

Divya vs Amith

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Court : Kerala

Decided On : Mar-31-2023

Judge : Honourable Mr. Justice Anil K.Narendran,Honourable Mr.Justice P.G. Ajithkumar

Appeal No. : OP (FC)/159/2023

Appellant : DIVYA

Respondent : AMITH

Judgement :

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. 159 OF 2023 AGAINST THE ORDER DATED 27.03.2023 IN I.A.NO.18 OF 2022 AND I.A.NO.25 OF 2023 IN O.P.NO.1537 OF 2016 ON THE FILE OF THE FAMILY COURT, THRISSUR PETITIONER: DIVYA AGED 31 YEARS, D/O SUKUMARAN, MONEKATTU HOUSE, KANNARA DESOM, NEAR COMPANYPADI, P O KANNARA, THRISSUR DISTRICT-680 652 REPRESENTED BY HER POWER OF ATTORNEY HOLDER AND HUSBAND SWAROOP N.S, AGED 35, S/O

SUDHARMAN, RESIDING IN THE ADDRESS GALAXY WINSTON, FLAT NO C-9, CHILAVANNUR ROAD, KADAVANTHRA P O, ERNAKULAM DISTRICT, PIN - 682020. BY ADV G.SREEKUMAR (CHELUR) RESPONDENT: AMITH AGED 37 YEARS, S/O SOMAN, THANDASSERY HOUSE, PAZHUVIL WEST DESOM, KURUMBILAVU VILLAGE, PAZHUVIL P O WEST, THRISSUR TALUK, THRISSUR DISTRICT, PIN - 680564. BY ADV.DHANYA P.ASHOKAN THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 29.03.2023, THE COURT ON 31.03.2023 DELIVERED THE FOLLOWING:

JUDGMENT

P.G. Ajithkumar, J.

This Original Petition under Article 227 of the Constitution of India is filed by the respondent in O.P.No.1537 of 2016 on the file of the Family Court, Thrissur. The respondent filed I.A.No.18 of 2022 in that O.P. seeking a direction to the respondent to produce the passport of the minor child Adwaith before the court for being handed over to the respondent and I.A.No.25 of 2023 for permission to take the minor child to Dubai, where the respondent is working during the school vacation. As per the common order dated 27.03.2023, the Family Court allowed both interlocutory applications. The petitioner challenges the said order in this original petition.

2. On 29.03.2023, when this matter came up for admission, the respondent entered appearance through his counsel.

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

4. Marriage between the petitioner and the

respondent was solemnised on 26.04.2012 and the child Adwaith was born in that wedlock. Following marital discord, litigations arose between the parties. They, on

entering into settlement, got the pending litigations disposed of and their marriage was dissolved on mutual consent. The petitioner subsequently married. Regarding the custody of the child there arose disputes. O.P.No.1537 of 2016 was with respect to the custody of the child. Regarding orders in a few interlocutory applications relating to custody of the child, Mat.Appeal and Original Petitions were s were filed before this Court. Ext.P20 judgment was rendered on 09.11.2022 in those matters. In that common judgment, this Court issued the following directions regarding the custody of the child,-

22. Accordingly, we dispose of these Original Petitions, Mat. Appeal and also I.A.No.2 of 2022 in O.P.

(FC) No.748 of 2022 in the following terms:

i) custody of the child, Adwaith will be given to the petitioner from 10.00 a.m. on every Saturday till 2.00 p.m. on the ensuing Sunday during the period when the petitioner is available in station;

ii) subject to the above, the custody of the child will continue to be governed by the stipulations in Ext.P1 as modified by the order dated 22.04.2019 in I.A.No.3461 of 2018 for the time being; iii) the child shall not be taken abroad either by the petitioner or by the respondent without the permission of the Family Court, Thrissur; and iv) it is open for the parties to approach the Family Court for modification of the custody order, if there is real and genuine requirement on account of the change in the circumstances.

5. The respondent thereafter filed I.A.Nos.18 of 2022

and 25 of 2023 before the Family Court, Thrissur. The petitioner filed objection to both the applications. After hearing both sides, the Family Court allowed the said interlocutory applications by directing as follows:

7. Admittedly, the respondent is now in Canada and the child is in the custody of her 2 nd husband, the step father of the minor. So the

petitioner's prayer for custody during the entire vacation period appears to be very much reasonable. Since the petitioner is working abroad, I am of the view that there is nothing wrong in permitting him to take the child abroad during this vacation period. Therefore, I am inclined to allow these applications. Accordingly the respondent is directed to

produce the minor and hand over custody to the petitioner or his parents on 01.04.2023 at 10 am at the office of this court. The passport of the minor also shall be produced and handed over to the petitioner or his parents at the time of producing the child. After taking the minor abroad the petitioner shall bring back the child and produce him before the court at 10 am on 28.05.2023 at the office of this court.

