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(1947) 10 AHC CK 0004

In the Allahabad High Court

Mt. Sakina Begam — APPELLANT

Vs

Malka Ara Begum — RESPONDENT

Date of Decision : 20-10-1947

Acts Referred:

Citation : AIR 1948 All 198 : (1948) 18 AWR 6

Hon'ble Judges : Sinha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sinha, J.—This is an appeal against an order of the learned District Judge of Moradabad by which he dismissed the application of the appellant, Mt. Sakina Begum, for her appointment as a certificated guardian of the persons of her: minor daughters named Naima Begum and Amina Begum.

2. The two minors are aged a year and a half and four years, respectively. The rival in the field was their father. The learned Judge thought that the father had a preferential claim both with regard to the guardianship and the custody of the minors.

3. Mt. Sakina Begum has come in appeal and her learned Counsel argues that the mother has the preferential claim under the Hanafi law. In support of this contention reliance is placed upon Lekhraj Vs. B. Chandra Prakash . There, the contest lay between the mother, who was living in Lucknow, and the father, who was living in Gorakhpur and who had, at the time of the contest, the custody of the child. It might also be noted that the child there was a male child; here we have two female children. At p.401, the learned Judges observe:

We also have to take into consideration the personal law to which the parties are subject, and that law is the Mahomedan Law of the Hanafi school. It has been shown to us that under this personal law, the mother would ordinarily be entitled to the personal custody of the child up to the age of 7 years. She may be deprived of that right on certain grounds, but no such grounds appear to exist in

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the present case.

The mother is, therefore, entitled to the custody of the children.

4. The learned Counsel for the respondent tries to support the order under appeal on two grounds. He relies upon a passage in Mulla''s Principles of Mahomedan Law Edn. 12, 1944, Section 258, Sub-section (2), at p. 276:

A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody (1)...(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father''s place of residence;

In Lekhraj Vs. B. Chandra Prakash the mother, as we have already noticed, was living away from the father. We might also say that we do not read this passage as an absolute prohibition operating against the mother, if she goes and resides at a distance from the father''s place. It all depends upon the circumstances. If the stay is only temporary or is forced or is due to circumstances beyond her control, it is difficult to hold that she should even then be deprived of the custody of her own children.

5. Lastly, it has been contended by the learned Counsel that the dominant, if not the sole consideration, is the welfare of the minors. A father will, it is argued, be in a much better position than the mother to look after them. When we bear in mind that they are females and when we also bear in mind their ages, we have no doubt that the custody of the mother is the only proper custody and, as held in Lekhraj Vs. B. Chandra Prakash , she will lose the right to this custody only if

she has any defect of character such as would render her unfit to have the custody of her own. child.

No such defect of character has been pointed out.

6. We, therefore, allow the appeal, set aside the order of the Court below and direct that the custody of the children be made over to Mt. Sakina Begum. Costs on parties.

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