROAD DESOM,
CHAVAKKAD TALUK, THRISSUR DISTRICT,
PIN - 680567.

BY ADVS.

SANTHOSH P.PODUVAL

R.RAJITHA

CHITHRA S.BABU

O.P.(FC) No.104 of 2023

RESPONDENT:

ISAHAK ISMAIL
AGED 33 YEARS, S/O.CHULLIPARAMBIL ISMAIL BAVA,
VADAKKUMKARA VILLAGE, VELLANKALLUR DESOM,
MUKUNDAPURAM TALUK, THRISSUR DISTRICT,
PIN - 680662.

BY ADVS.SRI GOKULDAS V.V.M
SRI SREEVINAYAKAN K.V

THIS OP (FAMILY COURT) HAVING COME UP FOR FINAL
HEARING ON 14.03.2023, THE COURT ON 21.03.2023 DELIVERED
THE FOLLOWING:

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JUDGMENT

P.G. Ajithkumar, J.

The petitioners are the respondents in O.P.No.884 of 2023 on the file of the Family Court, Kunnampulam. G.O.P.No.1076 of 2022 originally filed before the Family Court, Thrissur, was transferred to the Family Court, Kunnampulam, where it was renumbered as O.P.No.884 of 2023. They filed I.A.No.3 of 2022 seeking permission of the court to take the child Shaisa Mariam, aged 5 years to Qatar where the 1st petitioner is working. The Family Court as per the order dated 17.02.2023, Ext.P9, dismissed that application. The petitioners, aggrieved thereof, have filed this Original Petition under Article 227 of the Constitution of India seeking to set aside Ext.P9.

2. On 02.03.2023, notice was directed to be served on the respondent. The petitioners have filed I.A.No.1 of 2023 for amendment of the Original Petition, which was allowed on 09.03.2023. The respondent entered appearance through a learned counsel.

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3. Heard the learned counsel appearing for the petitioners and the learned counsel appearing for the respondent.

4. The 1st petitioner is the mother of the child. The 2nd petitioner is the mother and the 3rd petitioner is the brother of the 1st petitioner. Since the 1st petitioner is working abroad, child is now staying along with other petitioners. The respondent is the father of the child. He also had filed I.A.No.2 of 2022 in G.O.P.No.1076 of 2022. The Family Court as per the order dated 02.09.2022 in I.A.No.2 of 2022 allowed the respondent interim custody of the child during weekends and vacation. That order was challenged in O.P.(FC) No.562 of 2022 and this Court modified the said order regarding interim custody. Right of the respondent was restricted to right of visitation on alternate Saturdays. He was allowed to contact the child every day over phone also.

5. In such a scenario, the petitioners have filed I.A.No.3 of 2022. It was contended that since the 1st petitioner is working abroad, it is required to take the child

along with her in order to ensure welfare of the child. The petitioners contended that the respondent as well as his father were involved in many criminal cases and were in jail for quite some time and therefore the respondent cannot be entrusted with the custody of the child. The 2nd petitioner also will soon join the 1st petitioner in Qatar and as such it is only appropriate to take the child to Qatar, where she can be imparted with standard education. At this age, the child requires care, affection and protection of the mother. The petitioners emphasised thereby the necessity to take the child abroad.

6. The respondent filed a detailed objection resisting the request of the petitioners. He has denied the allegation that he as well as his father were involved in many criminal cases. He explains that some false complaints were filed against them and the cases arose therefrom exist. That does not mean that the respondent has any criminal background. He is in no way disqualified to be in custody of the child and interact with it. Being the father, he has to have the

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opportunity to interact with the child and if the child is relocated abroad, the child would be denied the love and affection of the father. Moreover, allowing the 1st petitioner to take the child abroad would have the result of non-suiting O.P.No.884 of 2023. There are other cases between the 1st petitioner and the respondent and trial of those cases will also be adversely affected. On such grounds, the respondent stoutly resists taking the child abroad.

7. The child is aged only 5 years. It is a girl child. When parents are at loggerheads and living separately, such a child shall ordinarily be with the mother, unless she is disqualified. When the mother is abroad and the father has in his command necessary facilities, he shall be allowed to be in custody of the child. The question as to whose custody will ensure welfare of the child during the pendency of O.P.No.884 of 2023 was decided by the Family Court as per the order in I.A.No.2 of 2022. That order was modified by this Court as per the judgement in O.P.(FC) No.562 of 2022. The 1st petitioner is allowed to be in custody of the child. The

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respondent has the right of visitation on alternate Saturdays. He can also contact the child over the telephone every day. If the child is allowed to be taken abroad, the respondent will not be able to exercise his right of visitation on alternate Saturdays. To that extent the right of the respondent would be adversely affected in the event of allowing I.A.No.3 of 2022.

8. The learned counsel appearing for the respondent placing reliance on the decision of this Court in **Smitha Antony v. Koshy Kurian [2022 (3) KHC 577]** would contend that when the petition for guardianship and custody is pending and an order allowing one of the parents to have interim custody of the child is in force, allowing the other parent to take the child abroad will amount to non-suiting of the pending proceedings. It is contended that, therefore, permission sought by the petitioners can only be declined.

