

1963

Present : T. S. Fernando, J.

M. A. S. MAFTHOOHA, Petitioner, and A. S. M. THASSIM and  
2 others, Respondents

*S. C. 373 of 1962—Application under Section 45 of the Courts Ordinance  
(Cap. 6) for a Mandate in the nature of a Writ of Habeas Corpus.*

*Muslim law—Custody of infant female children—Mother's right thereto—"Unworthy  
of being trusted"—Habeas corpus.*

Among Ceylon Moors a mother is entitled to the custody of her infant female children unless she by her conduct has disqualified herself from claiming the right to such custody.

Any disqualification of the mother on the ground of her being "unworthy of being trusted" must arise out of misconduct.

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

*S. A. Marikar*, with *M. D. K. Kulatunge*, for the petitioner.

*H. W. Jayewardene*, Q.C., with *M. S. M. Nazeem* and  
*M. T. M. Sivardeen*, for the 1st respondent.

*Cur. adv. vult.*

June 18, 1963. T. S. FERNANDO, J.—

The petitioner, the wife of the 1st respondent, makes this application for an order from this Court directing her husband to hand over to her custody the 2nd and 3rd respondents who are their children. The 2nd and 3rd respondents are both females, and are today of the ages of 4 and 2 years respectively. The petitioner has left her marital home and says that the 1st respondent prevented her from taking these two children away<sup>1</sup> with her.

There is no dispute between these parties who are Ceylon Moors that they are governed by the law applicable to the Shafei sect of Muslims. Under that law, the petitioner as the mother is ordinarily entitled to the custody of her female children. That right to custody which is known as *hizanat* is lost—

- (1) by the subsequent marriage of the *hazina* with a person not related to the child within the prohibited degrees ;
- (2) by her misconduct ;
- (3) by her changing her domicile so as to prevent the father or tutor from exercising the necessary supervision over the child ;
- (4) by her abjuration of Islam ;
- (5) by her neglect or cruelty to the child—vide Mahommedan Law by Ameer Ali (5th edition), p 256.

At the inquiry made on this application by the Magistrate of Matara the respondent failed to establish the existence of any one of the above five grounds. Mr. Jayewardene, stating that on an application for the custody of a child the paramount consideration is what is in the best interests of the child, argued that the authorities indicate that where the evidence shows that the mother is “unworthy of being trusted” she is not entitled to custody of the child. There is no doubt that the court is called upon to adjudicate in the best interests of the child, but that adjudication must be reached within the framework of the law governing the parties. Under that law, as I apprehend it, it is not open to this Court to refuse a mother the custody of her infant female children unless she by her conduct has disqualified herself from claiming the right to such custody. The allegation that the petitioner is “unworthy of being trusted” is put forward on the basis that the evidence shows that she is a weak-willed woman, completely under the domination of her elder sister. But as Ameer Ali’s treatise itself indicates—vide p. 257—any disqualification on the ground of being “unworthy of being trusted” must arise out of misconduct. Misconduct is not established on the evidence here, and even if it has been shown that the petitioner is a woman of weak will that infirmity has not led to misconduct or, I might add, even neglect such as is contemplated in the relevant law. That being so, the respondent has failed to show that the best interests of these two infant children require that the person who *prima facie* is entitled to their custody should be denied that right.

The application is allowed and I make order directing the 1st respondent to hand over the 2nd and 3rd respondents to the custody of the petitioner. This order will be executed by the Magistrate’s Court of Matara.

*Application allowed.*