

SHAMA BEG .V. KHWAJA MOHIUDDIN AHMED**CITATION: - ILR 1972 Dec 73****Decided on -23 December, 1971****Bench: - Prithvi Raj, J.**

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INTRODUCTION

This case deals with the custody of a minor child under the muslim law, i.e, Hizanat. As according to the personal law or guardian and wards act, father is considered to be the natural guardian of a minor child. So, in this context, the custody should be given to the father. Under muslim law the female has the rights of hizanat till the completion of 7yrs. After the attainment of such period, the custody goes to the father. Here, both the parties had a child out of the wedlock of marriage and after sometimes they got separated and remarried from the other person, also having children from that marriage. The minor was kept by his maternal grandmother. Under such circumstances the custody of a child is questionable. According to the Guardians and wards act, 1890, the custody should be given to the parties where the welfare of a child lies.

FACTS OF THE CASE

This case was firstly filed by the respondent father for the custody of his minor child, later on the aggrieved party, i.e., appellant mother filed the petition for the same. The appellant and the respondent had a child named Master shuja out of the wedlock of marriage. Later on both were unable to live together, so they got separated and also done the remarriage with the other person. Both had children's from their second marriage. In this situation, the minor child was kept by his maternal grandmother.

The respondent father didn't know paid attention towards the child because at the time of his birth, he was not been seen by the father. No maintenance was been paid by the respondent for the welfare of the child , a decree was also passed by the court to give Rs.200 monthly as maintenance, then also the respondent was failed to do so. So, the appellant contended that, the welfare of the children lies with his grandmother only and also the child didn't completed the said age.

But according to the Hanafi law, the custody lies with the mother till the age of 7 yrs until she got remarried. In this case the mother got remarried so she disentitled herself from the custody of a child¹. It was supported by Mulla that the female have the rights of hizanat till the age of 7 yrs for male child and for the female child, till the attainment of puberty². Thus the court given the custody of the child to the respondent.

According to guardian and wards act, 1890 also the custody is given to the party where the welfare of a child lies.³ In contention, the appellant filed the petition against the decision given by the court. The appellant contended that the welfare of a child lies with the mother only not with the father.

So, according to the personal law the custody lies with the father as the father is considered to be the natural guardian of a child.

ISSUES OF THE FACT

1. Whether the remarriage of a father will affects the custody of the child?
2. Whether the mother is entitled for the custody?
3. Whether the welfare of a child lies with the father or not?

JUDGEMENT

The appeal was dismissed by the court with some changes. The Hon'ble court held that as per the Muslim law and guardian and wards act, 1890, the custody would lies with the father only. But, because of the intention of the appellant to provide a better life to the child, the court ordered to remain the custody of the child with mother till the age of 7 yrs after the completion the father will have his custody. The court also provided certain rights to the father, i.e. that he is having right to meet his ward at any time and also would reside in Delhi with the ward. The latter decree for the maintenance was also dismissed because the custody of the minor child had given to the father only.

¹ Tyabji muslim law, fourth edition

² Mulla, Principles of mohmeddan law, 16th edition

³ Section 17, Guardian and wards act, 1890

ANALYSIS

The Hon'ble court has critically analyzed the issues and gave their view on it.

As per the court in first issue, the Muslim law only talks about the consequences of remarriage of a female. It can be said that, the law must be equal for everyone. Here, in this case both the parties were remarried. So, both of them are not in the correct situation for taking the custody. Though the remarriage of father will not affect the custody but then also there must be equal rights for both female and male.

According to the law, father is the natural guardian of the child. And the guardian and wards act says that the welfare of a child is must for taking the custody. But under Muslim law, women have the rights of hizanat till the age of 7 yrs. for male and according to which the wife is entitled for the custody till completion of said period. The paramount of custody should be the welfare of the child.

Some circumstances like, father had not seen the child at the time of birth and may he didn't had affection for the child. But when it comes to the welfare, the father is said to be the most prominent one. So, the custody of a minor in such case must be given to the father for his goodness.

CONCLUSION

When it comes to the children the case became a little bit sophisticated but in this case the court has given certain right to both the parties. For the welfare of children the custody must be given to the prominent person. Under this case both the parties had same situation but then also have their own rights to practice or to use it for the betterment of the child. Hence, the court took the correct decision without violating any other provision. Child needs the proper care, so it's necessary that he should live in a better surrounding. And the custody of the child lies with the person who is actually having the intention for the betterment of his ward. This analysis includes the certain provision provided by the court and also contains the clear concept of custody under Muslim law. The person who falls under this category shall be governed under this personal law only.