1957 *Present :* T. S. Fernando, J.

A. C. M. MOHIDEEN, Petitioner, *and* SITHY KATHEEJA, Respondent

S. C. 226—In the matter of an Application for a Writ of Habeas Corpus

Habeas corpus—*Muslim law—Custody of infant child—Preferential right of mother thereto.*

Where a Muslim father of the Shafei sub-sect who was entitled by law to supervise the upbringing of his four year old child sought to remove the child from the custody of the child's mother for about a fortnight once in three months during the child's school holidays—

Held, that the granting of the application would amount to a serious encroachment on the mother's legal right to the physical custody of the child.

APPLICATION for a writ of *habeas corpus.*

C. S. Barr Kumarakulasinghe, with *Izadeen Mohamed*, for the petitioner.

M. Rafeek, for the respondent.

Cur. adv. vult.

March 19, 1957. T. S. FERNANDO, J.—

The petitioner made this application on 28th February 1956 seeking an order from this Court for the production by his wife, the respondent, of his son, Abdul Aleem, in court and a further order granting him the custody of this child who was 4 years old at the time. It is not disputed that the law relating to the physical custody of children of Muslim parents in Ceylon who belong to the Shafei sub-sect of the Sunni sect is laid down correctly in the case of *In re Wappu Marikar* [1], where Wood Renton J. stated that the *cursus curiae* in Ceylon has been in favour of granting the custody of infant children of Muslim parents to the mother and the maternal relatives in preference to the father. It is there stated that according to the Shafei law the custody of a boy remains with the mother 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. If, therefore, the respondent is entitled to the physical custody of the child justification for making this application would have to be sought in some real attempt by the respondent to prevent the petitioner from seeing his child at reasonable hours and thereby interfering in some indirect way with his rights to exercise supervision over the child.

Notwithstanding the circumstances that the legal custody may be in the mother, it is alleged that the Muslim law recognizes a right in the father, by virtue of his duty to maintain the child, to supervise the upbringing of the child. This position is conceded by learned counsel for the respondent who states that at the inquiry before the Magistrate which preceded the argument before me the petitioner admitted under cross-examination that he was never prevented from seeing the child at the respondent's home and that the respondent has done nothing to estrange the child from him. I have no reason to doubt that the respondent who is an educated woman is genuinely desirous that the child should grow up—to use her own words—" acknowledging the petitioner as his father ".

The only dispute between the parties to this application centres round the petitioner's insistence that he should be permitted to have the child (who now attends a school nominated by him) with him for a part of the child's school holidays. The respondent is equally insistent that the child should not spend even a single night away from her. Her

[1] *(1911) 14 N. L. R. 225.*

unrelenting attitude on this point appears to be due to an anxiety for the child's health which she fears will suffer if the petitioner is allowed to take him away. Certain previous experiences apparently seem to have left on her an impression sincerely formed that the petitioner understands nothing of the likes and dislikes of the child. At the beginning of the argument I was inclined to view the petitioner's claim with some sympathy, but there are circumstances now disclosed which deter me from acceding to the petitioner's request, even if I had the power to do so. One is that the petitioner has divorced the respondent after this application was presented to the court, but the other and more compelling circumstance is that the petitioner's duties as an inspector of village works involve much travelling and consequent absence from his residence which at the moment is at Kathankudy in the Batticaloa District. He does not appear to have a relative or other fit person living with him who can look after the child while the petitioner is attending to his official duties. Moreover, an arrangement by which a child of tender age is taken away from its mother and left with the father even for a short period becomes meaningless when the father himself is so circumstanced as to be unable to have the child properly looked after and cared for. On the other hand, I can see no good reason why the petitioner cannot make use of his holidays to travel up to Jaffna where the child and its mother now live and see the child at all reasonable hours during such holidays.

Learned counsel for the petitioner has invited my attention to certain observations contained in the judgment of the Judicial Committee of the Privy Council in *Imambandi v. Mutsaddi* [1] which indicate that the mother is not the natural guardian of the child. I fail, however, to see what relevance these observations are in the present context. The Privy Council was concerned with a mother's right to deal with a minor child's property. What Their Lordships pointed out was that the custody of the person was not guardianship ; it was not disputed at any stage in that case that the mother is entitled to the custody of her minor children up to a certain age according to the sex of the child.

As I have stated already, it is not disputed by the respondent that the petitioner is entitled to supervise the child's upbringing. At the same time, as the respondent is entitled to the physical custody of the child, to permit the petitioner to take the child away for a fortnight or so once in three months would appear to me to be a serious encroachment on the respondent's rights in respect of that physical custody. It follows that even if I had taken a view on the facts favourable to the claim of the petitioner I would not have had the power in law to grant his prayer. This application must therefore be refused with costs.

Application refused.

[1] *(1917–18) L. R. 45 Ind. App. at p. 83.*