Allahabad High Court
Khurshid Gauhar vs Siddiqunnisa on 22 January, 1986
Equivalent citations: AIR 1986 All 314
Author: A N Varma
Bench: A N Varma
ORDER Amarendra Nath Varma, J.

1. This revision is directed against an order dt. Oct. 4, 1985 allowing an application filed by the mother for the interim custody of a minor child, a son aged about 31/2 years at the time of making of the application, having been born on Jan. 12, 1982. The said application was filed in an application filed by the mother of the child under Section 25 of the Guardians and Wards Act for an order for the return of the child from the custody of the applicant who is his father.

2. The relevant facts are that the applicant and the opposite party were married on May 11, 1980 and on Jan. 12, 1982, a son (the child in question) was born to them. On July 20, 1985 the applicant divorced the opposite party and it is alleged that he turned out the opposite party from the marital home and took the child from her custody and entrusted him to the care of his second wife. Thereafter on July 26, 1985 the opposite party filed an application under the Guardians and Wards Act stating the aforesaid facts and praying that she be appointed the guardian of the child and be given the custody of the child so that he may be reared and taken care of properly. A few days later the mother filed an application under Section 12 of the said Act for the interim custody of the child. In this application it was alleged that her husband has forcibly snatched the child from her and has turned her out of the house. She has only one child whereas her husband has five children from his second wife. She has grave apprehension that the step mother of the child, namely, the second wife of the applicant who has five children of her own, would grossly ill-treat the child. The child is already living under fear and there is even grave danger to the life of the child. The applicant has not been allowed to meet the child and if the interim custody of the child is not immediately granted, the poor and innocent child would be exposed to grave risk of life. The application for interim custody was contested by the applicant who filed a written objection in which it was alleged that the mother was a woman of loose character. She has no house and means to support the child. She is a school teacher and would have no time to look after the child. It was further pleaded that the applicant was the natural guardian of the minor and hence he could not be deprived of the custody of the child.

3. Both the parties filed affidavit in support of their respective allegations. The Court below has, on a consideration of the material on record, recorded a finding that in the interest of the child the interim custody must be granted to the mother and made a direction to that effect. While allowing this application the Court below also observed that if, at any time, the applicant found that the child was not being properly maintained by his mother he may move an application for the recall of the order. It also fixed Nov. 1, 1985 for evidence observing that in the interest of justice the case should be decided at the earliest. The parties had exchanged their pleadings and only evidence and argument remained to be adduced and heard. The Court below has referred to the authorities relevant to the issues arising for consideration and thereafter applies the principles emerging therefrom to the facts of the present case. It has concluded that there are valid grounds for believing the case of the applicant that the child would not be looked after properly by the step mother who

has five children of her own from the applicant. It has further observed that in view of the settled legal position that a mother governed by the Mohammedan Law is entitled to the custody of her male child until he has completed the age of seven years and further in view of the facts mentioned above the interest of the minor which is of paramount consideration in such cases clearly demanded that the wife be allowed the interim custody of the child.

4. The first contention raised by the learned counsel was that the Additional District Judge who has passed the impugned order was not authorised under the Guardians and Wards Act to entertain an application either under Section 25 or Section 12 of the said Act. This argument was, however, immediately given up when the relevant notification issued by the High Court in the exercise of powers conferred by Section 4A of the Guardians and Wards Act on November 27, 1958 was brought to the notice of the Court by the learned counsel for the wife. Under this notification the High Court has empowered all the Additional District Judges in the State to dispose of any proceedings under the Guardians and Wards Act.

5. The second submission in support of the revision was that the application filed by the wife under Section 25 itself is not maintainable and consequently the Court below had no jurisdiction to grant interim custody under Section 12 of the Act. It was urged that in the present case as the mother was living away from the husband the right of Hizanat which she had under the personal law disappeared. In support, learned counsel placed reliance on a decision of this Court reported in AIR 1932 All 215 (Mt. Siddiqunnisa Bibi v. Nizamuddin Khan). The contrary view expressed by this Court in the decision reported in 1983 All WC 572 (Hafizur Rahaman v. Smt. Shakila Khatoon) relied on by the Court below, it was submitted, did not lay down the law correctly.

