1974 *Present :* **Wijayatilake, J., Walgampaya, J., and Ismail, J.**

M. H. M. SUBAIR, Petitioner, *and* M. S. M. ISTHIKAR and 2 others, Respondents

S. C. 47/73—Application for a Mandate in the nature of Writ of Habeas Corpus for the production in Court of the body of M. S. Mohamed Isthikar

Habeas corpus—*Muslim law—Right to the custody of a male child who has passed the age of 7—Father's right is not absolute—Welfare of the child is the prime consideration—Effect of second marriage of the child's mother.*

Application for a writ of *habeas corpus* was made by the petitioner, a Muslim, for the custody of his male child (1st respondent) who was over the age of seven years. The child was in the custody of his maternal grandmother, with whom was also living the 2nd respondent, who was the mother of the child, and the 3rd respondent who married the 2nd respondent after the marriage of the petitioner to the 2nd respondent had been dissolved.

Held, that under the Muslim law, the father of a male child who is over the age of seven years does not have an absolute right to the custody of the child. After the age of 7 years a male child has the option to decide whether he should remain with the father or the mother. It is also clear from the authorities that the prime consideration is the welfare of the child. In the present case the second marriage of the child's mother would not entitle the petitioner to the custody of the child.

APPLICATION for a Writ of *habeas corpus*.

M. T. M. Sivardeen, for the petitioner.

M. Markhani, for the respondent.

Cur. adv. vult.

July 3, 1974. ISMAIL, J.—

This matter arises for consideration as a result of an application made by the father of the corpus for custody of the child M. S. Mohamed Isthikar from the custody of his maternal grandmother.

The facts briefly are that the Petitioner had married the 2nd Respondent in December, 1963. The parties had been divorced in 1964 after they had lived together for a couple of months or so. This child had been born after the Petitioner left the 2nd Respondent, in November 1964—vide P1. Subsequently the 2nd Respondent had married the 3rd Respondent. The 2nd and 3rd Respondents with the child had continued to live right through in the house of the grandmother. The Petitioner even at the time 2nd Respondent married the 3rd Respondent on 3.11.68 had made no effort to get the custody of this child.

It is also in evidence that the Petitioner had paid no attention whatsoever to the corpus, had not visited the corpus and had not maintained the corpus from the time of the child's birth right up to his making this application to this Court. The learned Magistrate was amply justified in coming to the conclusion that the Petitioner's story of having visited the child at the school on two occasions is probably untrue.

It is also in evidence that the 2nd Respondent had made an application to the Quazi Court for maintenance and an order for maintenance in a sum of Rs. 100 had been made against the Petitioner. It therefore appears to me that the Petitioner has made this present application for custody of the child only as a result of an order for maintenance made against him in the Quazi Court. It is also to be noted that the Petitioner has appealed against the order for maintenance. Therefore, there is no doubt from the facts and circumstances which the learned Magistrate has referred to in the course of his order that the present application apparently has been brought in view of the order for maintenance made against the Petitioner, to circumvent that order.

The evidence in this case amply indicates that the child in question is being very well looked after, considering his status in life, by his mother and grandmother. There is also ample evidence to indicate that the child is getting on happily in the environment in which he is now. It is also equally obvious that the Petitioner—the father—is a complete stranger to the child and the child categorically stated that until he came into Courts in connection with this application before the Magistrate that he had never set eyes on his father. The child has also expressed complete opposition to his leaving his grandmother's house and going to reside with his father.

Custody of the child with the Petitioner would necessarily mean that the child would be taken away from the place of his present residence and being put into completely new surroundings and being educated possibly at Kalutara as indicated by the Petitioner. It is also the Petitioner's evidence that he is in receipt of an income of only about Rs. 100 per month all inclusive and that too an allowance from his father. With this paltry sum it is apparent that the Petitioner will not be capable of maintaining the child in the circumstances which the child has become used to.

From the facts and circumstances that have transpired in the evidence it is clear that it is not love, affection, family loyalty or some similar sentiment which motivated the Petitioner to come to Court and ask for the custody of the child. On the other hand, it is equally clear that the reason for the Petitioner coming in at this belated stage and asking for the custody of the child is solely attributable to the order for maintenance made against him by the Quazi.

In the light of these facts it will be necessary to examine various authorities cited by the counsel appearing for Petitioner to determine whether the claim of a father for custody of a male child over the age of 7 years under the Muslim Law is paramount or whether one should take into consideration the welfare and the well-being of the child. Counsel appearing for Petitioner contended that the Muslim Law as it stands now gives absolute right to the father for custody of a minor male child of over 7 years of age.

In the case reported in 14 N. L. R.—page 225—it was held that, "the Cursus Curiae in Ceylon has been in favour of giving the custody of infant children of Muhammadan parents to the mother and the maternal relatives in preference to the father. According to the Shafei Law the custody of a girl remains with the mother, not merely until puberty, but till she is

actually married ; in the case of a boy, till the completion of his seventh year at all events, and from thence until puberty he may place himself under either parent whom he chooses. "

In 29 N. L. R.—page 136—it was held, " 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. " No doubt in this case, the corpus was a female. But, in the light of several decisions referred to in the course of the judgment the right to custody of the child was held not to be absolute. Lyall Grant, J., stated in the course of his judgment, " 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.

