(1934) 01 AHC CK 0049

Allahabad High Court

Case No: None

Mt. Haidri Begum		APPELLANT
	Vs	
Jawwad Ali Shah		RESPONDENT

Date of Decision: Jan. 5, 1934

Acts Referred:

- Guardians and Wards Act, 1890 - Section 9

Citation: AIR 1934 All 722(1) : 150 Ind. Cas. 149

Hon'ble Judges: King, J

Bench: Division Bench

Final Decision: Allowed

Judgement

King, J.

This is an application under Clause 12, Letters Patent, praying that the applicant may be appointed guardian of the person of the minor Mazhar Ali Shah and that the opposite party may be ordered to produce him before the Court, and that the Court may be pleased to order the delivery of the minor to the applicant.

2. The application arises out of the following facts : On 20th January 1928 the applicant Mt. Haidari Begum was married to the opposite party Syed Jawad Ali Shah. There was one child of the marriage, namely, Mazhar Ali Shah, who was born on 18th September 1928. The parties went to Europe in 1932 and after returning to India they were living at the house of Section Jawad Ali Shah in Gorakhpur in July 1933. On the 29th of July 1933 the applicant went to Lucknow to visit her parents. She went by the night train and as it was represented to her that there might be risk in sending the child by the train at night she left the child behind with her husband on the understanding that he would follow on the next day bringing the child with him to Lucknow. Her husband did not bring the child to Lucknow, as arranged. A few days later, the applicant received a letter dated 2nd August 1933 from her husband stating that he had divorced her. She then asked for the personal custody (Hizanat)

of the child but her husband refused to give him up. She has therefore made this application under Clause 12, Letters Patent, as mentioned above.

3. It has been conceded that this Court has jurisdiction to grant the reliefs prayed under Clause 12, Letters Patent. It is unnecessary for us to consider exactly how far the jurisdiction of this High Court extends under Clause 12, as it is conceded that this Court has at least jurisdiction to grant the reliefs prayed. It has been argued however for the opposite party that this Court ought not, in the exercise of its discretion, to take action under Clause 12, as the applicant''s more appropriate remedy would be to make an application to the District Judge, u/s 9, Guardians and Wards Act, 1890, for the guardianship of the child. It is contended that in the Court of the District Judge witnesses would be examined and cross-examined and so the facts could be more easily ascertained, whereas it is inconvenient to decide a matter of this sort in this Court merely on the basis of the affidavits and counter-affidavits that have been filed. There is no doubt some force in this contention, but in the circumstances of this case we think there is no reason why we should not exercise jurisdiction admittedly vested in us. Cases have been cited in which the High Court has decided similar applications upon the merits, although an'' alternative remedy was open to the applicant in the Court of the District Judge. We would refer to the case of Ellen Ramm v. Charles Spencer (1905) 2 A.L.J. 81 and that of Nursi Tokersey and Co. v. Sachindra Nath AIR 1929 Bom. 475. We do not wish to lay down as a general rule that this Court should in all cases take action under Clause 12, although the applicant has an alternative remedy under the Guardians and Wards Act, by an application to the District Judge. There may be cases in which complicated questions of fact have to be ascertained and such cases might be more suitably dealt with in the Court of the District Judge where witnesses could be examined and cross-examined. In the present case however it does not appear that there are any important matters of fact which have to be ascertained and we therefore see no reason why we should not decide the application upon the materials before us.

4. In a case of this sort; where the father and the mother are living apart, and where each of them claims to have the custody of the child, the main question for our consideration, is, what would be more conducive to the child''s welfare; i.e., whether the child would be better looked after by the mother or by the father. We also have to take into consideration the personal law to which the parties are subject, and that law is the Mahomedan Law of the Hanafi school. It has been shown to us that under this personal law, the mother would ordinarily be entitled to the personal custody of the child up to the age of 7 years. She may be deprived of that right on certain grounds but no such grounds appear to exist in the present case. It is not alleged that she has any defect of character such as would render her unfit to have the custody of her own child. It has been urged that the child is already sufficiently advanced in age to be brought up by the father and that he does not stand in need of his mother''s care. The child is only 5 years of age and at such an age we think that the mother would be the best person to take care of him. This is in accordance

with the personal law to which the parties are subject, and we think that it is also in accordance with common sense and natural principles. A mother, in the absence of any special disqualification, is undoubtedly the best person to look after a child of tender age.

5. It is further argued that the father is in a better position to look after the child''s welfare and education because he is in a good financial position, whereas the mother has small financial resources. It may be conceded that the father is in a good financial position but it has not been shown to us that the mother is too poor to be able to make suitable provision for the child. The mere fact that she has been able to secure the services of so eminent an advocate as the Rt. Hon. Sir Tej Bahadur Sapru leads us to infer that she must be far removed from financial destitution. Moreover, at the age of 5 years the child''s education is at a very elementary stage, and we are satisfied that the mother will be in a position to supply the child with all the educational requirements. The mere fact that the mother has been divorced does not appear to constitute any bar to giving her the custody of her child. Although the parties are obviously hostile, no allegation of immorality or of any other defect of character has been made against the mother. The Only point which seems to merit serious consideration, with reference to the mother''s fitness, for appointment as guardian, is that she is alleged to be suffering from consumption and it is suggested that the child might contract the disease from close personal contact with his mother. The allegation that she is suffering from consumption has been categorically denied by their counter-affidavit filed by the applicant. She swears that she has been examined by doctors who certify that she is free from tuberculosis. It is an admitted fact that the child has been living with his mother up to 29th July 1933. If She has been suffering from consumption and if it had been thought that this constituted a danger to the child, some steps would have been taken to separate the child from his mother. "But no such steps have been taken. We consider that the suggested risk of contracting consumption is a mere afterthought introduced as a ground for opposing the application and there is no substance in the suggestion." Taking all the facts into consideration we find that the mother is prima facie entitled, under the personal law to which the parties are subject, to the custody of the minor, until he attains the age of 7 years and we find that she is a fit and proper person to have the custody of the child. There is nothing which would disentitle her to her right which she claims under her personal law. We consider also that it would be for the child''s benefit to let his mother take care of him.

6. We accordingly grant the application and appoint the applicant guardian of the person of the minor Mazhar Ali Shah until be attains the age of 7 years, and we further order the opposite party Syed Jawwad Ali Shah, to produce the minor Mazhar Ali Shah before this Court on 10th January 1934 at 10 a.m., in order that he may be made over to his mother''s custody. The applicant should be present in person in order to take charge of the child. The applicant will receive her costs of

these proceedings from the opposite party. We assess the fee of the applicant''s counsel at Rs. 250. A certificate of fees received must be filed before the rising of the Court today.