6. Having heard learned counsel for the parties at some length and given the matter a careful consideration I find no merit in the above contention. In my opinion, insofar as the question of the maintainability of the application filed by the opposite party under Section 25 is concerned the same stands squarely covered and concluded by the latest decision of this Court reported in Hafizur Rahaman's case (supra). The facts of that case are in pari materia with those of the present case. There also the petition under Section 25 had been filed by a divorced wife who had been expelled from the marital home of her husband and the child was removed from her custody. A similar argument as the one advanced in the present case came up for consideration before the Bench which, after a very careful analysis of the law on the subject, as spelled out by leading authorities, both textual and judicial precedents, summed up the legal position at page 576 thus :

"(1) the father is the natural and legal guardian of the infant child but the right to the custody of the child is of the mother till he attains the age of seven years.

(2) being entitled to custody of the child the respondent is guardian within the meaning of Section 25 as defined in Section 4(2) of the Act and entitled as such to apply for the purpose. 'Custody' over the child, in our opinion, necessarily imports the element of 'care' referred to in Section 4(2). The custody entrusted to the mother is with the object namely that the child be reared properly by the person to whom he would naturally be most attached in the early years of his life.

(3) there is no conflict between guardianship of the father and the Hizanat of the mother. The two can co-exist side by side under the law. The mother exercises her right to rear up the child under the supervision and guidance of the father.

(4) the Hizanat of the mother is not lost by the mere fact that she has been divorced by the husband. The Hidaya and the Fatwa Alamgiri are recognized as standard authorities in this country on the Hanafi branch of the Sunni law, Imambandi v. Haji Mutsaddi, AIR 1918 PC 11 at p. 18. Ameer Ali points also that -

"The mother can on no account give up her right of Hizanat; for even if she were to obtain a khula in lieu of her abandoning her right to her child's custody, the Khula will be valid, and she will retain the right of Hizanat" (Vol. II Page 304).

The appellant in this case does not plead any of the recognized grounds for the loss of the mother's custody.

(5) the right of Hizanat is a personal right which the party entitled can enforce by a judicial proceeding under the Act (Ameer Ali, Vol. II page 303). In Mrs. Annie Besant's case, AIR 1914 PC 41 (supra)."

7. The nature of right described under the Mohammedan Law as Hizanat was examined by this Court in considerable depth and it was observed that the baste postulate underlying. the theory of the mother's right of Hizanat is that for rearing the child of that tender age mother is the best suited and this right is not lost by the mere fact that she has been divorced by the husband.

8. This principle spelled out in the Mohammedan Law is based on practical experience based on considerations which are conducive to the proper growth of the child. It cannot be disputed that a child of that tender age would feel psychologically most secure in the company of the mother rather than the father. No one can compete with the mother in that respect ordinarily. The amount of love and care which a child receives from the mother cannot be had or expected from any other relation including the father. It is necessary to dilate on the subject as, in my opinion, the law has been very ably summed up by the Division Bench decision of this Court in the case of Hafizur Rahaman (1983 All WC 572) (supra). I, however, cannot resist the temptation of citing a very apposite passage from 'Hidaya' Hamilton (Vol. 1) page 385 :--

"If a separation takes place between a husband and wife, who are possessed of an infant child, the right of nursing and keeping it rests with the mother because it is recorded that the woman once applied to the prophet, saying "O prophet of God; this is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own "care" to which the prophet replied" thou hast a right in the child prior to that of thy husband. So long as thou does not marry with" a stranger". Moreover, a mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child....."

9. With respect, I find myself in total agreement with the law spelled out in the case of Hafizur Rahaman (1983 All WC 572) (supra) and hold that the application of the opposite party under Section 25 of the said Act is prima facie maintainable.

