

(1969) 09 MAD CK 0040
In the Madras High Court

G.A. Mistafa

APPELLANT

Vs

Inyath Rathima Shah

RESPONDENT

Date of Decision : 23-09-1969

Acts Referred:

Guardians and Wards Act, 1890 — Section 25, 7(1)(b)

Citation : (1970) 83 LW 59 : (1970) 2 MLJ 354

Hon'ble Judges : K.S. Palaniswamy, J;K.S. Palaniswami, J

Bench : Division Bench

Judgement

K.S. Palaniswamy, J.—This is a petition under Sections 7(1)(b) and 25 of the Guardians and Wards Act, 1890, to declare the petitioner as the guardian, and for the custody of his minor daughter, Khudsia Fathima alias Shala Navid. The respondent is the divorced wife of the petitioner. The petitioner, who is employed as a pilot in Indian Airlines Corporation, stationed at Calcutta, married the respondent at Madras on 3rd September, 1960, and the respondent begot Khudsia Fathima alias Shala Navid on 28th October, 1961. When the couple were living at Calcutta along with the minor, the petitioner appears to have developed friendship with an air-hostess and divorced the respondent on 4th May, 1967. After the divorce, the respondent came away to Madras with the minor daughter and is now living with her parents, who are residents of Madras. The petitioner is a native of Madras where he has got an ancestral house in which his parents are living. The petitioner's contention is that he being the natural guardian of his minor daughter, is entitled to be appointed guardian and is also entitled to custody.

2. The respondent's contention is that the petitioner treated her and the child in an indifferent and cruel manner when they were at Calcutta and relinquished all his claim over the child at the time of the divorce and that by reason of his conduct, he is disentitled from asking for the custody of the child, though in law he may be the guardian. The petitioner has filed a reply statement denying that he relinquished his right to the custody of the child.

3. It is not in controversy that the petitioner who is the father of the minor, is the natural and lawful guardian. The only question is whether he is entitled to the custody of the child. In considering this question what is paramount is the welfare of the minor. Such welfare includes the moral, religious and physical welfare and ties of natural affection cannot be ignored in considering the question of custody. Under what circumstances the minor left the custody of the petitioner should be examined to find out whether he is entitled to the custody. What happened between the couple prior to the divorce, that was effected on 4th May, 1967 is not strictly germane for consideration in this proceeding, and as such they were well advised in not letting any evidence on that question. All that appears from the oral evidence is that the respondent resented the visits of the air-hostess to her house and that led to misunderstanding resulting in divorce. The evidence of the respondent further shows that only when she was taken to the presence of the Khazi on 4th May, 1967 she came to know that she was taken there for the purpose of divorce. Exhibit D-2, dated 4th May, 1967 is the deed of divorce written by the Khazi Ahmed Raza of Calcutta and signed by the petitioner. It is in Urdu (English translation attached). It refers to the divorce and also states that the child will always remain with the respondent and that from that date the petitioner shall have no relationship whatsoever. While admitting the signature in the divorce deed, the petitioner contends that when he signed the document, it contained only the recitals relating to the divorce, that there was no reference to the child and that the reference to the child appears to have been incorporated by the Khazi after he signed. But the evidence of the respondent is that after the first portion of the document relating to the divorce was written and read out by the Khazi, she stated that there was a child, that the child should be with her, that thereupon the Khazi questioned the petitioner, that the petitioner replied stating that the respondent will take the child and that he will have nothing to do with the child thereafter. He evidence is that thereafter the Khazi wrote the recitals relating to the child and that thereafter the petitioner signed with full knowledge of all the contents. The question is which of these two versions is believable. The petitioner admits that the entire document is in the handwriting of the Khazi. He does not attribute any motive to the Khazi as to why he should be a party to the insertion of a recital, without his consent and knowledge in the document after he, the petitioner, signed it. Much reliance is placed upon the word " faqth " in Urdu, which means " thus," occurring after the recitals dealing with divorce and before the recitals dealing with the child, That word was evidently written by the Khazi thinking hat there was nothing more to be written after he wrote the recitals about the divorce. It was only after he wrote up to that word and after he read out the document, the respondent claimed custody of the child and thereafter the Khazi after ascertaining the wishes of the petitioner wrote the remaining portion of the document dealing with the child, but omitted to strike out the word " faqth." It is not the evidence of the respondent that the entire document was written at a stretch. As a matter of fact, she admits that the portion relating to the child was written subsequently but before the petitioner signed the document.

