

RAJASTHAN HIGH COURT

Farha @ Kamrunisha

Vs.

Kamrul Abadeen

D.B. Civil Misc. Appeal No. 1379 of 2006
(Shiv Kumar Sharma and Guman Singh, JJ.)

01.06.2007

JUDGMENT

Guman Singh, J.

1. This appeal is directed against the judgment and decree dated 27.2.2006, passed by Judge, Family Court, Ajmer, whereby, Application No. 7/2003 filed by the appellant-wife, under Sections 10 and 25 of the Guardians and Wards Act 1890 (for short 'the Act') for custody of the child was dismissed and Suit No. 16/03 filed by the respondent-husband for the relief of permanent injunction restraining the Appellant-wife from forcibly snatching the child from his natural guardianship was decreed.
2. In the petition No. 7/2003 filed by the wife for the custody of the child, it was averred that appellant and her younger sister were married on 17.1.2000 with the respondent and his younger brother at Ajmer according to Hanafi School of Mahommedan Law. But their in-laws were not satisfied with the dowry and hence started harassing and torturing both of them. On 31.10.2001, the appellant wife gave birth to a male child named Naveed Abadeen but ever since her delivery, she was neither allowed to touch the child nor allowed to feed him. It has been further averred that on 21.3.2002 the wife tried to feed her child with the help of her younger sister but both the sisters were beaten by their husbands and other family members and they also demanded scooter, washing machine and Rs. 50,000/- in dowry and they were told that the child could be handed over to her only on meeting the aforesaid demand. Then, both the sisters were turned out of house in the night at about 8 p.m. while the child was retained by their in-laws.
3. The respondent and his parents were persuaded for one year to resolve the matter but on 5.4.2003 when both the sisters with their brother and other relatives went to

their matrimonial home, the in-laws refused to accept them until their demand for dowry was not exceeded. The appellant-wife was also not allowed to meet her child and she was threatened to be divorced and even slapped by the husband. Their brother who went along with them was also beaten by the respondent, his brother and father. The appellant-wife has further averred that as per Mahommedan Law among the Hanafis the mother's hizanat of a male child ends with the completion of his seven years. The mother and the grandmother, "says the Fatawat Alamgiri," are entitled to the custody of a boy until he is independent (of their care) that is, until he is seven years old. It was further averred that respondent and his mother and sisters are doing business of selling bangles in Langarkhan Dargah Bazar, Ajmer and as such the appellant can take care of the small child in proper way as the husband is also busy with his business of looking after the guest house and remains out for the whole day and comes late in the night. Therefore, it was prayed that the custody of the child be handed-over to her.

4. The respondent husband in his reply denied all the allegations levelled by the wife and stated that no such demand for dowry, as alleged was made. He made a counter allegation that the wife appellant is a lady who believes in free style of living and she refused to feed her child when the child was only four months old on the ground that it may adversely affect her health and figure. It was also averred that she was interested in the business of selling bangles and she remains in the shop from dawn to late hours in the night and if she is allowed to have the custody of the child the child is likely to be adversely effected from that atmosphere. He also stated that his family is well-educated while there is no such atmosphere in the family of the wife.

5. In the suit filed by the respondent-husband against the wife for restraining her from snatching the child, almost the same averments and counter averments were made by the parties in their pleadings. It was further pleaded by the husband that the wife lodged an F.I.R. in Mahila Police Station. Ajmer, for dowry against him and his family members on 19.4.2003. It was also pleaded by the husband that his sister used to feed the child and the appellant Kamrunisha never bothered to care the child and he received a threatening call on 20.4.2003 about snatching away the child forcibly. Therefore, he was compelled to file the suit for injunction.

6. On the basis of the pleadings of the two petitions stated above, following issues were framed by the trial Court:-

(1) Whether the welfare of the minor child Naveed is vested in the custody of

the appellant ?

(2) Whether the welfare of the child can be ensured in the custody of the respondent-father?

(3) Whether the appellant-wife is entitled to the custody of the child as a guardian?

(4) Relief?

7. The appellant wife examined herself as A.W.1 in support of her pleadings while the respondent-husband examined himself as NAW1 and also produced NAW2 Navneet Jain in support of his case.

8. After hearing both the parties the Judge, Family Court decided all the four issues against the appellant-wife and dismissed the petition for custody of the child as a guardian and also decreed the suit of the husband as stated here-in-above.

9. We have heard learned counsel for the parties and gone through the material placed before us.

10. On appraisal of the evidence led by the parties the following fact situation has emerged in the case:-

(1) Parties were married as per Mahommedan Law on 17.1.2000 at Ajmer;

(2) On 31.10.01, a male child named Naved was born out of their wedlock;

(3) The parties are not living together from 21.3.2002 and child was retained by the husband and his family members;

(4) The petition for custody of child was filed by the appellant-wife in the Family Court, Ajmer and the husband also filed the suit for injunction restraining wife from taking away the child from his custody.

11. In view of the above fact situation, the main contention of the learned counsel for the appellant wife is that both the parties are governed by Hanafi School of Mahommedan Law according to which the mother's hizanat of a male child continues up to the completion of his seven years. The mother and the grand-mother are entitled to the custody of a boy until he is independent i.e., until he is seven years old as per Fatawat Alamgiri. Therefore, it has been strenuously argued that the custody of the child be given to the appellant and she being the mother of the child is in a better position to look after the child and ensure his all round development.

12. The counsel for the respondent contended that ever since the wife left the house of the husband leaving behind the child, she did not bother for 15 months to take care of the child until she filed petition for custody of the child. It was further contended that

child could be said to be in the need of the mother in the first year of birth and during that period child has been looked after by the family members of the husband and now the child is about six years old and thus his custody should not be changed except by taking him in confidence and that too only in the interest of the welfare of the child. According to him the child has fully adjusted with the present atmosphere where he feels safe, secure and emotionally attached.

13. In view of the above fact situation and submissions of the parties, we have gone through the material placed before us and find that ever since the appellant left the house from 31.10.2003, the child is living with the father and his family members. We had an occasion to call and converse with the child and we find that the child is very much attached with his grandmother and the child considers her to be his real mother and expressed no inclination to leave the present surroundings and he was found to be happy. In view of the facts and circumstances of the case, when both the parties are residing in the same vicinity at Ajmer, though separately as their relations are not cordial, it would not be in the interest and well being of the child to disturb him from the present surroundings and to hand-over his custody to the appellant- wife while she is staying away from the husband though there has been no 'Talaq' as yet. Therefore, considering that the child is almost six years old and his well-being cannot be unilaterally determined as against his wishes lest it may be a cause of emotional set back to the infant mind.

14. In the above backdrop, we find that the learned Family Court has discussed the evidence adduced by both the parties in detail and arrived at a conclusion on proper appreciation of evidence as such no interference is called for in the findings of the learned Family Court. However, we deem it proper to allow the appellant wife an opportunity to regularly meet the child on the week- ends.

15. Consequently, the judgment and decree of the Family Court, Ajmer, dated 27.2.2006, is confirmed with the modification that the appellant wife shall be regularly allowed to meet the child do all week-ends for one hour, preferably between 5 p.m. to 7 p.m. at a meeting place mutually agreed by them or subject to such directions of the family Court, Ajmer from time to time, if, required.

Appeal dismissed.