10. As regards the decision reported in AIR 1932 All 215, the learned counsel for the applicant contended that in this case it was held that if the lady claiming the right of Hizanat takes away the child from the place of his birth and away from his father at a distance from where the supervision of the child by the father would not be possible the limited right of Hizanat automatically comes to an end. To reinforce this argument learned counsel also placed reliance on a passage from Hamilton's Hidaya at page 139 in which there are some observations to the effect that a mother cannot remove the child to a strange place i.e. out of the city where the husband resides and if she does so the right of Hizanat would be lost to her.

11. I have given the above submission a careful consideration and I am clearly of the view that the above decision cited by the learned counsel is of no assistance in the present case. The sole ground on which learned counsel sought to support this contention was that whereas the husband resides at Daurala, Meerut, the wife is working as a teacher in the Government Girls College at Deoband, district Saharanpur. From this fact alone learned counsel wanted this Court to conclude that the mother ipso facto forfeited her right of Hizanat. I am unable to agree. In the facts of the case reported in AIR 1932 All 215 this Court, after having held that considering the circumstances prevailing in that case the interest of the child would be best served if he was allowed to remain with the father and that the education of the child would suffer if he was allowed to remain with his maternal grandmother at Zamania, ruled that the maternal grandmother had lost the right of Hizanat. The decision is, however, no authority for the proposition that in all circumstances as soon as the wife lives away from the husband she automatically loses her right of Hizanat. In the present case, nothing was brought to my notice beyond the fact that whereas the husband resides at Daurala in the district of Meerut the wife is working at Deoband in the district of Saharanpur to justify the conclusion that the wife has lost the right of Hizanat.

12. Further, Mulla in his commentary on Mohammedan Law has in Section 354 specified the grounds when a female becomes disqualified for the custody of a child. These have been set out as :

"(1) if she marries a person not related to the child within the prohibited degrees (Sections 260-261) e.g. a stranger, but the right revives on the dissolution of the marriage by death or divorce; or (2) if she goes and resides, during the subsistance of the marriage, at a distance from the father's place of residence; or (3) if she is leading an immoral life, as where she is a prostitute; or (4) if she neglects to take proper care of the child."

13. It will be seen that under the second ground enumerated above the female becomes disqualified only if she goes and resides during the subsistence of the marriage at a distance from the father's place of residence. We are here dealing with the case of a divorced wife. It is normal and natural for a divorced wife to reside separately and away from the husband and so long as it is not demonstrated that general supervision of the child to which the father is entitled as the natural guardian has not become impossible, in my opinion, the mother cannot be deprived of the right of

Hizanat. Moreover, as has been repeatedly stressed in the conflict of rival claims put forward by the father and the mother in regard to the custody of a child of tender age based on their respective rights under the personal law, the interest of the child cannot be sacrificed. The overriding consideration in all such cases and in all circumstances is the interest of the child and all other claims of rival parents must be subordinated to it. (See Mohd. Yunus v. Smt. Shamshad Bano 1985 All WC 386 : (AIR 1985 All 217) following Dr. Mrs. Veena Kapoor v. Verinder Kumar Kapoor, AIR 1982 SC 792; Rosy Jacob v. Jacob A Chakramakkul, AIR 1973 SC 2090; Imam Bandi v. Haji Musaddi, AIR 1918 PC 11 and Mst. Samiunnissa v. Mt. Saida Khatun, AIR 1944 All 202.

14. I have also not found anything to the contrary in the passage cited by the learned counsel from Hamilton's Hidaya which might lead to the conclusion that Hizanat available to a Mohammedan female is automatically lost as soon as she goes and resides away from the husband after divorce in a different district.

15. In any case, this Court is not finally disposing of the petition under Section 25 of the Act which is still pending in the Court below. That being so, I would prefer to rely on the decision reported in 1983 All WC 572 for the present as against the view expressed in AIR 1932 All 215 though I am clearly of the view that the decision in AIR 1932 All 215 had turned on its own facts and does not derogate from the law laid down in 1983 All WC 572 and hold that prima facie the application filed by the opposite party under Section 25 is maintainable and the impugned order cannot be set aside on the submission of the learned counsel for the revisionist to the contrary.

