

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

FRIDAY, THE 31ST DAY OF MARCH 2023 / 10TH CHAITHRA, 1945

O.P. (FC) NO. 119 OF 2023

AGAINST THE ORDER DATED 17.02.2023 IN I.A.NO.5 OF 2023 IN

O.P.NO.485 OF 2023 ON THE FILE OF THE FAMILY COURT,

KUNNAMKULAM

PETITIONER:

BY ADVS .

A.PARVATHI MENON

P.SANJAY

BIJU MEENATTOOR

PAUL VARGHESE (PALLATH)

P.A.MOHAMMED ASLAM

KIRAN NARAYANAN

PRASOON SUNNY

RAHUL RAJ P.

AMRUTHA M. NAIR

O.P.(FC) No.119 of 2023

RESPONDENT:

BY ADVS.
Sandeep M.B
K.P.SREEJA
AMAL STANLY

THIS OP (FAMILY COURT) HAVING COME UP FOR FINAL
HEARING ON 24.03.2023, THE COURT ON 31.03.2023 DELIVERED
THE FOLLOWING:

JUDGMENT

P.G. Ajithkumar, J.

The petitioner is the mother of _____, _____, born on 03.07.2015. The petitioner filed O.P.No.485 of 2023 seeking a decree of divorce, under Section 13(1)(ia) of the Hindu Marriage Act, 1955. She filed I.A.No.5 of 2023 in that original petition seeking to issue to her a Sole Legal Responsibility Certificate relating to the child. The Family Court dismissed that application as per order dated 17.02.2023, Ext.P9. The petitioner challenges the said order in this Original Petition filed under Article 227 of the Constitution of India.

2. On 13.03.2023, notice was directed to be served on the respondent. On receipt notice, the respondent entered appearance.

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

4. O.P.No.485 of 2023 was filed by the petitioner while she was in India. She subsequently went to the United

Kingdom on a student Visa. It is stated that she is studying in the United Kingdom. She claims that she would be able to maintain to child and impart to him standard education in the United Kingdom. She accordingly through her power of attorney filed I.A.No.5 of 2022 seeking to issue a Sole Legal Responsibility Certificate to her for the purpose of taking the child abroad. It is stated that as per the communication issued by the UK Decision Making Centre, either both parents together should apply or a Sole Legal Responsibility Certificate should be submitted to process the Visa of the child. Alleging that the respondent did not consent to submit application for Visa, the petitioner has filed I.A.No.5 of 2022.

5. The respondent filed a written objection. He contended that the petitioner is staying in the United Kingdom on a student Visa and therefore she would not be able to look after the affairs of the child. It was his further contention that in an original petition filed seeking divorce, a petition for the custody of the child or to get a certificate, especially of this kind, cannot be entertained and further that if the child is

taken abroad, he would not get any opportunity to interact with the child. Practically that would amount to non-suiting the respondent in the matter of custody of the child. The other allegations in I.A.No.5 of 2023 were denied by the respondent as well.

6. The Family Court took the view that once the petitioner is allowed to take the child abroad, there would be little chance for the respondent to see and interact with the child, and therefore, permission to take the child abroad cannot be granted. So the Family Court, by placing reliance on the decision in **Smitha Antony v. Koshy Kurian [ILR 2022 (2) Ker.1153]** held that in case the petitioner takes the child abroad, the right of the respondent to interact with the child will be foreclosed forever. The Family Court eventually concluded that without having a detailed enquiry in the matter, no permission can be granted to the petitioner to take the child abroad and further observed that it would not be in the welfare of the child to take him abroad. Hence, the petition was dismissed.

7. The learned counsel appearing for the petitioner would submit that since the respondent also is abroad, disallowing the petitioner to take the child along with her to the United Kingdom, would render the child in the custody of the grandparents, which is not conducive for his proper upbringing. The child is now aged 7 years and if it is able to take him abroad, he can be imparted with proper education and also ensure motherly affection, which is always helpful for a healthy and emotionally sound atmosphere for the child. The learned counsel appearing for the respondent while refuting the said contentions of the petitioner pointed out that she stays in the United Kingdom on a student Visa and therefore there would not be sufficient physical amenities enabling the child to have proper education and other facilities. The learned counsel also raised a legal contention that under Section 26 of the Hindu Marriage Act, the request of the petitioner cannot be allowed.

8. Section 26 of the Hindu Marriage Act deals with custody of the children. The provision enables the court,

where any proceedings under the Act is pending, to pass such interim orders as the court deems just and proper with respect to the custody, maintenance and education of minor children. It is true that the provisions in the Guardian and Wards Act, 1890 are the specialised provisions in regard to the custody and guardianship of children. That does not mean that Section 26 of the Hindu Marriage Act does not have application in such matter, especially in case the proceedings under the Act is pending consideration of the Family Court. Hence, we are of the view that the provisions of Section 26 of the Hindu Marriage Act can be invoked in order to get an order regarding custody, maintenance and education, of whom the child of the parties to the litigation are the parents.

