



2023/KER/53618

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

MONDAY, THE 4<sup>TH</sup> DAY OF SEPTEMBER 2023 / 13TH BHADRA, 1945

MAT.APPEAL NO.757 OF 2022

AGAINST THE ORDER/JUDGMENT IN OPGW NO.766/2022 OF FAMILY

COURT, PATHANAMTHITTA

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APPELLANT/PETITIONER & COUNTER CLAIM RESPONDENT:

JISHA MOHAN,

BY ADVS.  
T.S.HARIKUMAR  
P.B.SAHASRANAMAN

RESPONDENT/RESPONDENT & COUNTER CLAIM PETITIONER:

VISHAL V.M.,

BY ADVS.  
MANU RAMACHANDRAN  
M.KIRANLAL (K/963/2009)  
R.RAJESH (VARKALA) (K/78/2000)  
SAMEER M NAIR (K/000481/2017)  
DHANALAKSHMI V.K. (K/206/2013)  
GEETHU KRISHNAN (K/001199/2021)  
SAILAKSHMI MENON (K/1518/2021)

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 04.09.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:



## JUDGMENT

### A.Muhamed Mustaque, J.

This appeal arises from the judgment of the Family Court, Pathanamthitta, in a custody matter. The mother is the appellant and the respondent is the father. In the wedlock, a child was born on 10.02.2018. The respondent is employed in Bahrain. The appellant also joined the respondent in Bahrain. However, the appellant later returned to her home town in Kerala during the eighth month of pregnancy. The appellant filed a case for divorce and also a case for patrimony and maintenance. The case related to patrimony was compromised on 06.11.2021 and the decree was passed based on the compromise. As per the compromise, the minor child, namely, \_\_\_\_\_ was given custody to the appellant/mother with a stipulation allowing the respondent/father to have visitorial rights during the vacation. However, it was further stipulated that the child custody to the mother was only till the child reaches the age of 6 years. The respondent/father was also allowed to have contact rights with his child. The appellant moved to New Zealand and now obtained residential status. Her brother and family are also settled in New Zealand. The present petition for declaration of guardianship and to take the child along



with her to New Zealand is due to a change in circumstances. The child is with the parents of the appellant/mother. The respondent/father resisted the petition. According to him, the present petition is filed to violate the compromise decree entered between the parties and therefore the child cannot be taken to New Zealand.

2. The parties adduced evidence before the Family Court. Exts.A1 to A10 were marked on the appellant's side. The appellant was also examined as PW1. Though the respondent/father was not examined, his power of attorney holder and other witnesses were examined on his side. Exts.B1 to B10 were also marked on his side.

3. The Family Court dismissed the petition and ordered to handover the minor child to the parents and sister of the respondent if the appellant is leaving for New Zealand.

4. The Family Court entered the following reasons for declining the request of the appellant:

- i. There is no reason to change the condition in the compromise agreement.*
- ii. In March 2022, the appellant's father committed suicide while the appellant was residing in that house along with the minor child.*
- iii. The appellant went to New Zealand without informing the court as she was given the custody of the minor*



*child based on the compromise decree.*

*iv. The child is comfortable with the parents and unmarried sister of the respondent.*

*v. The child is now studying in a reputed school.*

5. On appreciation of pleadings and evidence and on perusal of the impugned judgment, we are sure that the Family Court had not adverted to the paramount consideration that is required in such matters. The Family Court apparently decided the matter as though it was deciding the rights and obligations of the individual parties before the court rather than focusing objectively on the welfare of the child. The welfare of the child is the paramount importance in matters relating to the custody of the child.

6. What is the paramount? Is it not depriving the child to be with the parent a consideration in such matters. In the absence of any disability that would deprive one of the parents from having custody, the preference of the child to be with one of the parents should be the paramount consideration to protect the welfare of the child. Admittedly, the respondent/father is in Bahrain. The Family Court assumed that grandparental custody should be preferred as against the parent's custody because of the geographical location of the parties. No doubt, if none of the parents can have custody, the grandparental custody can be preferred.