16. As regards the merits of the findings recorded by the Court below on fact learned counsel for the applicant had hardly any submission to make. However, on going through the conclusion reached by the Court below on fact I find myself in total agreement with the Court below. I am not making detailed comments on facts found by the Court below as the petition under Section 25 is still pending and any observations made by this Court may prejudice a fair trial of the issues arising therein. Suffice it to say that the conclusions reached by the Court below not being vitiated by any error of jurisdiction the same are not being interfered with in this revision.

17. The third and the last submission of the learned counsel was that in a petition under Section 25 of the aforesaid Act an order for interim custody cannot be made under Section 12. It was urged relying on a decision of the Gujarat High Court reported in AIR 1962 Guj 227 (Ruzmaniben Tribhovandas Jethabhai v. Minor Narmada) that the power to make an interlocutory order for production of a minor and interim protection of his person is available only in proceedings for appointment or declaration of a guardian provided under Ch. II of the Guardians and Wards Act. Section 12 which provides for making an order for interim protection of the person and property of a minor appears in Chap. II and must, therefore, necessarily be held to be available only in proceedings initiated for appointment or declaration of a guardian and inasmuch as Section 25 appears in Chap. III dealing with the duties, rights and liabilities of guardians, Section 12 cannot be invoked in an application filed under Section 25. It was further urged that if Section 12 is held not to apply to an application under Section 25, the Court cannot fall back on any supposed inherent powers to make an order for interim protection or production of the minor.

18. Having given the matter a careful consideration I find it difficult to accept the above submission. It must be borne in mind that the Guardians and Wards Act has been enacted primarily for the welfare of minor children. Consequently in constituting the provisions of the enactment that interpretation ought to be accepted which subserves the welfare of the minor in preference to one which might prove detrimental to his interest. That this should be the approach of Courts in construing the provisions of the enactment has been repeatedly stressed by Courts throughout and it does not seem necessary to dilate on the subject further. It is in this background that I shall proceed to consider the validity of the argument.

Section 12 provides :

"12. Power to make interlocutory order for production of minor and interim protection of person and property -

(1) The Court may direct that the person, if any, having the custody of the minor shall produce him or cause him to be produced at such place and time and before such person as it appoints, and may make such order for the temporary custody and protection of the person or property of the minor as it thinks proper.

(2) If the minor is a female who ought not to be compelled to appear in public, the direction under Sub-section (1) for her production shall require her to be produced in accordance with the customs and manners of the country.

(3) Nothing in this section shall authorise --(a) the Court to place a female minor in the temporary custody of a person claiming to be her guardian on the ground of his being her husband unless she is already in his custody with the consent of her parents, if any, or

(b) any person to whom the temporary custody and protection of the property of a minor is entrusted to dispossess otherwise than by due course of law any person in possession of any of the property."

It will be seen that intrinsically there is nothing in Section 12 which might indicate that the power of the Court to make interlocutory order for production of a minor and interim protection of his person or property is available only in proceedings for appointment or declaration of a guardian. The words used in the statute "the Court may direct the person, if any, having the custody of the minor shall produce him at such place and time....and make such order for the temporary custody and protection of the person and property of the minor as it thinks proper" are words of wide amplitude and insofar as the plain language of the section goes there is nothing to suggest that Section 12 should be read down and be restricted in its application only in respect of proceedings for appointment or declaration of a guardian. Section 12 is part of the same statute of which Section 25 is. Except, therefore, that Section 12 appears in the chapter in which Sections 15 and 16 dealing with the power and procedure for appointment or declaration of guardian appears, there does not exist any valid ground for limiting its application only to the proceedings initiated under Chapter II of the Act. Section 12 itself does not state that this power to make interlocutory order is exercisable

pending the disposal of an application under Sections 15 to 19 of the Act.

