

1953 .

Present : H. A. de Silva J.

A. R. A. HASSEN, Petitioner, and C. L. M. MARIKKAR *et al.*,
Respondents

S. C. 689 and 465—Habeas Corpus Application

Muslim law—Custody of children—Preferential right thereto after mother's death.

Under the Muslim law the custody of a male child remains, at least up to his seventh year, with the maternal relations, the mother being dead, and, in the case of female children, until they are married.

HABEAS corpus application.

M. I. M. Haniffa, for the petitioner.

Izadeen Mohamed, for the 2nd respondent.

Cur. adv. vult.

¹ 14 *Cr. App. R. 1.*

² (1916) 3 *C. W. R.* 366.

March 31, 1953. H. A. DE SILVA J.—

The petitioner who is the father of the 3rd, 4th, and 5th respondents asks for their custody.

The petitioner's wife, A. L. M. Khadija Umma, the mother of these three children, died in July, 1950. The 1st respondent is petitioner's late wife's father. The 2nd respondent is a sister of petitioner's deceased wife. The 2nd respondent claims the custody of these three children on the ground that on the death of the children's mother she as a maternal relative has a preferential right to their custody. The learned Magistrate to whom this matter was sent for inquiry and report has after inquiry sent his report. In his report the Magistrate recommended that the custody of these three children be given to their maternal aunt, the 2nd respondent, in whose custody they are at present. The learned Magistrate after considering the facts placed before him and the arguments on the law has made his recommendation. The facts as found by him are these. The petitioner after his marriage to A. L. M. Khadija Umma in the year 1944 lived with his wife in the 1st respondent's house where the 2nd respondent too was living. The 2nd respondent married after two of the children of the petitioner were born. She too continued to live in her father's house with her husband. She has three children. The learned Magistrate has found further that these three children have been looked after well and that they have not been subjected to any indifferent treatment which has rendered their living with the 2nd respondent unhappy.

The petitioner is a business man who is away from his home during the day-time attending to his business and he proposes to place these children now in charge of his widowed sister. The eldest of the three children is a male and the other two are females, their respective ages at the date the petition was filed were 6, 4½ and 3 years. After his wife's death the petitioner was away for sometime in India. The 1st and 2nd respondents looked after the children from the date of their mother's death. The children are quite used to their maternal grandfather and maternal aunt. There appears to have been a dispute between the petitioner on the one side and the 1st respondent, his father-in-law, on the other regarding the estate of the late Khadija Umma which is said to be worth about Rs. 30,000. Hitherto the 1st and 2nd respondents have brought those children up at their expense and under their care. As far as the facts go it seems pretty obvious that the children are quite happy and are being well looked after by the 1st and 2nd respondents.

The next point one has got to consider is the legal position. Mr. Haniffa has contended that on the death of the mother the custody of the children should be with the father under the law applicable to Muslims. The parties are Muslims admittedly of the Shafee sect which is a subdivision of the Sunnis. He cited to me the following authorities amongst others:— *9 S. C. C. 42, 29 N. L. R. 136, 51 N. L. R. 509*. I may say that the case reported in *29 N. L. R.* does not help the petitioner. Lyall Grant J. held as follows: "Where a Muslim child was in the custody of her maternal aunt from her infancy till the ninth year, the Court will not restore the child to her father's custody, where it is of opinion that such

a change would be to the detriment of the child's welfare". The case on which Mr. Haniffa laid emphasis is the one reported in 9 S. C. C. 42; there Burnside C.J., Clarence and Dias J.J., held that the father should be preferred to the maternal grandmother of an infant whose mother was dead. Dias J. has observed that in that case there was no proof as to the sect of Mohammedans to which the infant's parents belonged. On the other hand this authority has been considered and dissented from in the subsequent decisions of this Court. Vide 14 N. L. R. 225. Wood Renton J. after considering the decisions in 9 S. C. C. and the other decisions held that the Moors in Ceylon belong to the Shafee sect of Sunnis and that according to the Shafee law the custody of a girl remains with the mother not merely until puberty but till she is actually married. In the case of a boy the custody remains with the mother till completion of his seventh year at all events, and from thence until puberty he may place himself under either parent whom he chooses. Jayawardene A.J. in 32 N. L. R. 63 has come to a similar conclusion. In *Junaid v. Mohideen et al.*, 34 N. L. R. 141, having considered most of the earlier authorities including the case reported in 9 S. C. C. 42, Drieberg J. came to the conclusion that 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 authorities seem to indicate that the custody of a male child at least up to his seventh year remains with the maternal relations, the mother being dead, and in the case of females until they are married.

The petitioner's application fails and it is dismissed. The custody of the children will remain with the 2nd respondent with whom they are at present.

Return papers to the Magistrate to communicate this order to the parties.

Application dismissed.