

1967

*Present : Manicavasagar, J.*

M. C. M. HAMEEN, Petitioner, *and* A. C. M. MALIHA BABY  
and another, Respondents

*S. C. 791/64—Habeas Corpus Application*

*Muslim law—Dissolution of marriage—Mother's right to the custody of her child—  
Forfeiture thereof if she re-marries—Habeas corpus.*

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.

**A**PPPLICATION for a writ of *habeas corpus*.

*M. T. M. Sivardeen*, for the Petitioner.

*M. S. M. Nazeem*, for the Respondent.

*Cur. adv. vult.*

May 6, 1967. MANICAVASAGAR, J.—

In these proceedings, the petitioner seeks an order from this Court for the custody of his son Cassim Mohamed Hameen who is at present living with his mother, the former wife, the respondent.

The petitioner and the respondent are Muslims and belong to the Shafei subsect ; they were married in 1951 and their marriage was dissolved in 1957 : Hameen was born in May 1953 and will be 14 years next month ; he has been in the custody of his mother since the dissolution of the marriage.

The learned Magistrate has in a careful analysis of the evidence considered every fact relevant to the issue, and found on the one hand that there is no factual circumstance which militates against the petitioner having the custody of his son, and on the other, that the child has not suffered one whit from being with his mother, who has cared for him and looked after his health and education as any mother is expected to do. But the Magistrate took the view that the law applicable to the parties is such that the father should have the custody of his son.

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 7th 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 : Mohammedan Law, Vol II, (5th Edition) page 251, and 50 N. L. R. 102 at 105).

In this case the boy has opted to live with his mother ; it is submitted that his decision is not of his own free will but has been influenced by the fact that he lives with his mother and has been persuaded to say so. This is a submission which needs consideration : as against this the boy has lived with his mother for many years and being well cared for he may have made his choice untrammelled by any extraneous influence. The Magistrate, however, though he does not say so, explicitly appears to

think that the boy has been unduly influenced. I also lean to the same view because the boy denied knowledge of the petitioner being his father, though he lives in close proximity to his father's home and has spoken to him. I think it most unlikely that he does not know the petitioner to be his father. In any event village gossip would have made him wise on this ; his ignorance does not appear to be true and his choice therefore is of doubtful value and not made in good faith. But there is a more cogent reason ; his mother has contracted another marriage and it is conceded that her husband is not related to the child. Under Muslim law a mother forfeits the right of custody by marriage to one who is not related to the child within the prohibited degrees (Ameer Ali : page 256), unless it is shown that there are special circumstances pertaining to the exclusive interests of the child which require that he should be in his mother's custody ; the evidence does not disclose any such circumstances.

The recommendation by the Magistrate is adopted and is made an order of this Court. The boy will soon reach the age when he would be emancipated ; he is old enough to have access to his mother of his own free will and he should not be restrained from exercising his rights.

*Application refused.*

