

Abul Kalam Vs. Akhtari Bibi

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Court : Orissa

Decided On : Jul-31-1987

Reported in : AIR1988Ori279

Judge : G.B. Patnaik, J.

Acts : [Guardians and Wards Act, 1890](#) - Sections 4(2), 10 and 25; Muslim Law

Appeal No. : Misc. Appeal No. 213 of 1987

Appellant : Abul Kalam

Respondent : Akhtari Bibi

Advocate for Def. : Y.A. Rafrim, Adv.

Advocate for Pet/Ap. : Rahenoma, Adv.

Disposition : Appeal dismissed

Judgement :

G.B. Patnaik, J.

1. This appeal is directed against the order of the Additional District Judge, Cuttack, directing that the minor child be kept in custody of his mother (Respondent) till he completes the age of seven years whereafter the father will have the custody of the child. When the case was listed for admission, respondent

entered appearance and bearing in mind the question of law involved, the matter was heard and is being disposed of at the admission stage.

2. The mother, respondent filed the application purporting to be one under Section 25 of the Guardians and Wards Act claiming custody of her minor son and for a direction to the father to give the child in her custody. The parties are Mohamedans and are governed by Hanafi School of Mohamadan Law. The respondent married the appellant in June, 1983 according to Mohamedan custom and out of their wedlock, a son was born namely, Abdul Salam. He was two years old on the date of the application and now would be three years. The appellant divorced his wife and thereafter the respondent was driven to her house but the father, appellant forcibly kept the son with him. It was alleged that the appellant lives away at Calcutta and the minor son is in his native village. It was prayed that in the interest of the child, the custody should be given to the mother for proper upbringing of the child. The husband, the present appellant filed objection before the District Judge. Though in the said objection he admitted to have married the respondent and out of their wedlock the son Abdul Salam was born, he, however, took a stand that his wife (respondent) is a lady of loose morals and has absolutely no means to sustain the child and, therefore, it is in the interest of the child, the father should be permitted to have the custody of the child.

3. The District Judge on consideration of the legal position regarding the guardianship of a minor child came to the conclusion that welfare of the child is of paramount consideration and for a child of two to three years, undoubtedly the mother would be the proper person to have the custody of the child and accordingly he directed that the custody of the child should be given to the mother till the child completes the age of seven years whereafter the father may get the custody of the son.

4. Mr. Rahenoma, the learned counsel for the appellant in assailing the impugned judgment of the learned District Judge raised three contentions : -

i) A bare perusal of Section 25 of the Guardians and Wards Act would indicate that it has no application to a muslim child since under the personal law of the mohamedan, father is the guardian of the person and, therefore, the question of

removing from the custody of the guardian does not arise;

ii) The application filed by the wife, the respondent was required to be filed in the form provided for under Section 10 and all the particulars contained in the said form had not been filled up and, therefore, the application was defective;

iii) On the evidence of this case, the learned trial Judge committed an error in coming to the conclusion that the interest of the minor son will be best served if the custody is given to the mother.

5. I do not find any substance in any of these contentions. The word 'guardian' has been defined in Section 4(2) to mean a person having the care of the person of a minor or of his property, or of both his person and property. This has nothing to do with the personal law of the Mohamedans. It is too well settled that the provisions of the Guardians and Wards Act apply equally to Hindus and Mohamedans. In fact the term 'guardian' used in the said section would mean against all whether testamentary, certificated, natural or de facto and is not confined to statutory guardian alone. A muslim mother having the care of a son of two years old would be the child's guardian within the Section 4(1) of the Act and when the child is taken away from her by the father who is the natural guardian of the child, the mother has a right of Hizanat under Mohamedan law and, therefore, she would be fully entitled to apply under Section 25 of the Act. In this view of the matter, the contention of Mr. Rahenoma, the learned counsel for the appellant is devoid of any substance.

6. So far as the second contention is concerned, namely, the application filed did not furnish all the particulars provided for in the form as contemplated under Section 10 of the Act; I find such a contention had not been raised in the court below. Even in the memorandum of appeal in this Court such a point has not been taken. In this view of the matter, it is futile to urge this point now. That apart, non-mention of the names of near relations of the minor under Section 10(1)(a) will not make the application not maintainable particularly when the mother is the applicant. I, therefore, do not find any substance in the second contention of the learned counsel for the appellant.

7. Coming to the last submission of the learned counsel, the Act confers a discretion which has to be exercised for the protection and welfare of the children. The Court on an application being filed makes an enquiry and only after being satisfied that it would be in the interest of the child to give the custody to the mother or father passes the order giving custody. The Supreme Court has considered this matter in several cases and it would be sufficient to note the decision in the case of Dr. Mrs. Veena Kapoor v. Varinder Kumar Kapoor, AIR 1982 SC 792. It has been the consistent view of all courts that in respect of a child of tender age, the mother is more suitable to have the custody. A child at that tender age requires love and affection and proper care which is normally expected of from the mother. The learned trial Judge has passed the impugned order bearing in mind the legal principle regarding the custody of a minor child and after examining the same, I am satisfied that he has properly kept in mind the paramount consideration, namely, the welfare of the child. I am not in a position to agree with the submission of Mr. Rahenoma that the learned trial Judge did not have proper consideration before him while passing the impugned order. In fact in my opinion, the learned district Judge has passed the most reasonable order in the facts and circumstances of the case.

8. In the result, therefore, I do not find any merit in this appeal which is accordingly dismissed, but there would be no order as to costs.