1930

Present : **Jayewardene A.J.**

In the Matter of an Application for a writ of *habeas corpus* by Nona Sooja.

Habeas corpus—*Muslim law—Custody of girl—Marriage of mother—Right of grandmother.*

Under the Muslim law the right which a mother has to the custody of a minor daughter is lost on the marriage of the mother to a person not related to the minor within the prohibited degrees.

In such a case the right of custody devolves on the maternal grandmother of the girl.

APPLICATION for a writ of *habeas corpus* by the petitioner, the mother of a girl of 11½ years. The respondents were the grandparents of the girl.

Bandaranaike (with *Hanifa*), for respondent.

October 13, 1930. JAYEWARDENE A.J.—

The petitioner is the mother of Nona Rahuel, a girl of the age of 11½ years. The respondents are the grandparents of the girl, the first respondent being the petitioner's mother, and the second respondent her father. The petitioner was first married to one Kamer, and the girl Nona Rahuel was their daughter. The petitioner divorced her first husband, the father of the child. She next married one Miskin, who is now dead. She was then married for a third time to one Laxana, who is now living with her. The parties are Malays and are governed by the Muhammadan law. According to the Muhammadan law applicable in Ceylon the mother is entitled to the custody of a girl not merely until she attains puberty but till she is actually married. (Re *application of Wappu Marikar and his wife Umani Umma*[1] followed in *Mohamadu Cassim v. Cassi Lebbe.*[2]) Two interesting traditions are mentioned in the *Hedaya, vol. I.*, 385 : Abu Bakr, the first Caliph, addressing Omar, who claimed the custody of his child, said, " The spittle of the mother is better for thy child than honey, O Omar " ; and on a similar occasion, a woman applied to the Prophet saying, " O Prophet of God ! this is my son, the first of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own care." To which the Prophet replied, " Thou hast a right in the child prior to that of thy husband so long as thou dost not intermarry with a stranger." The custody (*hizanat*) of a boy until he has completed his seventh year and of girl under the age of puberty belongs to the mother, if alive and not disqualified, and, failing her, to the mother's mother and other females in due order.

A woman otherwise entitled to the custody of a boy or girl is disqualified however by being married to a man

[1] (1911) 14 *N. L. R.* 225.
[2] (1927) 29 *N. L. R.* 136.

not related to the minor within the prohibited degrees, so long as the marriage subsists. (*Wilson's Mohammadan Law*, 183, 184.)

According to the *Maihaj et Talibin*, which forms the basis of the legal literature of the school of Shafei, to which the Ceylon Moors belong, the education of a child can never be entrusted to the mother, if she has married again (*Vandenberg, p.* 392, *French ed. translated by Howard*). Baillie in his Digest of Muhammadan Law observes that when a woman marries, she loses the right to the custody of her child(*Baillie's Muhammadan Law, Part II., p.* 96).

The rights of all women are made void by marriage with strangers, and when the child has no mother and, none that is entitled and competent to take charge of it, the mother's mother is preferred to all other persons (*Baillie, Part I., pp.* 431, 432).

According to *Tyabji* 236, in the absence or the disqualification of the mother, the custody of the child belongs to the mother's mother, the principle being that the custody of an infant belongs as of right to its mother's relations. He mentions the marriage of the mother as one of the disqualifications.

Ameer Ali quotes the *Radd-ul-Muktar* as an extremely valuable and authoritative work on Muhammadan law and states that the mother is best entitled to the custody (*hizanat*) of her infant children and that this right belongs to her *qua* mother, even though she be separated from her husband, and nothing can take it away from her except her own misconduct. Among the Hanafis, the mother is entitled to the custody of her daughter until she arrives at puberty, among the Shafeis the custody continues till she is married. *Ameer Ali* observes that the right of *hizanat* or custody, according to all the schools, is lost by the subsequent marriage of the *hizanat*. The author of the *Radd-ul-Muktar* says the right of *hizanat* is lost by the mother (or any other woman) marrying a *ghair-mahram* of the infant, that is, one not related to the infant within the prohibited degrees, for a stranger would not be agreeable to her bringing up the child with affection and care (*Ameer Ali's Muhammadan Law, vol. II., pp.* 247–254, *4th ed.*).

Mulla, p. 212, in his treatise on Muhammadan law states that a female including a mother loses her right of custody when she marries, and the rights devolve upon the mother's mother. The law seems to be clear and universally accepted. In the present case the petitioner who is the mother is married to a stranger and cannot claim the custody of the child from the first respondent, the mother's mother. The right of the maternal grandmother was upheld in 1843, in 1861, and in the Full Court case *Hadji Marikar v. Ahamadu.*[1]

In my view the interests of the child require that the respondents should be the custodians of this girl. The second respondent, the grandfather, has insured his life in her favour for Rs. 1,500, and deposited Rs. 1,800 for her in the Savings Bank. He is giving her a good education. He has been a Government servant for over 30 years and is drawing a good salary. The present husband of the petitioner is according to him an impecunious person, who asks him for money. He says he is tired of giving him money and hence this case. He also fears that this girl is really wanted to look after the child of the third marriage and to do work in the house. In that event her education will be neglected. These are the very evils which the Muhammadan law seemed to contemplate. In many cases the Courts have said broadly that the welfare of the minor must be the paramount consideration. In *Regina v. Gyngall*[2] the Court of Appeal held that the Court would refuse to give the mother the custody of the child, if satisfied that it was essential for the

[1] (1860–62) *Ram.* 88 *and* 144.
[2] (1993) 2 *Q. B. D.* 232.

well-being of the child. The same principle was followed in *Muhamadu Cassim v. Cassie Lebbe* (*supra*).

In the present case however the Court need not give its decision in accordance with its own views of expediency. The law and the interests of the minor seem to me to coincide and to require that the girl should be in the custody of the first respondent. I accordingly dismiss the application.

The mother is however in my view entitled to visit the girl and see her at least once a week. I would make order accordingly and remit this case to the Police Magistrate to communicate this order to the parties.