Merely because there is a parental battle for custody, it cannot be said that one should remain locally forever without moving from the location for the purpose of custody of the child. The appellant relocated to New Zealand for better job opportunities. It is also to be noted that the appellant's brother and family are settled there. If the relocation of the appellant is for better fortune, that cannot hold against her from claiming custody, provided, that the child's welfare is also protected. The child should recognise his biological parents and have every right to grow under their care and protection. If the biological parents are willing to protect the best interest of the child, denying the child to grow in a natural and familial atmosphere itself is against the best interest of the child.

7. Article 7 of the United Nations Convention on the Rights of the Child recognizes the right of the child as:

*“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”*

*Similarly, article 10(1) of the International Covenant on economic social and cultural right recognizes the right to family. It reads thus:*

*The widest possible protection and assistance should*



*be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.*

8. In this case, it is to be noted that there is nothing on record to deprive the appellant/mother of permanent custody and to appoint her as the legal guardian of the child to take the child abroad. The Apex Court judgment in **Vikram Vir Vohra v. Shalini Bhalla [(2010) 4 SCC 409]** at para.18 observed as follows:

*“Every person has a right to develop his or her potential. In fact, a right to development is a basic human right. The respondent's mother cannot be asked to choose between her child and her career. It is clear that the child is very dear to her and she will spare no pains to ensure that the child gets proper education and training in order to develop his faculties and ultimately to become a good citizen. If the custody of the child is denied to her, she may not be able to pursue her career in Australia and that may not be conducive either to the development of her career or to the future prospects of the child. Separating the child from his mother will be disastrous to both.”*

9. As seen from the above judgment, separating the child from the mother itself would be disastrous. The child has every right to be with the mother. If the mother can provide a conducive atmosphere to protect the interest of the child, nothing prevents the court from allowing the child to be with the mother even if the child is being taken beyond the jurisdiction of the court or to other



country. The mother has sworn an affidavit before the court that she can bring the child to India when the academic year of the child ends in December to allow him to be in the company of the respondent/father. She also stated in the affidavit that the child can be enrolled in a good school in New Zealand close to her residential house. She also has assured contact rights to the respondent whenever the child is in New Zealand. We incidentally perused the education system in New Zealand online and found that New Zealand's education is internationally accredited and valued. It is unique and diverse that offers consistent, high-quality education at all levels maintaining a global standard. It has an excellent child care and education system. We do not want the child to be in India, depriving him of parental care and protection. We are sure that if the child is allowed to remain in India that would adversely affect him. For the reason that the child is allowed to be taken to New Zealand, that will not result in deprivation of the respondent's right to contact the child or to have short duration custody. We, therefore, set aside the impugned judgment and pass the following orders:

i. we declare that the appellant/mother is the sole legal guardian of the child for the purpose of taking a child to abroad (New Zealand) and appoint her as the sole guardian.



ii. The permanent custody of the minor child will be with the mother subject to short-duration custody and visitorial right granted to the respondent/father.

iii. The father will have short duration custody of three weeks when the school is closed in New Zealand upon completion of the academic year.

iv. The appellant/mother shall not change the nationality of the child during his minority without the consent of the respondent/father.

v. The respondent will have contact rights through Zoom video calls and WhatsApp calls on every Saturday and Sunday between 4.00 pm and 4.30 pm(IST 10.am-10.30 am).

vi. The respondent is also permitted to visit the child in New Zealand after providing advance notice to the appellant.

Sd/-

**A.MUHAMED MUSTAQUE**

**JUDGE**

Sd/-

**SOPHY THOMAS**

**JUDGE**

In





**APPENDIX OF MAT.APPEAL 757/2022**

PETITIONER'S ANNEXURES:

ANNEXURE A1                    THE ORIGINAL OF THE AFFIDAVIT SWORN BY  
THE APPELLANT, DATED 30-06-2023.