9. In the said decision, it was observed in the light of the submissions made by the Amicus Curiae appointed in that case that if one of the parents is permitted to take the child abroad before deciding the question of guardianship and

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custody involved in a pending proceedings, the other party will be non-suited. The reasons stated is that India not being a signatory to the 1980 Hague Convention on the Civil Aspects of International Child Abduction, prospects of enforcing orders regarding interim custody is bleak. The said observation may not be correct if the parties to the litigation are Indian citizens. As long as they continue to be the citizens of India, they are subject to Indian law. They stay abroad in terms of Visas issued by such foreign country, acting upon the passport issued by the Government of India. As such, there is absolutely no difficulty to make such parties amenable to the lawful orders passed by the courts in India. Therefore, the contention that allowing the 1st petitioner to take the child abroad is as good as non-suiting of O.P.No.884 of 2023 is not sound.

10. In **Yashita Sahu v. State of Rajasthan [(2020) 3 SCC 67]** the Apex Court held that law is well settled by a catena of judgments that, while deciding matters of custody of a child, primary and paramount

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consideration is the welfare of the child. If the welfare of the child so demands then technical objections cannot come in the way. However, while deciding the welfare of the child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the child. In **Yashita Sahu** the Apex Court noticed that a child, especially a child of tender years requires the love, affection, company, and protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. Even if the custody is given to one parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child.

11. In the light of the said proposition of law, while deciding the request of the 1st petitioner to take the child to Qatar, consideration shall be whether the same would cater to the best interest of the child and ensure its welfare. The Family Court has given custody of the child to the 1st petitioner and the order was confirmed by this Court. The 1st petitioner's custody of the child is subject to the right of the visitation of the respondent. He is allowed custody of the child on Saturdays and to interact over phone every day. When the Family Court and this Court after considering the relevant facts and circumstances, found appropriate to entrust custody of the child to the 1st petitioner, that arrangement is expected to continue even if the 1st petitioner is abroad. In the event of taking the child abroad, right of the respondent to have custody of the child on alternate Saturdays could not be exercised. Since the welfare of the child is important, the right of the respondent to exercise visitation right cannot be given predominance. He is given liberty to contact the child every day through phone and by exercising that right he can

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maintain an emotional bondage and parental affection with the child. During the school vacation of the child, it is possible for bringing her to India and enable the respondent to have interim custody also. In such circumstances, we are of the view that Ext.P9 order declining the request of the 1st petitioner to take the child abroad is liable to be set aside. The 1st petitioner can be allowed to take the child to Qatar by ensuring the right of the respondent to interact with the child.

12. This Original Petition is accordingly allowed. Ext.P9 is set aside. The 1st petitioner is allowed to take the child Shaisa Mariam, aged 5 years to Qatar, where the 1st petitioner is working. The respondent will have the right to make audio/video call to the child every day for 15 minutes between 7.30 p.m. and 8.00 p.m.(Qatar time). During annual school vacation, the child shall be brought back to India for a period of one month and the respondent shall be allowed to have interim custody as ordered by this Court in O.P.(FC) No.562 of 2022 during that period of one month. The petitioners shall cooperate to dispose of the cases relating to the matrimonial

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dispute between the 1st petitioner and the respondent pending before the Family Court, as expeditiously as possible.

**Sd/-
ANIL K. NARENDRA, JUDGE**

**Sd/-
P.G. AJITHKUMAR, JUDGE**

dkr

CORRECTION

The word 'Qatar' occurring in paragraph Nos.1, 5, 11 and 12 of the judgment dated 21.03.2023 in O.P.(FC) No.104 of 2023 stands corrected as 'Oman' as per the order dated 31.03.2023 in I.A.No.2 of 2023 in O.P.(FC) No.104 of 2023.

**Sd/-
DEPUTY REGISTRAR**

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APPENDIX OF OP (FC) 104/2023

PETITIONER EXHIBITS

EXHIBIT P1	A COPY OF THE PETITION IN GOP 1076/22 BEFORE THE FAMILY COURT, IRINJALAKKUDA, DATED NIL
EXHIBIT P2	A COPY OF I.A. 2/22 IN GOP 1076/22 BEFORE THE FAMILY COURT, IRINJALAKKUDA, DATED 29.04.2022
EXHIBIT P3	A COPY OF OBJECTION IN I.A. 2/22 IN GOP 1076/22 BEFORE THE FAMILY COURT, IRINJALAKKUDA, DATED 17.05.2022
EXHIBIT P4	A COPY OF I.A. 3/22 IN GOP 1076/22 BEFORE THE FAMILY COURT, IRINJALAKKUDA, DATED NIL
EXHIBIT P5	A COPY OF ORDER DATED 2/9/22 IN I.A.2 OF 2022 IN GOP 1076/22 BEFORE THE FAMILY COURT, IRINJALAKKUDA
EXHIBIT P6	A COPY OF JUDGMENT DATED 16/11/22 IN O.P. (FC) 562/22 OF THIS HON'BLE COURT
EXHIBIT P7	A COPY OF I.A 8/23 IN G.O.P 1076./22 OF FAMILY COURT THRISSUR , DATED 06.01.2023
EXHIBIT P8	A COPY OF JUDGMENT DATED 17/1/23 IN O.P. (FC) 22/23 OF THIS HONOURABLE COURT.
EXHIBIT P9	A COPY OF ORDER DATED 17/2/23 IN I.A. 3/22 IN O.P 884/23 BEFORE THE FAMILY COURT, KUNNAMKULAM