

1914
May, 13.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.
SALIM-UN-NISSA (APPLICANT) v. SAADAT HUSAIN AND ANOTHER
(OPPOSITE PARTY) *

Muhammadian law—Shia sect—Guardian and minor—Right to guardianship of female minor.

According to the Muhammadian law applicable to the Shia sect, the right to the guardianship of a female minor rests primarily with the mother; on her death with the father, and only on the death of the father does the right pass to the maternal grandmother and other ascendants.

THE facts of this case were briefly as follows:—

A Muhammadian lady belonging to the Shia sect died leaving a minor girl about 3½ years old. Her mother applied to be appointed guardian of the person and property of the minor. The grandfather and the father of the child opposed the application; but the District Judge appointed the maternal grandmother to be guardian of the person of the child. The father and the grandfather appealed to the High Court, where it was urged that the father had a preferential right to be appointed guardian excluding the maternal grandmother.

Mr. *Agha Haidar*, for the appellants, submitted that the court below was wrong in applying the Sunni law to the parties, who were Shias. The Shia law differs from the Sunni law, and among the Shias in the absence of the mother the father is the proper guardian. Failing him come the grandmother and other ascendants; Baillie's *Imamia Law*; *Ameer Ali*, Vol. 2, page 294 (3rd edition); *Tyabjee's Muhammadian Law*, sec. 242.

Maulvi Shafi-uz-zaman, for the respondents, submitted that although among the Shias the father has a preferential right, in this case he did not apply to be appointed guardian, and it was only in this Court that he set up his preferential right. The court has to look to all the circumstances of the case when appointing a guardian for a Muhammadian child; *Wilson*, page 195. The grandmother only wanted to be appointed guardian of the person of the girl and not of her property. She will maintain the child with her own money and it is for the welfare of the minor to appoint the lady as her guardian. The father is a young man of 25 and may marry again.

* First Appeal No 35 of 1914, from an order of *Muhammad Ali*, District Judge of Moradshad, dated the 7th of November, 1913.

MUHAMMAD RAFIQ and PIGGOTT, JJ.—The point raised in this appeal relates to the guardianship of a minor Shia girl, about 3½ years old, whose mother died on the 25th of August, 1913. The maternal grandmother of the minor applied to the court below to be appointed guardian of her person and property. The application was opposed by the father and paternal grandfather of the minor. The father did not apply to act as guardian of the minor, but supported the application of his own father. The learned District Judge appointed the maternal grandmother as guardian of the person of the minor. The question as to the guardianship of the minor's property was given up by the applicant. The father and the paternal grandfather of the minor have come up in appeal to this Court and contend that the order of the court below is bad under the law. It is said that under the Shia law, to which the parties are subject, on the death of the mother or her disqualification for any reason, the next person entitled to the guardianship of a minor child is its father. It has been pointed out to us that the Shia law on this subject differs from the Sunni law. The contention for the appellants is borne out by the books on Shia law, to one of which we may refer here. Mr. Ameer Ali in his book on Muhammadan Law, Vol. II, 3rd edition, page 294, says as follows:—"The Shias are in agreement with the Sunnis with regard to the general principles governing the right of *hizmat*. But among them, in the absence of the mother, the right passes to the father, and failing him to the grandparents and other ascendants." The maternal grandmother had therefore no right to claim to act as guardian of the minor girl when her father was alive. The appeal prevails and is allowed. We set aside the order of the court below and dismiss the application of Musammat Salim-un-nissa. Costs are allowed to the appellants.

Appeal decreed.

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