

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

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THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

THURSDAY, THE 24<sup>TH</sup> DAY OF AUGUST 2023 / 2ND BHADRA, 1945

OP (FC) NO. 409 OF 2023

AGAINST THE ORDER IN I.A.NO.1/2023 IN O.P.NO.325/2023 OF FAMILY  
COURT, KOTTAYAM

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PETITIONER:

LALAMMA JOHN, AGED 69 YEARS, W/O.JOHN P. ABRAHAM,

BY ADVS.  
AKHIL VIJAY  
C.S.AJAYAN

RESPONDENTS:

1 JIJO VARGHESE, AGED 38 YEARS, S/O.T.P. VARGHESE,  
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2 ELIZABETH P. JOHN, AGED 33 YEARS, D/O.JOHN P.

3 T.P.VARGHESE, AGED 72 YEARS, S/O.POULO POULOSE,  
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4 MINISTRY OF EXTERNAL AFFAIRS, REPRESENTED BY ITS  
SECRETARY, SOUTH BLOCK, SECRETARIAT BUILDING, RAISINA  
HILL P.O., NEW DELHI, DELHI, INDIA,  
PIN - 110001.

5 STATE OF KERALA, REPRESENTED BY GOVERNMENT PLEADER,  
HIGH COURT OF KERALA, MARINE DRIVE, ERNAKULAM DT.,  
PIN - 682031

BY ADV SIKHA G.NAIR

BY GOVERNMENT PLEADER, SMT. PRINCY XAVIER

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 24.08.2023,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**J U D G M E N T****A.Muhamed Mustaque, J.**

This original petition was filed challenging an order of the Family Court, Kottayam at Ettumanoor declining a temporary order of injunction restraining the father and paternal grandfather of the minor child, taking the child from the custody of the petitioner (maternal grandmother). The brief facts involved are as follows:

The child Abigail was born in the wedlock of Jijo Varghese and Elizabeth P. John who are respondents 1 and 2 in this original petition. They initially resided in India after their marriage and moved to UK somewhere in 2021. The child was taken to the UK in the month of March, 2022. Thereafter, some dispute ensued between them. The child was brought back to India by the mother in December, 2022. The father moved the UK court for child custody. The mother undertook to produce the child before the UK court. Thereafter, the maternal grandmother approached the Family Court for custody. In that, an application was filed leading to the impugned order. The Family Court dismissed the application taking note of the fact that the UK court had passed an order in the matter.

2. When we entertained the matter, we noted that there was no order passed by the competent court in the UK protecting the welfare of the child. Accordingly, we passed the following order on 20.07.2023:

*“This case involves a larger issue relating to the jurisdictional competency of a foreign Court to deal with a minor, who is now under the custody of her maternal grandmother in India. Admittedly, parents are residing in UK. The issue arose some time back, when the mother brought the child to India and entrusted minor with the grandmother in December, 2022.*

*2. The father approached the UK Court for custody of the child, where the mother appears to have undertaken to bring the child from India. In the meanwhile, the maternal grandmother approached the Family Court, Ettumanoor, to appoint her as the guardian. The mother has not been made a party in that proceeding. Obviously, the mother is conceding to the fact that the child has to put in the custody of the maternal grandmother for the time being. An application has been moved before the family Court not to remove the child from the jurisdiction of Indian Court. That application has been dismissed. Thus, the maternal grandmother has come up before this Court in this Original Petition.*

*3. Normally, it would suffice to say that we are bound to honour the order of a competent Court in a foreign jurisdiction. However, in child custody matters, we have to ensure that the welfare of the child is protected even in the foreign jurisdiction, especially when the child is being taken from India to a foreign jurisdiction. The parents have no overriding right over the welfare of the child. Biological parents, no doubt would be entitled to custody provided they ensure the welfare of the child. The Court will have to consider in such situations, whether the welfare of the child is protected in UK and what measures have been taken in that regard, even if the mother is compelled to produce the child before the UK Court. Nothing is discernible from the records as to the measures taken by the UK Court to protect the welfare of the child. The maternal grandmother is having custody of the child. The Family Court proceeded as though parental rights supersede the right of the*