8. Before receiving custody, the petitioner shall file a

written undertaking that he shall produce the child and return custody to the respondent or her husband on the above mentioned date. Both applications are allowed accordingly.

6. The learned counsel appearing for the petitioner

would submit that without waiting much after the judgment of this Court, the respondent filed I.A.Nos.18 of 2022 and 25 of 2023 and his intention is to remove the child from the custody of the petitioner-mother. The learned counsel for the petitioner would submit that in terms of Ext.P20, the respondent can have custody of the child during half period of the school vacation, provided he is available in India. The petitioner does not have any objection in the respondent taking the child into custody. But, considering the nature of the respondent, his taking child abroad is hazardous to the welfare of the child. The learned counsel would submit that there is a conscious attempt from the part of the respondent to malign the mind of the child, and in Gulf, there would not be anyone to take care of the affairs of the child.

7. The learned counsel appearing for the petitioner further would submit that a petition for review Ext.P20

judgment has already been filed and therefore, Ext.P27, which

was passed in terms of that judgment would not sustain in law. It is the contention of the petitioner that she was allowed to process Visa for taking the child to Canada and in that circumstance, allowing the respondent to take the child to Dubai would cause much inconvenience to the petitioner.

8. The learned counsel appearing for the respondent,

on the other hand, would contend that the permission granted to the petitioner to process Visa for taking the child to Canada was taken note of while this Court passed Ext.P20 judgment. In that judgment, there is a provision enabling the parties to take the child abroad, provided the Family Court, Thrissur grants permission. During the school vacation, the respondent is entitled to get the child in his custody for a period of one month. The child is now staying with the second husband of the petitioner for she is in Canada. Taking all such aspects into account, Ext.P27 order was issued by the Family Court. The learned counsel for the respondent accordingly submitted that the said order does not suffer from any impropriety or illegality.

9. The allegations set forth by the petitioner that the

respondent is alcoholic and the same, in fact, ruined the marital relationship, the respondent is ineligible to have custody of the child and he has a sinister intention of distancing the child from the petitioner, were repeatedly raised by the petitioner. After considering those allegations only earlier custody orders were passed by the Family Court as well as this Court. The respondent has permission in terms of Ext.P20 to have custody of the child during half period of the mid summer vacation, of course, only if he is available in India.

10. The petitioner-mother is in Canada and the child is

now staying with her second husband. We do not intend to consider any matters pertaining to the custody of the child, which shall be governed now by the directions in Ext.P20. When there is permission for the respondent to have custody of the child during half period of the vacation, the Family Court thought it

fit to allow him to take the child to Dubai along with him during the period from 01.04.2023 till 28.05.2023. If the child can be given in custody of the respondent for a month during vacation, in our view, there is nothing wrong in allowing to take the child to Dubai by the respondent. No doubt, while granting such permission, welfare and well-being of the child in Dubai shall be ensured. In the affidavit filed in support of I.A.No.25 of 2023 the respondent averred that there are enough facilities in Dubai for the accommodation of the child and he intends to take his parents also along with the child. That being a sworn statement of the respondent-father, there is no reason to disbelieve it.

11. The petitioner was granted permission to process

Visa for the travel of the child to Canada. Such a permission was granted as early as on 13.09.2022. The petitioner has no case that she obtained Visa and she is able to take the child along with her to Canada. As such, there is no rhyme or reason to contend that by taking the child to Dubai by the respondent during the ensuing vacation, efforts of the petitioner to take the child to Canada would be futile. That question arises only when the petitioner is in a position to take the child to Canada by making all the arrangements for the same.

12. The directions contained in Ext.P20 no way is a bar

for granting permission to either party to take the child abroad. We do not find any reason to hold that the respondent has some sinister motive behind taking the child

along with him to Dubai. In such circumstances, Ext.P27 order

does not require any interference by this Court in exercise of powers under Article 227 of the Constitution of India. The Family Court insists in Ext.P27 order on the respondent to file a written undertaking that he should produce the child before the Court and return the custody to the petitioner on 28.05.2023. That would be sufficient to alleviate the apprehension of the petitioner. In view of what are stated above, we are of the view that this Original Petition lacks merits and it is therefore dismissed. Sd/- ANIL K. NARENDRAN, JUDGE Sd/- P.G. AJITHKUMAR, JUDGE

dkr APPENDIX OF OP (FC) 159/2023 PETITIONER EXHIBITS EXHIBIT P1 A TRUE COPY OF THE IN G O P NO 1537 OF 16 DATED 19.9.16 ON THE FILE OF THE FAMILY COURT, THRISSUR. EXHIBIT P2 A TRUE COPY OF THE OBJECTION FILED BY

THE PETITIONER IN I A NO 3461 OF 16 IN G O P NO 1537 OF 16 ON THE FILE OF THE FAMILY COURT, THRISSUR DATED 5.11.18.

