1932 *Present :* **Drieberg J.**

JUNAID *v.* MOHIDEEN *et al.*

In the Matter of an Application for a Writ of *habeas corpus* for the Production of SITHI MARLIYA.

Habeas corpus—*Muslim girl—Right of grandmother to custody—Muslim law.*

Under the Muslim law the maternal grandmother of a girl is entitled to her custody on the mother's death in preference to her father.

The rule of Muslim law is in force among the Ceylon Moors in such a case.

[1] *(1931) 1 C. L. W. 170.*

APPLICATION for a writ of *habeas corpus.*

R. L. Pereira, K.C. (with him *Gratiaen* and *Ismail*), for the petitioner.

F. H. B. Koch, K.C. (with him *Chelvanayagam*), for the respondents.

November 14, 1932. DRIEBERG J.—

The wife of the petitioner died in February, 1932, leaving an only child, Sithi Marliya, aged four and a half years who, for some time since her mother's death, has been with her maternal grandmother, the second respondent, Balkees Umma. The petitioner asks that the girl be given over to him.

If the second respondent is entitled to the custody of the child in preference to her father the petitioner, there are no special considerations as I shall point out, why the second respondent should be deprived of this right.

The parties are Ceylon Moors who belong to the Shafei sect of Sunnis and there is no question, it is admitted by the counsel for the petitioner, that under the Shafei law the second respondent as maternal grandmother is entitled to the custody of the child. It is clear that this rule of the Muslim law was adopted by and is in force among the Ceylon Moors. This was recognized by the Full Court comprised of Creasy C.J., Sterling J., and Temple J. in *D. C. Colombo 29,370* and *C. R. Colombo, 9,370* decided on July 22, 1862, reported in *1860–1862 Ramanathan 144.* In the same volume of Ramanathan's reports on page 88, in the case of *Aysa Natchia,* Temple J. on August 6, 1861, in an application of *habeas corpus* upheld the right of the maternal grandmother. Counsel for the grandmother relied on a decision of the Supreme Court of June 14, 1843. Thomson J. *in his Institutes of the Laws of Ceylon,* published in 1866, volume 2, page 545, says:—

> "The grandmother of a Mahomedan child is entitled to the custody of the child after the mother's death. The obligation of providing for the child's maintenance is paramount on the father, although the grandmother has the child in her custody, and although the father wishes to have the child in his own."

He refers to the two cases reported in *1860–1862 Ramanathan's Reports.*

That the Muhammadan law on this point was in force among the Ceylon Muslims does not appear to have been questioned, to judge from the reports, until 1890 in the case of *S. M. L. Ahamedu Lebbe Marikar*[1]. That was a *habeas corpus* proceeding in which the father of a boy three years of age, his mother being dead, claimed custody of the child against his maternal grandmother. The matter was dealt with by Burnside C.J. in Chambers. He stated his doubts whether the Muhammadans could be exempt from the ordinary law, but said he was bound by the decisions. He felt that these should be reviewed and directed that the matter be heard by the Full Court which then consisted of three Judges. It

[1] *9 S. C. C. 42.*

appears, however, to have been brought before a bench of two Judges, Clarence J. and Dias J., who held in favour of the father on the ground that there was no evidence that the Muhammadan laws and usages on this point were adopted in Ceylon; a point was also made that under the Shiah law the father had preference and that there was nothing to show whether the mother of the child belonged to the Shiah or the Shafei sect.

In the case of *Wappu Marikar and Ummaniumma*[1], Wood Renton J. declined to follow the judgment in *9 S. C. C. 42* on the ground that it was not a judgment of three Judges, though no doubt Burnside C.J., in referring it from Chambers, expressed his view of the case. Wood Renton J. said: " the *cursus curiae*, has, I think, been in favour of giving the custody of infant children of Muhammadan parents to the mother and maternal relatives in preference to the father." He referred to *Thomson's Institutes, Vol. 2 p. 545,* and the cases in *1860–1862 Ramanathan,* which I have cited, as express authorities to that effect. With the one exception of the case of *Mohamadu Cassim v. Cassie Lebbe*[2] the *cursus curiae* has continued. The record-keeper has traced a number of similar cases which I have examined. They are—Petition 340 of 1912 decided by Ennis J. on November 12, 1912. Petition 36 of 1916 decided by Sampayo J. on February 18, 1916. Petition 394 of 1917 decided by Sampayo J. on September 21, 1917. Petition 274 of 1920 decided by Schneider J. on August 31, 1920. Petition 681 of 1926 decided by me on February 8, 1927, in that case the maternal aunt was preferred to the father. Petition 446 of 1929 decided by Akbar J. on June 11, 1929. Petition 287 of 1929 decided by Akbar J. on April 22, 1929. Petition 653 of 1930 decided by Jayewardene A.J. on September 3, 1930.

In *Mohamadu Cassim v. Cassie Lebbe* (*supra*) the father of a girl of nine years claimed custody of her against her maternal aunt. The child had been with the aunt from infancy. Lyall Grant J. refused to give over the child to the father but not however on the ground that the maternal aunt was legally entitled to custody to it, for he considered that in *sego Meera Lebbe Ahamado* the Full Court decided in favour of the preferential right of the father. There was a good deal against the father personally and he held that there was sufficient ground to interfere with the father's legal right in the interests of the child. He said he did not think the decision in *9 S. C. C. 42* had ever been questioned. It was not brought to his notice apparently that it was considered and not followed by Wood Renton J. in *Wapu Marikar v. Ummaniumma* (*supra*) and that that judgment was thereafter followed.

The second respondent being entitled to the custody of the child, it remains to be considered whether any special circumstances exist which make it necessary, in the interests of the child, that she should not be left with the second respondent. All that can be urged against her is her state of health. She suffers from an organic disease which ordinarily is progressive. It renders her liable to uraemic coma and she had once an attack of it, but Doctor Paul who saw her when she was in that condition says that the ailment is sometimes stationary and that she might

[1] *14 N. L. R. 225,* [2] *(1927) 29 N. L. R. 136.*

not have a return of it in an embarrassing form for some length of time. He says that men with this ailment have carried on active and successful professional work. She is extremely stout and the Police Magistrate thought she was too lethargic to attend to the child properly. Doctor Paul calls it a pathological type of fatness but he says it should not prevent her from giving the child all the attention she needs. The girl appears to be well looked after and very fond of the second respondent.

I do not think it necessary in the interests of the child that she should be taken away from the second respondent.

The application of the petitioner is dismissed.

Application dismissed.