

O.P.No.247 of 2016

SENTHILKUMAR RAMAMOORTHY, J

This petition is filed by the father of the minor child requesting that permanent custody be granted to the father and that the father should be appointed as the Guardian. The admitted position is that the marriage of the Petitioner and the Respondent was conducted on 11.11.2012 at the SIET College, Chennai. The marriage was celebrated as per the religious obligations of the holy Koran and following the procedures applicable to a Mohammedan marriage. The Petitioner and the Respondent lived together at No.5, Sastri Nagar Annex, Kolathur, Chennai. A male child was born to them on 07.10.2013 and the child was named as Bilawal Ahmed Tanekar.

2. According to the Petitioner, the Respondent removed the child from the matrimonial home on 05.06.2014 and stayed at Avadi, Chennai, and later at Tiruchirapalli. Because the Respondent could not be easily traced and continued to treat the Petitioner with cruelty, the Petitioner pronounced triple talaq and divorced the Respondent as per Mohammedan Law on 12.09.2014, 22.10.2014 and 04.12.2014.

3. The Respondent challenged the divorce by filing a suit (O.S. No.15 of 2015) before the Family Court, Tiruchirapalli, and also filed a case under the Domestic Violence Act, 2005 before the Additional

Mahila Court, Tiruchirapalli, and both these cases are pending adjudication. According to the Petitioner, he is entitled to the permanent custody of the minor child, as per Mohammedan law, because the child is more than two years old and should be in the custody of the father. In addition, the Petitioner is in a position to provide the following: the best education at the primary, secondary and tertiary level, a favourable home environment, good ethical and moral values, love and affection, including that of the paternal grandparents, and access to toys, games and sports.

4.The case of the Respondent, on the other hand, is that the Petitioner and the Respondent spent only about 4 to 5 months together after their marriage in the Petitioner's father's house. She further states that the Petitioner had not disclosed that he was unemployed at the time of their marriage. He was in an illicit relationship with another woman. According to the Respondent, after attending the funeral of the Petitioner's grandmother, the Respondent and her son were dropped off at her parent's house in the middle of the night when the child was a eight-month old baby. Thereafter, the Petitioner issued notices to the Respondent pronouncing talaq. Therefore, the Respondent instituted proceedings before the Family Court and the Additional Mahila Court. She further stated that the Petitioner did not pay maintenance and instead contested the said

proceedings.

5. According to the Respondent, as per Mohammedan law, the mother has the right of custody over minor children and that this right is called the Hizanat. Such right is lost only if she remarries a person who is considered a stranger under Mohammedan law.

6. Upon completion of pleadings, oral and documentary evidence was adduced. The Petitioner adduced evidence by examining himself as P.W.1. 13 documents were exhibited through P.W.1 as Exs.P1 to P13. Thereafter, P.W.1 was cross-examined by the counsel for the Respondent. The Petitioner's father was examined as P.W.2. 8 documents were marked through P.W.2 as Exs.P.14 to P.21. P.W.2 was also cross-examined by the learned counsel for the Respondent. The Respondent examined herself as R.W.1. 11 documents were exhibited through R.W.1. However, in spite of being granted several opportunities, the Respondent remained absent and could not be cross-examined by the learned counsel for the Petitioner. Eventually, by order dated 19.08.2019, the learned Master closed the evidence of the Respondent and directed that the testimony of R.W.1 be eschewed. Therefore, this case should be decided on the basis of pleadings and the evidence of the Petitioner. Besides, the learned counsel for the Respondent filed a memo dated 23.09.2019 reporting

that the counsel were withdrawing their vakalat. Fresh notice was issued to the Respondent, in such circumstances, and such notice was served on the Respondent on 19.10.2019. In spite of receipt of notice, the Respondent was neither represented in person nor through counsel thereafter.

7. I considered the pleadings and the oral and documentary evidence on record. I also examined the written submissions of the Petitioner. In matters relating to custody of minor children, there can be no quarrel with the position that the welfare of the child is the paramount consideration of the court and this case should be decided with the said consideration at the forefront.