9. The petitioner claims that she can provide all the amenities for the proper stay, education and upbringing of the child in the United Kingdom. She, as the mother, is confident of ensuring such facilities. Therefore, there is no need for any doubt about the said claim. In **Smitha Antony** (supra) this Court held that India being not a party to the 1980 Hague

Convention on the Civil aspects of International Child Abduction, the orders regarding custody of a child would not be able to enforce in a foreign country. Therefore, allowing one of the parents to take the child abroad may have the effect of non-suiting the claim of the other parent for the custody of the child. Going by the said resolution, particularly Article 4, procuring custody and bringing a child to India, who is habituated resident in a foreign Country, by enforcing the provisions of the said Convention may not be possible. Here is a case where an Indian citizen, the petitioner seeks permission of the court for taking her child abroad. Issuance of Sole Legal Responsibility Certificate is what is sought. It is for facilitating her to get the Visa. If the petitioner takes the child abroad as permitted by a court, there would not be any difficulty for enforcing the directions regarding custody of the child. The Family Court and this Court would be able to enforce such orders as long as the petitioner continues to be an Indian citizen. The enforcement of any such order is not similar to enforcement of custody orders relating to a habitual

resident child in a foreign country. Therefore, we are of the view that the order granting permission to an Indian citizen to take his/her child abroad will not foreclose the right of the other spouse to get custody.

10. The father and mother of the child are abroad. The child is now in the defacto custody of the parents of the petitioner-mother. Since the father is also abroad, there is no possibility of looking after the affairs of the child by the father. In such circumstances, the request of the petitioner to issue a Sole Legal Responsibility Certificate facilitating her to get a Visa to take the child along with her to the United Kingdom, where she is pursuing her studies would be in the best interest of the child.

11. It may be correct that if the child is taken abroad by the petitioner, the respondent will be denied to have personal interaction with the child as long the child remains abroad. But when the child is relocated to the United Kingdom, that will help him to have good education as well as the care and protection of the mother. The concern of the

father that the mother being a student only, she may not be able to provide all the required facilities of the child, cannot be appreciated. The petitioner filed the petition expressing her confidence that she is able to look after the entire affairs of the child. In that matter, there need not be more concern since none other than the mother is taking the child with her.

12. In the circumstances, we are of the view that ensuring the right of the respondent to have interim custody and regular interaction with the child, permission as sought in I.A.No.5 of 2023 can be granted. Accordingly, we set aside Ext.P9 order. I.A.No.5 of 2023 in O.P.No.485 of 2023 is allowed. If permission to take the child abroad is to be granted, it shall be subject to the arrangements for interacting by the respondent with the child and to bring the child to India during the school annual vacation of the child.

13. The petitioner shall file an affidavit before the Family Court, Thrissur undertaking that she should comply with the aforesaid conditions, without any fail. On submission of such an affidavit, the Family Court will issue the Sole Legal

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Responsibility Certificate.

The Original Petition is allowed as above.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr

APPENDIX OF OP (FC) 119/2023

PETITIONER EXHIBITS

- EXHIBIT P1 TRUE COPY OF OP 1957/2021 RENUMBERED AS OP 485/2023 ON THE FILE OF FAMILY COURT KUNNAMKULAM
- EXHIBIT P3 TRUE COPY OF THE MAIL FROM UK DECISION MAKING CENTRE ON 03-02-2023
- EXHIBIT P4 TRUE COPY OF THE PETITION FILED IN PETITION AND IA 5/2023 FILED ON FAMILY COURT, KUNNAMKULAM DATED 06.02.2023
- EXHIBIT P5 TRUE COPY OF THE JUDGMENT IN OP (FC) 82/2023 DATED 16.02.2023 FILED FAMILY COURT, THRISSUR
- EXHIBIT P6 TRUE COPY OF THE OBJECTION FILED BY THE RESPONDENT IN IA NO. 5/2023 IN OP NO.485 OF 2023 DATED 17.02.2023
- EXHIBIT P7 TRUE COPY OF THE PETITION FILED BY THE RESPONDENT IN OP NO. 837/2023 ON MARCH 2022
- EXHIBIT P8 TRUE COPY OF THE MAILS DATED 2.4.22, 7.12 PM AND 3.4.22, 7.57 AM
- EXHIBIT P9 TRUE COPY OF THE ORDER IN IA 5/2023 IN OP 485/2023 FAMILY COURT, KUNNAMKULAM DATED 17.2.23