19. The contrary view expressed by the Gujarat High Court in AIR 1962 Guj 227 is founded solely on the juxta position of Section 12 and the fact that Section 12 appears in Chap. II which deals with the appointment and declaration of guardians. With profound respect to the decision of the Gujarat High Court, I find it difficult to share the view. As already observed, the language of Section 12 is explicit and unambiguously indicates that the same is not limited to any particular type of proceedings contemplated under the Act. I do venture to think that in no contingency would the exercise of power of making interlocutory order for production of a minor and interim protection of his person be more appropriately warranted than an application under Section 25 which deals with cases where a ward removed from the custody of a guardian of his person. To deny the power to make such an order for interim production or protection of the child in a petition filed under Section 25 would undeniably result in irreparable harm to the child and be destructive of the very purpose of the enactment. It is not difficult to imagine a case where an infant or a child of tender years being removed from the custody of a guardian of his person in circumstances which may warrant immediate restoration of the Child to the custody of the lawful guardian of his person. For example, an infant or a child of tender years may be seriously ill requiring immediate attention by his mother or the other parent for recovery. If in such circumstances the mother makes an application under Section 25 and it is held that the Court totally lacks any power to give immediate relief to the child, it would be undeniably destructive of the very purpose of the entire enactment. Surely a person who is already recognized as a guardian of a minor applying to the Court for an order for the return of the ward under Section 25 illegally removed from his custody cannot be legitimately held to be in a less advantaged position than one who is still to be appointed or declared a guardian in so far as the right to apply for an order for production of the minor is concerned.

20. For the reasons stated above, I hold that Section 12 of the Act is available even in respect of an application filed under Section 25 of the Act and, with respect to the decision cited by the learned counsel, namely, AIR 1962 Guj 227 and (1916) ILR 40 Bom 600 : (AIR 1916 Bom 129) (Achrat Lal Jaikisendas v. Chimanlal Prabhudas) on which the Gujarat High Court placed reliance, have taken a view which, in my humble view, is far too restricted and is not warranted by the scheme and purpose of the enactment.

21. In any case, the Gujarat decision itself clearly lays down that even if Section 12 is held not to apply to an application under Section 25 of the Act the Court must be held to have inherent powers to make such an order pending the decision of an application filed under Section 25 of the Act. It was observed in that decision at page 228 of the report: --

"The question would, however, still remain whether the petitioner was entitled to maintain the application for interim custody of Narmada under the inherent powers of the Court. I do not agree with Mr. R. C. Mankad that the Court has no inherent powers to make interlocutory order for interim custody of a minor apart from the express provision of Section 12. It is no doubt true that since there is an express provision contained in Section 12 for making of interlocutory order for interim custody in an application for appointment or declaration of a guardian, the inherent powers of the Court cannot be invoked for making any order for interim custody in an application for

appointment or declaration of a guardian. The enactment by the Legislature of an express provision would exclude the inherent powers of the court in the area over which the express provision operates but when the question arises whether interlocutory order for interim custody can be made in a petition under Section 25 to which the provisions of Section 12 do not apply I do not see how the inherent powers of the Court can be excluded. If the Court can under Section 25 order that the minor should be returned to the custody of the guardian on the ground that it is for the welfare of the minor to return to such custody, I do not understand why the Court cannot do so as an interim measure. It may take considerable time before a petition under Section 25 may be disposed of by the Court and if the Court has no power to make interlocutory order for interim custody of the minor, considerable injury may be caused to the interests of the minor during the period that it may take to dispose of the petition. Surely the Court is not so powerless as to prevent any injury being caused to the welfare of the minor during the period that the petition is not disposed of by it. I am of the opinion that the Court has inherent powers to make interlocutory order for interim custody of a minor in a petition under Section 25. This being the position it is obvious that the application of the petitioner for interim custody of Narmada was maintainable under the inherent powers of the Court."

With respect I completely agree with the law laid down in the passage quoted above.

22. In the premise, I hold that the impugned order does not suffer from any error of jurisdiction warranting interference by this Court under Section 115 of the Civil P.C. On merits, I endorse the conclusions reached by the Court below that it is a fit case in which an order should be made for the return of the child to the custody of the mother. The discretion exercised by the court below is valid and proper.

23. As a result the revision fails and is dismissed with costs. The interim orders passed by this Court from time to time are vacated.