

GAHC010076482023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Mat.App./24/2023

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W/O YASIR MAMUD BHUYAN,
D/O JELKAT ALI,
VILL.- BALAIPATHER, MOUZA- RUPSHI,
P.S.- KALGACHIA, DIST.- BARPETA, ASSAM.

2: RUKIA KHATUN
W/O JELKAT ALI
VILL.- BALAIPATHER
MOUZA- RUPSHI
P.S.- KALGACHIA
DIST.- BARPETA
ASSAM.

3: JELKAT ALI
S/O NURU
VILL.- BALAIPATHER
MOUZA- RUPSHI
P.S.- KALGACHIA
DIST.- BARPETA
ASSAM

VERSUS

XXXXXXXXXX
S/O KALU MOLLAH,
VILL.- BALARTARY (PRESENTLY RESIDING AT VILLAGE- CHENIMARI),
P.S.- TARABARI, DIST.- BARPETA, ASSAM.

Advocate for the Petitioner : MR. N HAQUE

Advocate for the Respondent : MR. A R SIKDAR

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 21-08-2023

(M. Zothankhuma, J)

Heard Mr. N. Hoque, learned counsel for the appellants as well as Mr. N. Ahmed, learned counsel for the respondent.

The appellants have challenged the judgment dated 27.03.2023, passed by the Court of learned Principal Judge, Family Court, Barpeta in Case No.Misc. (G.C.) F.C.02/2022, by which custody of the four year old daughter of the appellant No.1 and the respondent has been given to the respondent husband.

Mr. N. Hoque, learned counsel for the appellants submits that a girl child had been born to the appellant No.1 and the respondent on 15.10.2018, following their marriage on 12.02.2017. Thereafter the appellant No.1 and the respondent divorced. The appellant No.1 then married one Yasir Mamud Bhuyan with whom the appellant No.1 had a child.

The girl that was born between the parties was thereafter kept in the custody of her mother (appellant No.2) by the appellant No.1. However, due to the impugned judgment passed by the Family Court, Barpeta, custody of the child has been taken away from the appellant No.2 and put in the hands of the respondent.

Mr. N. Hoque, learned counsel for the appellants submits that in terms of Clause 353 of Mulla's Principles of Mahomedan Law, the custody of a girl who has not attained puberty goes to the mother's mother, if the mother remarries. Mr.

Hoque accordingly submits that the child should thus be kept in the custody of the appellant No.1's mother, i.e. the appellant No.2.

Mr. N. Ahmed, learned counsel for the respondent, on the other hand, submits that there is no error in the judgment of the learned Family Court, Barpeta, in view of the fact that the custody of the child goes to the father i.e. the respondent, when the mother remarries another person. He accordingly submits that the appeal should be dismissed.

We have heard the submission of the learned counsels for the parties.

Clause 353 of the Mulla's Principles of Mahomedan Law 20th Edition provides that in default of the mother being entitled to the custody of her daughter, the daughter who has not attained puberty belongs to the female relatives. As per the said Clause 353, preference for the custody of the girl who has not attained puberty, first comes to the mother's mother first. Thereafter to the mother's father, full sister, etc.

In Clause 352 of the Mulla's Principles of Mahomedan Law, it has been provided that the mother is entitled to the custody (hizanat) of the male child until he has completed the age of 7 (seven) years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband, in which case the custody of the minor child belongs to the father.

As can be seen from a reading of Clause 352 and Clause 353, Clause 353 cannot be read in isolation and the same would have to be read in conjunction with Clause 352.

On perusal of the above two Clauses, it is quite apparent that custody of a female child who has not attained puberty would remain with the mother, even if the mother is divorced. However, as soon as she marries a second husband,

the custody of the child belongs to the father. Clause 352 would thus have to be read and applied prior to the custody of the girl being given to the mother's mother, father's mother, etc.

The above being said, Clause 351 provides that in appointing or declaring a guardian of a minor, the Court shall subject to the provisions of the said Clause, be guided consistently with the law to which the minor is subject, which appears in the circumstances, to be for the welfare of the minor.

Furthermore, the fact that the appellant No.1 had placed the child in the custody of her mother, would go to show that she has not taken care of her child and as such, the natural rights of the father to have custody of the child cannot be allowed to be defeated.

In the present case, there is nothing to show that the custody of the child being given to the father would not be for the welfare of the child. The learned Family Court, Barpeta, while giving custody of the child to the respondent herein i.e. the father, held that the appellant No.1 had forfeited her right over the child by re-marrying a person, not related to the child within the degrees of prohibited relationship, in terms of the Mahomedan Law, applicable to the parties herein. We do not find any ground to interfere with the impugned judgment.

Accordingly, the appeal is dismissed.

The LCR be returned.

JUDGE

JUDGE

Comparing Assistant