8. Many of the facts are admitted. Both parties agree that they married each other on 11.11.2012 as evidenced by Exs.P1, P2 and P3. The child was born on 07.10.2013, as evidenced by Ex.P4, the birth certificate. The first, second and third talaq letters were issued by the Petitioner on 12.09.2014, 20.10.2014 and 04.12.2014, as evidenced by Exs.P5 to P7. The correspondence between the Petitioner and Respondent by letter dated 12.10.2014 and reply 17.10.2014 has been marked as Exs.P11 and P12. In the letter dated 12.10.2014 (Ex.P11), the Petitioner stated that he is not interested in living with the Respondent because she continues to find fault with him and his

parents. In the reply by the Respondent (Ex.P 12), she stated that she is entitled to custody because only she can look after the child and that the Petitioner could visit after giving prior notice. The father of the Petitioner adduced evidence with regard to his financial status, including his appointment order as the Senior Manager of the United Economic Forum. This document was marked as Ex.P.17 and evidences that he was appointed as Senior Manager on the monthly salary and allowances of Rs.50,000/-.

9. In addition to the aforesaid documentary evidence, as stated earlier, both P.W.1 and P.W.2 were cross-examined. During the cross-examination of P.W.1, he admitted the following:

(i) the child is under the exclusive care of the mother from the time the child was eight months old(cross examination on 01.11.2018);

(ii)The petitioner runs a restaurant on OMR, which is about 25 kms from his residence and the working hours are from 11 AM to 11 PM. However, he has two partners in the business (cross examination on 01.11.2018);

(iii) the child is studying at the Kaveri Global School, Trichy and is in the UKG(Cross-examination on 17.09.2018).

10. Moreover, it is stated in the counter of the Respondent that

<http://www.judis.nic.in> she lives in Tiruchirapalli with her parents and that her brother also

lives there. Her father is employed and is drawing a salary of Rs. 6500 per month.

11.From the above evidence and pleadings, I find that it is the admitted position that the child has been under the exclusive care and custody of the mother from the time the child was eight months old. The Petitioner has not produced any evidence that he paid for the maintenance of the child. The Respondent stays with her parents at Tiruchirapalli and her father is employed. The Petitioner runs a restaurant, which is about 25 km away from his residence. The child is about 6 ½ years old.

12. The learned counsel for the Petitioner relied upon the judgment in **Shaleen Kabra v. Shiwani Kabra (2012) 5 SCC 355**, a case concerning the custody of two children aged 15 and 9. At paragraphs 14 to 17 of the said judgment, the Hon'ble Supreme Court held that the two children should not be separated and that, therefore, the father should have custody of both children. In coming to this conclusion, the court took into account the desire of the children to be with each other and also the fact that the father and paternal grandfather were well educated and capable of taking care of the children. The judgment of this Court in **Rashida Patel v. Yusuf, O.P. No.201 of 2009, order dated 5.05.2011**, was also relied upon. In

that order, this court held that the father should retain custody over the child because the child is in a good school and she is creative and independent in every respect. In addition, the evidence disclosed that the father was regular in ensuring that immunisation was provided to the child. The judgment in **Sheila B. Das v. P.R.Sugasree (2006) 3 SCC 62** was also relied upon by the learned counsel for the Petitioner. In this judgment, the Hon'ble Supreme Court concluded that the minor child should remain with the father but with sufficient access to the mother to visit the child at regular intervals. The Respondent had relied upon the judgment of the Allahabad High Court in **Khurshid Gauhar v. Siddiquinissa, AIR 1986 All 314**. In that case, the High Court held that the basic postulate underlying the mother's right to Hizanat is that the mother is best suited to raise the child at a tender age and that this right is not lost by the mere fact that she has been divorced by the husband and is living away from him.

13. All the above judgments emphasise the fact that the interest of the minor child is the principal consideration. In addition, the custody of the minor child is not lightly disturbed unless there are compelling reasons. In paragraphs 9 to 11 above, I set out the facts elicited from the pleadings and evidence. Upon consideration thereof and by applying the principles laid down in the above judgments, I conclude that it is in the best interest of the minor child to continue to

be in the custody of the mother. In the facts and circumstances, I also conclude that it would not be in the welfare of the minor to appoint the Petitioner as the guardian. Therefore, this petition is dismissed. Notwithstanding such dismissal, the Petitioner is entitled to apply for visitation. In addition, both parties are granted leave to re-apply if there are material changes in the facts and circumstances.

21.02.2020

Speaking order
Index : Yes
Internet : Yes

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