*grandmother to deny custody and dismissed the application. It is to be remembered there is no overriding and superseding rights involved in the matter of child custody. What is of paramount importance is the welfare of the child and that alone. The Court in that process will have to enquire whether the parent and any other person is entitled to custody, keeping in mind the welfare of the child. We, therefore, adjourn this matter to make available any orders passed by the family court of competent jurisdiction in UK, protecting the welfare of the child. It is only after ascertaining the measures in regard to the welfare of the child, the father or the mother can remove the child from the local jurisdiction. Further proceedings before the family court are stayed.”*

3. Thereafter, the UK Court passed an order which is produced as Ext.R3(a) along with I.A.No.1/2023. The relevant portion of the order reads thus:

*H. The High Court in England and Wales has already determined that Abigail was habitually resident within the jurisdiction of England and Wales at the point of her removal to India by her mother. Habitual Residence has previously been conceded by the mother.*

*I. The court expects Abigail to be returned to this jurisdiction in accordance with the injunction below. The mother was made aware of the consequences of breaching the penal notice attached to this order. The mother confirmed in court that she agreed for Abigail to be returned to India.*

*j. The court have confirmed that when Abigail returns to England she will return to the care of her mother. She will return to the family home in which she was removed. The mother has made an application for Abigail to be enrolled in Stanley Primary School for her to commence in September 2023*

*when the school reopens after the summer break.*

4. Parental custody is always preferred as the parents are competent to protect the welfare of the child. We are not persuaded to accept the arguments of the learned counsel for the petitioner, as the UK court had noted the measures to protect the welfare of the children. When the competent court of jurisdiction in UK has already taken measures, the comity of courts demands to respect that order unless such order is passed without any jurisdiction. Admittedly, the child came down to India along with the mother only in December, 2022. At present, we cannot acknowledge any superior right of the grandmother to have custody of the child overlooking the interest and welfare of the child provided by parents. The UK court having taken the responsibility to protect the interest and welfare of the child, we are of the view that the interim order sought by the petitioner cannot be granted. Therefore, the original petition fails and it is dismissed.

Sd/-

**A.MUHAMED MUSTAQUE**

**JUDGE**

Sd/-

**SOPHY THOMAS**

**JUDGE**

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APPENDIX OF OP (FC) 409/2023

**PETITIONER'S EXHIBITS:**

- EXHIBIT P1** A TRUE COPY OF THE MARRIAGE CERTIFICATE DTD 23/06/2017 ISSUED BY THE LOCAL REGISTRAR OF MARRIAGES, ANGAMALY MUNICIPALITY.
- EXHIBIT P2** A TRUE COPY OF THE BIRTH CERTIFICATE OF ABIGAIL SARA JIJO ISSUED BY THE REGISTRAR OF BIRTHS AND DEATHS, ETTUMANOOR MUNICIPALITY DTD 11/02/2022.
- EXHIBIT P3** A TRUE COPY OF THE APPOINTMENT LETTER ISSUED TO THE SECOND RESPONDENT DTD 23/04/2021.
- EXHIBIT P4** A TRUE COPY OF THE RESIDENCE PERMIT ISSUED TO THE SECOND RESPONDENT
- EXHIBIT P5** A TRUE COPY OF THE RESIDENCE PERMIT ISSUED TO THE FIRST RESPONDENT.
- EXHIBIT P6** A TRUE COPY OF THE RESIDENCE PERMIT ISSUED TO THE MINOR DAUGHTER OF THE FIRST AND SECOND RESPONDENTS.
- EXHIBIT P7** . A TRUE COPY OF THE RELEVANT PAGES OF THE PASSPORT OF THE MINOR SARA JIJO ABIGAIL.
- EXHIBIT P8** A TRUE COPY OF THE PETITION REFERRED BY THE FIRST RESPONDENT DTD 19/12/2022 BEFORE THE HONORABLE HIGH COURT OF JUSTICE, FAMILY DIVISION, BLACKBURN DISTRICT.
- EXHIBIT P9** A TRUE COPY OF THE EMAIL AND THE ATTACHMENT SENT BY THE SECOND RESPONDENT TO THE HONORABLE COURT DTD 02/02/2023.
- EXHIBIT P10** A TRUE COPY OF THE SUPPLEMENTAL STATEMENT SENT BY THE SECOND RESPONDENT TO THE HONORABLE COURT DTD. 02/02/2023.
- EXHIBIT P11** A TRUE COPY OF THE ORDER OF THE HONORABLE HIGH COURT OF JUSTICE, FAMILY DIVISION, BLACKBURN DISTRICT DTD. 02/02/2023 IN CASE NUMBER PR22P01555.
- EXHIBIT P12** A TRUE COPY OF THE STATEMENT FILED BY THE SECOND RESPONDENT.

