1927.

Present: Lyall Grant J.

In the Matter of an Application for a Writ of *Habeas Corpus*.

MOHAMEDU CASSIM *v.* CASSIE LEBBE.

Habeas corpus—*Muslim law—Father's right to the custody of child.*

Where a Muslim child was in the custody of her maternal aunt from her infancy till the ninth year, the Court will not restore the child to her father's custody, where it is of opinion that such a change would be to the detriment of the child's welfare.

APPLICATION for a writ of *habéas corpus* by the father of a muslim girl.

The facts appear from the judgment.

H. V. Perera (with *Sri Nissanka*), for applicant.

Hayley (with *Vethevanam*), for respondent.

June 15, 1927. LYALL GRANT J.—

This is an application for a writ of *habeas corpus* by the father of a girl of about nine years of age. All the parties are Mohamedans.

The child's mother died in July, 1919, and gave the infant, who was then about an year old, into the custody of her sister, who is the wife of the respondent. The child has since that date been in the care of her maternal aunt, and it is from this custody that her father seeks to recover her. Strictly speaking the petitioner's sister-in-law ought to have been made the respondent to this petition, but the respondent does not press the point.

The matter was remitted to the Police Magistrate of Kandy for investigation of the facts, who, after recording evidence, has found the following facts to be proved:—"The respondent is a very wealthy and well known man; the petitioner is a man who before his marriage appears to have had nothing, and who since his marriage has run through his wife's dowry and whatever of his property, including his aunt's jewellery, came his way. Of his wife's dowry there remain only the houses in Trincomalee street, Kandy, which are mortgaged to a Chetty."

He finds that an allegation made by the petitioner that the child's present custodian belongs to a family of chronic consumptives is not true. In regard to an allegation that the respondent is mismanaging the minor's estate, he reports that on the evidence it would appear that but for the respondent the minor's property would already have been sold out. He also reports that the father has taken no interest in the child.

The remaining ground on which the applicant asks for the custody of the child is that his sister-in-law is not entitled to the custody of the child as she is married to a man not within the prohibited degrees, and also that a female custodian can only have the custody of a female child up to nine years, whereas if she attains the age of puberty and is a virgin the father can have the custody.

These arguments are founded upon Mohamedan law, and if they set out correctly the Mohamedan law applicable to this case, they raise the question how far that law will be applied in cases of this nature where it would lead to a different result from the ordinary law of the land.

The general law in regard to the custody of children is stated by this Court to be that the father has the right to the custody of the children. This view of the law was adopted by this Court in the case of the *Application of Sego Meera Lebbe Ahamado*,[1] which was a Full Bench case, and I do not think that this decision has ever been questioned.

This agrees with the English law, and as Mr. Justice Dias said in that case:—"According to the laws of all civilized countries the parents are the natural guardians of their children, and as such are entitled to their custody."

The decision in that case, however, was chiefly directed to the question whether there was a Mohamedan law in force in Ceylon which would deprive a father of his right to such custody, and it was held that there was no such law.

Although, however, this is the general principle of our law, it is subject to exceptions where such exceptions are shown to be for the benefit of the child. That is true not only of the ordinary law administered in this country, but also of the law applied to Mohamedans.

In the case of the *Application of Wappu Marikar and his wife Ummaniumma*,[2] Mr. Justice Wood Renton held that according to the Shafei law, which is the Mohamedan law governing the Moors of Ceylon, the custody of a girl remains with the mother not merely until puberty, but until she is actually married.

This view of the Mohamedan law is borne out by what is said by Sir Ameer Ali in his book on Mohamedan Law, Vol. 2, p. 294, where he says that among the Shafeis a mother is entitled to the custody of her daughter until the latter is married, but adds at page 297:—"That as the right of hizanat (guardianship) has in view of the exclusive benefit of the infant, each particular case would be governed by the doctrine in force among the sect to which the child is supposed to belong; or, if that cannot be ascertained, by a consideration of what would be best for the child as a Moslem child." This is the rule followed in Algiers.

[1] *9 S. C. C. 42.*

[2] *14 N. L. R. 225.*

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There would appear, therefore, to be no essential difference between the fundamental principle which guides the Court in dealing with the custody of children other than Mohamedans and the principle which it follows in dealing with the custody of Mohamedan children.

The grounds upon which a parent's rights may be interfered with were considered in England in the case of *Regina v. Gyngall.*[1] In that case the Court of Appeal decided that although the mother of a female infant aged fifteen had not been guilty of any misconduct to disentitle her to the custody of the child, yet the Court would, if satisfied that it was essential for the well being of the child, refuse to give the mother such custody. The facts in that case were in some respects not unlike the facts in the present case. Lord Esher M.R. said that the Court had to consider the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, and the happiness of the child.

The principle there enunciated appears to me to be the same as that upon which the Courts in Ceylon act. It was the principle acted upon by the Court *in re the Application of Aysa Natchia*,[2] and it appears to be the ruling principle in other cases.

I do not think that this Court has ever felt itself compelled to order a child to be removed from the custody of relatives who are performing their duty towards the child in a perfectly satisfactory manner and to be handed over to the custody of its natural guardian, where the Court is of opinion that such a change would be to the detriment of the welfare of the child.

The Magistrate has reported in this case that in his opinion " the handing over the custody of the child to the petitioner would affect the child adversely and strongly work for her unhappiness." I see no reason to disagree with his opinion.

The application is refused.

Application refused.

[1] *(1893) 2 Q. B. 232.*

[2] *(1862) Ram. Rep. (1860-1862) 130.*