It will therefore be seen that of the principles that are a guide to Courts in considering the question of custody of a child, the child's welfare and happiness are the prime consideration.

In the case reported in 70 N. L. R.—page 405, it was held that " in Muslim Law (Shafei Sect) a woman, whose marriage has been dissolved, forfeits her right to the custody of a male child of that marriage if she marries subsequently a person who is not related to the child, unless special circumstances are shown which require that the child should continue to remain in the mother's custody." In the course of the judgment Manicavasagar, J., stated—" Under any system of law, a paramount and, indeed, a vital consideration on an issue such as the instant one is the interest of the children, any other consideration being subordinate to it. The law applicable to the Muslims of the Shafei Sect recognises this by granting to the mother her natural right to the custody of her child either on account of tenderness of age or weakness of sex, up to a specified time, which normally is the seventh year in the case of a male child ; at this age the law permits the male child the choice of living with either of his parents until he attains puberty, when on the attainment of this or on reaching 15 years, whichever is earlier, he is personally emancipated from the patria potestas. "

Ameer Ali in volume II—Mohammedan Law—at page 251 says, "Shafeis and Hanbalis allow a boy at the age of seven, the choice of living with either of its parents. Should he prefer to continue with his mother, he is allowed to do so until he attains the age of puberty, when he has no option and his guardianship devolves on the father. In practice, however, the father's right to the custody of the boy's person terminates with his puberty. For he is then personally emancipated from the patria potestas."

At page 257—Ameer Ali discusses the question of the subsequent marriage of the Hazina—that is the woman having custody of the child—to a person who is not related to the child within the prohibited degrees. It appears that normally when such a marriage takes pace the woman loses the custody of the child, but he says, "Although ordinarily the woman entitled to the custody of a child forfeits her right on contracting a marriage with a stranger, special considerations regarding the interests of the child may require that its custody should be retained by her. For example—if a woman separated from her first husband were to marry a second time in order to secure for her infant child better and more comfortable living, she would not forfeit her right to custody. The Courts would preserve to the mother the custody of the child, if it be in its interest that it should remain with her. So also where the Hazina contracts a second marriage, and the father does not, within a reasonable space of time from the date of such marriage, or from the date of his knowledge thereof claim the person of the infant, he should be supposed to have abandoned his right over it, and it should remain thenceforward definitely under her care."

Tyabji, in his principles of Muhammandan Law 1913 Edition at page 207 comments as follows:—"There are many cases in which the Courts have said broadly that the welfare of the minor shall be the paramount consideration in appointing (or declaring) guardians; and this may afford an explanation of different views taken on the point whether the Courts should consider the welfare of the minor in the first instance or subordinate that consideration to the law by which he is governed .....For the law is professedly based on a regard for the welfare of the minor; assuming that it fails in its purpose, it is not the function of the judicial tribunals to set right the shortcomings of legislators."

At page 209—he has incorporated the translation from the Sharsh-I—Viqaya which reads, "The minor cannot be given an option except according to Imam Shafii (who considers that the child has the option of remaining with either parent, and his view is based on the tradition that the Prophet (on whom and

whose descendants be peace) gave the child the choice between its mother and father, and said, ' go to either as you desire ', and said, ' Oh God, direct him (the child) rightly, ' and the child chose its mother."

Therefore, it will be seen, that the trend of authorities in Ceylon has consistently followed the priciples which I have reproduced based on the law applicable to Muslims and which have been commented upon by the authorities both in India and in Ceylon to which I have made reference earlier.

The considered views appear to be that after the age of 7 years a male child has the option to decide whether he should remain with the father or the mother, when no doubt the mother's right to custody ceases when the male child passes the age of 7. It is also clear from the authorities that when the Court has to interpret the law relating to minors among the Muslims the prime consideration must necessarily be the welfare of the minor concerned.

The facts in the present case indicate that the father had not been concerned in any way with the welfare of the minor from birth right up to the time he came into Courts asking for the custody of the child in these proceedings. He had initiated these proceedings purely to circumvent the order for maintenance made against him on application made by the mother. It is also apparent from the findings of the learned Magistrate that the Petitioner on his own evidence is not in a position to maintain this child and look after it in the manner the child has become accustomed to. In the initial stages of the submission—counsel for the Petitioner conceded that the Petitioner himself has married again and has children by his second marriage. This factor would indicate that the Petitioner is further burdened on the paltry income he is in receipt of. Even apart from this fact, it appears to me that taking into consideration the welfare of this child and the child's preference, the custody should be with the mother. In the circumstances, I am of opinion that the recommendation of the learned Magistrate should be accepted. The application of the Petitioner is dismissed with costs fixed at Rs. 200.

WIJAYATILAKE, J.—I agree.

WALGAMPAYA, J.—I agree.

Application dismissed.