
(2008) 02 AHC CK 0285
In the Allahabad High Court

Mohammad Maaz and Mohammad Moin both minors through their mother Smt. Wakeela Bano APPELLANT

Vs

State of U.P. and Mohammad Maroof RESPONDENT

Date of Decision : 13-02-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 482
Dowry Prohibition Act, 1961 — Section 3, 4
Penal Code, 1860 (IPC) — Section 323, 498A

Citation : (2008) 2 AWC 1925

Hon'ble Judges : Barkat Ali Zaidi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Barkat Ali Zaidi, J.—Through this Habeas Corpus petition, a mother seeks custody of her two minor children who are boys aged about 4 1/2 and 2 1/2 year. The husband is the respondent.

2. Heard Sri M. S. Haq, counsel for the petitioner, Sri I.K. Chaturvedi, counsel for respondent No. 3 and Sri Mohammad Israil Siddiqui, Addl. Government Advocate for respondent State.

3. Differences arose between the couple leading to litigation. The wife lodged an F.I.R. under Sections 498A, 323, and Section 3/4 Dowry Prohibition Act requesting that a case be instituted under the said sections against the respondent-husband and other members of his family, while the husband instituted a suit for restitution of conjugal rights. An application u/s 482 Cr. P.C. by the husband and his family was filed in the High Court in connection with the case u/s 498A, 323 I.P.C. read with Section 3/4 Dowry Prohibition Act which was referred to the Reconciliation Centre and the proceedings were stayed. Efforts for reconciliation failed to fructify.

4. The children for the present are with the father- respondent No. 3 for the last more-than a year and are said to be doing well. The elder son Mohammad Maaz

is four and a half year old and is studying in a school and the relevant documents about the same have been filed. It has been clarified that sister of the respondent-husband and the mother are both looking after the children very meticulously and with great care and affection.

5. In her reply the mother had not referred the facts about the children being not adequately looked after by the respondent's sister and mother. She has only laid stress on the right of "Hizanat" under the Muslim Law and the prominence of his motherhood.

6. Before we decide the issue of Hizanat, a preliminary objection raised by the respondent may be disposed of. It has been contended that the petition under the Habeas Corpus is not maintainable and the proper course for the petitioner was to apply before the District Judge under the Guardians and Wards Act, 1890 about directions for the custody, and since a specific remedy is available under the Guardians and Wards Act, 1890, this petition is not maintainable. The question has been answered by a Full Bench in the case of Iqbal Ahmad versus Shaban Ali Khan and another 1986 A C J 81 where it has been held that despite the alternative proceedings under the Guardians and Wards Act, 1890 available, the Habeas Corpus petition for the direction of the custody of children will be maintainable.

7. It will appear from the facts and circumstances, which have been disclosed in the case, that the father, is taking good care of the children and the father's sister and mother both are looking after the children with care and affection, and the elder son is studying in a School. The mother is not employed anywhere and no specific sources of her income have been revealed, and it appears, that it will not be possible for her to bear the expenses, for bringing up the children, and their education.

8. The mother of course may apply u/s 125 Cr. P.C. for maintenance, but she has not done so, and that may take time, and we do not know, what amount may be granted. The financial aspect of the maintenance of the children weighs therefore, in favour, of the father.

9. The mother's counsel says, there can be no substitute for a mother's love, and, the love and affection a mother can give to her children, is irreplaceable and the father cannot take care of the children like a mother. That may be, by and large true, and there can be no dispute, that a mother's love is proverbial, but mere love and affection is not the sole criteria in determining custody of the children, and all mothers are not alike, some love their children more-than the others. The mother here does not seem to possess overwhelming love for her children, otherwise, she would have not abandoned them like this, to their father's care. If she were in love with the children, she would have sacrificed her annoyance, and come to terms in some manner or the other with her husband to be able to live with her children, but the mediation efforts at the Mediation Centre did not succeed, and the mother did not yield. Love entails sacrifice and

here the mother does not want to forget and forgive.

10. The counsel for the petitioners emphasises the circumstance of the Muslim Law providing the right of Hizanat to the mother for boys up to 7 year and girls up to the age of puberty. But, law apart, the paramount consideration to decide custody is the welfare of the children, and the court has to see where, in the circumstances of the case, the welfare of the minor lies.

11. In view of the overall circumstances in the family, it appears that for the present, it would be in the interest of the children, if they are allowed to remain with their father, where they are living for more than a year and have now become accustomed to the atmosphere of the case and have become familiar with the family members. If the father, however, remarries, the mother will have a right to ask the court to reconsider the question of custody.

12. The mother, however, must be given a chance to meet her children and for that purpose, the respondent will take the children every week to the mother's house for five hours in the day. In case of non-compliance, the mother-petitioner will have a right to ask the court to reconsider the question of Hizanat. With these observations, the petition is dismissed.,