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**(2015) 07 KAR CK 0340**

**In the Karnataka High Court**

**Case No :** Miscellaneous First Appeal No. 2051 of 2014 (G & WC)

Sabeha

APPELLANT

Vs

Rahamathulla

RESPONDENT

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**Date of Decision :** 22-07-2015

**Acts Referred:**

Guardians and Wards Act, 1890 — Section 25

**Citation :** (2015) 07 KAR CK 0340

**Hon'ble Judges :** N.K. Patil, J; Rathnakala, J

**Bench :** Division Bench

**Advocate :** L. Harish Kumar, for the Appellant; Spoorthy Hegde, Advocates for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Rathnakala, J—This appeal is filed by the appellant against the judgment dated 24.06.2013 passed in G & W.C. No. 5/2010 on the file of the Principal Civil Judge (Sr. Dn.) & C.J.M., Chitradurga.

2. The fact is:

The respondent herein being the brother-in-law of the appellant/Smt. Sabeha, filed a petition under Section 25 of the Guardianship and Wards Act, for the custody of his minor child Mohamed Osama, born on 20.02.2002, through his wife Irshadunnissa, who expired during the delivery of the child. It was his case that, including the said minor child he has four children. The respondent being his sister-in-law used to take care of all the four children and used to take them to her house. She took the 4th child four months ago, but never returned the child.

3. The petition was contested by the respondent. Her defence was, since the birth of the child she has brought him up. She adopted the child in the presence of the relatives and elderly persons of their community in the locality. After the death of her sister Irshadunnissa, the petitioner has married another woman. On

the death of his first wife, he had taken her sister Irshadunnissa as second wife. She has provided standard atmosphere to the child. She has no issues. If the custody is granted to the father, the child's welfare will be ruined.

4. The trial Court on overall consideration of the matter allowed the petition directing the appellant/respondent to handover the custody of the child.

5. Sri L. Harish Kumar, learned Counsel for the appellant submits that though the practice of adoption is not recognized in Mohammed Law, there is customary practice known as "Kafala" among Mohammedan community, according to which the child will be given to the protection of care taker parent, even though the biological parents are alive. In view of the impugned order, the future and wellbeing of the child is jeopardized. Ultimately, the paramount consideration is welfare of the child and the parenting by the respondent is more congenial to the child than it's biological father who has remarried.

6. Sri Spoorthy Hegde, learned Counsel for the respondent while substantiating the impugned order submits that the appellant/the sister of deceased wife of the respondent herein failed to establish her right for the custody of the child either under personal law or under any statute. She not being a biological parent is not entitled for the custody of the child during the lifetime of the father, who is not disabled in any manner to take care of his own child.

7. The relationship between the parties being undisputed, the appellant to establish her right for the custody of the child ought to have established that the child is given to her for care and custody by the biological parent as per "Kafala" system.

8. It is not her case that she has adopted the child in accordance with the procedure known to law. It is also not her case that the biological father is in any way incapacitated or disabled either morally or physically to take care of his child. It has come in evidence that, after the death of the mother, the child was with it's aunt/appellant. Now, he is with his biological family consisting of his father and three siblings. The concept of "Adoption" is foreign to Muslim personal law.

9. The Apex Court in the case of Shabnam Hashmi Vs. Union of India & Others in W.P.(Civil) No. 470/2005, disposed of on 19.02.2014, had an occasion to deal with the recognition of the right to adopt and to be adopted as a fundamental rights under Part-III of Constitution of India. During the course of hearing, the conflict between Muslim Personal Law which does not recognize adoption and amended Juvenile Justice Act, 2000 read with Juvenile Justice Rules 2007, which contemplates adoption as one of the mode of rehabilitation and social reintegration of neglected or delinquent juveniles was brought to the notice of the Apex Court by one of the intervening party (The All India Muslim Personal Law Board). However the Apex Court without touching upon the conflict raised by the intervener disposed of the said petition. That being so, the adoption which the appellant is putting forth in respect of the child since not established, the

appeal shall fail.

10. Hence, the appeal is rejected.

In view of the disposal of the main appeal, the relief sought in I.A. No. 2/2014 does not survive for consideration and hence, it is disposed of as having become infructuous.