EXHIBIT P3 A TRUE COPY OF THE MEDIATION AGREEMENT ENTERED INTO IN EXT P1 BY THE PARTIES DATED 3.3.17. EXHIBIT P4 A TRUE COPY OF THE ORDER PASSED BY THE FAMILY COURT, THRISSUR IN G O P NO 1537 OF 16 DATED 24.4.17. EXHIBIT P5 A TRUE COPY OF THE O P NO 2178 OF 17 DATED 22.12.17 ON THE FILE OF THE FAMILY COURT, THRISSUR. EXHIBIT P6 A TRUE COPY OF THE ORDER PASSED IN O P NO 2178 OF 17 DATED 12.4.18 ON THE FILE OF THE FAMILY COURT, THRISSUR. EXHIBIT P7 A TRUE COPY OF THE APPLICATION IN I A NO 3461 OF 18 IN G O P NO 1537 OF 16 DATED 16.7.18. EXHIBIT P8 A TRUE COPY OF THE ORDER PASSED IN I A NO 3461 OF 18 ON O P NO 1537 OF 16 DATED 22.4.17 ON THE FILE OF THE FAMILY COURT, THRISSUR. EXHIBIT P9 A TRUE COPY OF THE CERTIFICATE OF MARRIAGE ISSUED BY THE GURUVAYOOR MUNICIPALITY DATED 21.6.19. EXHIBIT P10 A TRUE COPY OF THE COMMUNICATION RECEIVED BY THE PETITIONER DATED 30.7.19. EXHIBIT P11 A TRUE COPY OF THE CONDITIONAL OFFER BY THE SCHOOL AT DUBAI ISSUED TO THE PETITIONER DATED NIL. EXHIBIT P12 A TRUE COPY OF THE CERTIFICATE ISSUED TO THE CHILD DATED NIL. EXHIBIT P13 A TRUE COPY OF THE PROGRESS CARD REPORT OF THE CHILD OF THE PETITIONER FOR THE YEAR 2017-18 DATED NIL. EXHIBIT P14 A TRUE COPY OF THE PROGRESS CARD REPORT OF THE CHILD OF THE PETITIONER FOR THE YEAR 2018-19 DATED NIL. EXHIBIT P15 A TRUE COPY OF THE RECEIPT ISSUED BY THE SCHOOL AT DUBAI DATED 1.9.19. EXHIBIT P16 A TRUE COPY OF THE TAX INVOICE ISSUED BY THE SCHOOL AT DUBAI DATED 9.1.19. EXHIBIT P17 A TRUE COPY OF THE APPLICATION I A NO 3707 OF 19 FILED IN O P NO 1537 OF 16 DATED 14.8.2019 BEFORE THE FAMILY COURT, THRISSUR. EXHIBIT P18 A TRUE COPY OF THE JUDGMENT DELIVERED IN O.P(F.C) NO 530 OF

2019 DATED 11.10.2019. EXHIBIT P19 A TRUE COPY OF THE ORDER PASSED IN I A

NOS 3707 AND 4070 OF 2019 IN O P NO 1537 OF 2016 DATED 27.11.2019 ON THE FILE OF THE FAMILY COURT, THRISSUR.

EXHIBIT P20 A TRUE COPY OF THE COMMON ORDER

DELIVERED BY THIS COURT IN O P FC NO 748 OF 19 AND 758 OF 19 DATED 9.11.22 EXHIBIT P21 A TRUE COPY OF THE APPLICATION FILED BY THE RESPONDENT AS I A NO 20 OF 22 DATED 1.12.22 IN O P NO 1537 OF 16 BEFORE THE FAMILY COURT, THRISSUR.

EXHIBIT P22 A TRUE COPY OF THE COUNTER FILED IN THE SAID APPLICATION IN EXT P21 AT THE INSTANCE OF THE PETITIONER HEREIN DATED 31.12.2022. EXHIBIT P23 A TRUE COPY OF I A NO 18 OF 2022 DATED 1.12.22 IN O P NO 1537 OF 16 BEFORE THE FAMILY COURT, THRISSUR. EXHIBIT P24 A TRUE COPY OF THE COUNTER FILED BY THE PETITIONER HEREIN DATED 29.12.2022 IN EXT-P23. EXHIBIT P25 EXT-P25: A TRUE COPY OF THE

APPLICATION FILED AS I A NO 25 OF 23 IN O P NO 1537 OF 16 BEFORE THE FAMILY COURT, THRISSUR DATED 6.3.2023. EXHIBIT P26 A TRUE COPY OF THE COUNTER FILED IN EXT P25 DATED 22.6.2023. EXHIBIT P27 A TRUE COPY OF THE COMMON ORDER PASSED BY THE COURT BELOW IN I A NO 18 OF 2022 AND IN I A NO 25 OF 2023 IN O P NO 1537 OF 16 BEFORE THE FAMILY COURT, THRISSUR DATED 27.3.2023 EXHIBIT P28 A TRUE COPY OF THE POWER OF ATTORNEY EXECUTED BY THE ORIGINAL PETITIONER DATED 20.8.2022.

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