4. The evidence of the respondent is entirely consistent with the conduct of the petitioner. The divorce was effected on 4th May, 1967. But even the previous day, namely, 3rd May, 1967, the petitioner had applied to the school in which the child was studying at Calcutta for the issue of a transfer certificate obviously with the intention of sending away the child with the respondent after the divorce. A copy of that application for transfer is Exhibit D-1. The petitioner admits having made that application. If his intention was not to part with the custody of the child after the divorce, there was obviously no reason for him to apply for the transfer certificate even the previous day. That conduct on his part is entirely consistent with the evidence of the respondent that when she mentioned about the child, the petitioner willingly gave up his custody and agreed that she the respondent, may have the custody of the child. I accept the evidence of the respondent that the petitioner relinquished his right to the custody of the minor and declared that she child shall always remain with the respondent.

5. After the divorce, the respondent was practically left in the streets at Calcutta. The petitioner did not provide the respondent with the necessary funds for her journey from Calcutta to Madras, where her parents are residing. The evidence of the respondent shows that she had to contact her parents at Madras to get necessary financial assistance for her travel with the child from Calcutta to Madras. The evidence of the petitioner that he had given enough funds to the respondents and that the respondent had saved from such payments is not borne out by acceptable evidence. The respondent no doubt admits that the petitioner used to give her money for household expenses. Some cheques amounting to Rs. 1,150 were given to the respondent in the months of March and April, 1967 as seen from the extract of the bank account Exhibit P-17. But there are no materials to hold that after meeting the family expenses any substantial amount was left with the respondent to cover her travelling expenses. This piece of conduct of the petitioner in totally ignoring the child after the divorce and after parting with the custody is unfatherly and unpardonable.

6. It is true that sometime after the divorce the petitioner began to remit money to the respondent at the rate of Rs. 150 per month for the expenses of the minor. He also wanted the respondent to keep him informed about the welfare of the child vide his letter Exhibit P-1, dated 20th June, 1967. To that letter, the respondent replied under Exhibit P-2 stating that the petitioner had already consented to the child being always with her and that the petitioner need not have any apprehensions about the child thereafter. To that letter, the petitioner replied under Exhibit P-3 denying that he consented to the custody of the child being with the respondent. On occasions when the petitioner came to Madras, he wanted the child to be sent to him, to which request the respondent does not appear to have agreed. Correspondence passed in that respect. It is unnecessary to refer to them.

7. After the petitioner divorced the respondent he has married the air-hostess as his second wife. That air-hostess is admittedly not a relation of the child. The

petitioner has no other female relation living with him. His mother is a permanent resident of Madras, where the petitioner's father is also living. The petitioner is employed as a pilot and on the days of his flight he is likely to be away for some days as seen from the evidence of the respondent. During such days, the minor, if she is to be in the custody of the petitioner, would have to depend entirely upon the mercy of the step-mother. That is certainly not good for the minor. In the household of the petitioner at Calcutta there is no other female relation except his second wife to take care of the child. Having regard to the fact that the petitioner has married the air-hostess after divorcing the respondent, it is not natural, in the circumstances, to expect the air-hostess to have kindly feeling towards the child. It is stated that she has not yet presented any child to the petitioner. If she happens to present one, it would not be reasonable to expect her to have sufficient affection towards the minor in question. Certainly, it would not be in the interests of the minor to send her to a home where there would be no love and affection.

8. As already pointed out, the petitioner, who is the father, is undoubtedly the natural and legal guardian of the minor. This is what the learned author, Mulla, has observed in *Principles of Mohammedan Law*, 16th Edition at page 324, paragraph 352:

352. Right of mother to custody of infant children.--The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child unless she marries a second husband in which case the custody belongs to the father.