- EXHIBIT P13 A TRUE COPY OF THE RESPONSE STATEMENT FILED BY THE FIRST RESPONDENT DTD 09/02/2023 IN CASE NUMBER PR22P01555.
- EXHIBIT P14 A TRUE COPY OF THE ORDER OF THE HONORABLE HIGH COURT OF JUSTICE, FAMILY DIVISION, BLACKBURN DISTRICT DTD 10/02/2023 IN CASE NUMBER PR22P01555.
- EXHIBIT P15 A TRUE COPY OF THE ORDER OF THE HONORABLE HIGH COURT OF JUSTICE, FAMILY DIVISION, BLACKBURN DISTRICT DTD 10/03/2023 IN CASE NUMBER PR22P01555.
- EXHIBIT P16 A TRUE COPY OF THE EMAIL SENT BY THE SECOND RESPONDENT TO THE COURT DTD 03/04/2023.
- EXHIBIT P17 A TRUE COPY OF THE PETITION DTD 02/03/2023 FILED BY THE PETITIONER BEFORE THE HONORABLE FAMILY COURT, KOTTAYAM AT ETTUMANOOR IN O.P. 325/2023.
- EXHIBIT P18 A TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE THIRD RESPONDENT BEFORE THE HONORABLE FAMILY COURT, KOTTAYAM AT ETTUMANOOR IN O.P. 325/2023.
- EXHIBIT P19 A TRUE COPY OF THE AFFIDAVIT AND PETITION FILED BY THE PETITIONER IN I.A.01/2023 IN O.P. 325/2023 OF THE HONORABLE FAMILY COURT, KOTTAYAM AT ETTUMANOOR.
- EXHIBIT P20 A TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE THIRD RESPONDENT IN I.A.01/2023 IN O.P. 325/2023 OF THE HONORABLE FAMILY COURT, KOTTAYAM AT ETTUMANOOR.
- EXHIBIT P21 A TRUE COPY OF THE ORDER PASSED BY THE HONORABLE HIGH COURT OF KERALA IN OP(FC) 269/2023 DTD 24/05/2023
- EXHIBIT P23 A TRUE COPY OF THE 1996 HAGUE CONVENTION ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN AS AVAILABLE ON THE URL [HTTPS://ASSETS.HCCH.NET/DOCS/F16EBD3D-F398-4891-BF47-110866E171D4.PDF](https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf) AS ACCESSED ON 06/07/2023.

**EXHIBIT P24**            **A TRUE COPY OF THE STATUS TABLE PUBLISHED  
AND AVAILABLE ON THE URL  
[HTTPS://WWW.HCCH.NET/EN/INSTRUMENTS/CONVEN  
TIONS/STATUS-TABLE/?CID=70](https://www.hcch.net/en/instruments/conventions/status-table/?cid=70) AS ACCESSED ON  
06/07/2023.**

**RESPONDENTS' EXHIBITS:**

**EXHIBIT R3 (A)**        **TRUE COPY OF ORDER OF HIGH COURT OF  
JUSTICE FAMILY DIVISION ,BLACKBURN  
DISTRICT REGISTRY ,DATED 26.07.2023**