The mere fact that the applicant, the father, is the natural guardian does not automatically entitle him to the custody of the child. He has relinquished his right to the custody of the child in favour of the respondent though he would have done it with a view to cool down tempers as he puts it, Though, in law the father cannot validly divest himself of guardianship, as such a duty is sacred in its nature, still there is nothing to prevent him from allowing the child to be under the care and protection of another person particularly if the other person happens to be his divorced wife and mother of the child. Such an entrustment may be revocable, but what is of primary importance for the Court to consider is not the right of revocation of the father of such entrustment but the welfare of the minor. If after such entrustment the atmosphere in the father's family has so changed as to lead to the reasonable inference that it would not be in the welfare of the child to place the child in the changed atmosphere, the Court would be justified in rejecting the claim of the father for custody from his divorced wife though technically he may be within his rights in revoking the authority for custody. If the application is not bona fide and if the father is guilty of negligence or indifference, the application for custody is liable to be dismissed--vide *Ponnaiah Asari v. Suppiah Asari* (1935) 68 M L J. 230 : AIR 1935 Mad. 363 . In this case, as I have already pointed out, the family atmosphere at Calcutta

where the petitioner is living is certainly not conducive to the welfare of the minor. The mother is the most suitable person to take care of the child and it is quite impossible to find an adequate substitute for her and she is certainly preferable to the father in such a case.

9. Facts are elicited in the course of the evidence of the respondent to make out that the building in which the respondent is living with her parents is not so spacious as the house in which the petitioner's parents are living at Madras.

10. It was also elicited that the child is taking its lunch in the school. The respondent's evidence shows that she has arranged with the Good Shepard Convent, where the child is studying, for her lunch to be taken along with the Mothers there and that the child never walks to the school. I see no reason to disbelieve her. The fact that food is not being sent to the child from home does not mean that the child is being neglected. The respondent is living with her parents and one of her brothers and the children of that brother. There is company for the minor girl and it is not as though she is left alone to look after herself. The respondent is the only daughter of her parents and the respondent's father is a retired Government servant. It is not even suggested on behalf of the petitioner that the wherewithal of the respondent's parents is not sufficient enough to provide adequately for the child. The respondent is a graduate of the Madras University and her evidence shows that due to her efforts the minor has been able to get double promotion in her class. All these go to show that the respondent is eminently the best person to have the custody of the child and that the petitioner, although he is the natural guardian, is, by his own conduct, disentitled to have the custody.

11. Though I find that the petitioner is not entitled to the custody of the child, still inasmuch as he appears to have repented for his past conduct of neglect and indifference and as he is paying for the maintenance of the child, which, in law, he is bound to do, I think some suitable direction may be issued to enable him to see the child and keep her with him on occasions when he visits Madras. The respondent's Counsel has no objection to give suitable direction in this behalf. During the pendency of this petition, an interim arrangement had been made in that behalf whereby the respondent was directed to send the child to the house of the petitioner's father on some particular days during particular hours. It is represented on behalf of both sides that the said arrangement did not work well in actual practice. The petitioner does not come to Madras often. He comes only occasionally. It would be enough if a direction is given to enable him to have temporary custody of the child on the day of his visit to Madras. He should, give written intimation to the respondent about his visit and the respondent shall send the child to the petitioner between 8 and 9 a.m., whenever he is at Madras to be in his custody and that the petitioner should return the child to the respondent the same day before 6 p.m. This should not, however, be done on any School day, as the education of the child would be affected if she is sent to the petitioner on school working day. Such temporary custody also should not be

repeated too frequently. The petitioner can ask for such custody once a month. If the parties feel any difficulty in carrying out these directions they may apply to this Court for suitable directions.

12. The prayer of the petitioner that he may be appointed guardian is unsustainable as he is the natural guardian by personal law and such a prayer is unsustainable. Vide Seeyali Veetil Abubacker Vs. Ovinakath Vayyilapurayil Mariyumma, .

13. In the result, the petition is dismissed subject to the direction given above. The respondent is entitled to the costs of this petition.