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Busting the Myths of Custody: A Case Note on Zohra Begum v. Sh. Latif [Lahore High Court, Yakub Ali J, 1965]

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Facts

Mst. Zohra Begum and Shah Latif Munawwar were married for about two and half years. They were parents to one boy named Khalid Latif and one girl named Robeena. After their marriage, at one-point Zohra Begum was caught with split personality disease named schizophrenia. But she reeled back from her disease after getting proper treatment. Even though she was no longer suffering from sickness, the relationship between her and her husband became progressively more and more distant by time. At that point, Shah Latif was determined to dissolve their marriage. So, the divorce took place from the part of Shah Latif. Therefore, Zohra Begum along with her two minor children left the house of Shah Latif. Shah Latif didn't provide even a single penny for the maintenance of Zohra Begum and the minors after the divorce took place. So, Zohra Begum filed a suit for dower against him and a petition was also filed by her for maintenance of the minors.At first, Shah Latif replied by filing a suit for custody of the minor under section 17 of the Guardian and Wards Act 1890. But the court decided that he was competent to apply for a suit under this section. So, it was converted to a case under the section 25 of the same Act.

According to the traditional age rule of custody (hizanat), the guardianship of a boy over seven years of age belonged to the father and the custody of a girl under the age of puberty belonged to the mother. At that point in time, Khalid was above the age of seven and Robeena was under the age of puberty. But, Shah Latif filed this case in the Guardian Court of Lahore to gain custody of both the child believing that it will be for the welfare of the wards to be under his custody, so the custody of the minors should be returned to him.While deciding the outcome of the case Mr. Ishaq Rahim, the Guardian Judge of Lahore, strictly followed the traditional age rule of hizanatand gave the custody of the son to the father and the custody of the girl to the mother. He relied on the case of Chand Bibi v. Bulbullah[1] where age rule is given priority over the consideration of welfare. He also followed the case of Kanamji v. Forman Ali[2] where traditional age rule prevails even if the guardian previously neglected his duty by not providing the minors with maintenance. But, he gave the burden of maintenance of the minors to Shah Latif mentioning that Zohra had no means to maintain the minors because even if a father doesn't have the custody of the child, he must provide the child with maintenance as it is his duty under Muslim law.After this decision from Guardian Court Both of them appealed against the part that were unsuitable for them. Because of that, the appeal came before the Lahore High Court bench of Yakub Ali J. for further consideration. Mr. A R Sheikh appeared in the court on behalf of the petitioner. He argued on the fact that there is no definite rule of decision about the age at which the mother losses the custody of her children. He also relied on some cases of the continent in which the court didn't follow the traditional age rule. So, as there was no universally accepted rule of decision Mr. A R Sheikh requested that the court should give the decision of the case based on the sources and principles of Muslim Law.

Judgement

After scrutinizing this case the court came to conclusion that this case is not a conventional one. The main factor behind deciding the outcome of this case was the one thing that was of paramount consideration. As there was no rule universally followed regarding the custody, the court looked for a different pathby following a progressive interpretation of Shariah. The court applied ijtihad and istihsanwhich enabled the court to form its own point of view and decide what would be the bettersolution to follow in term of a matter of custody. The court decided that,it is the welfare of the

[1] PLD 1951 Peshawar 26
[2] PLD 1962 Lahore 166

children which had more importance than this rule of personal law as the age rule of is not uniformed. The learned judge also mentioned that, even if the case is considered under section 17,the consideration of welfare is the one that trumps the age rule.It was clearly visible that the welfare of the children lied with the mother. Because Zohra Begum was raising the minors without any shortcoming for last 9 years from the time of their separation. They were also attending schools and were fit physically. In the meantime, no allegation was made by Shah Latif against Zohra about the well-being of the children. It was admitted by Shah Latif that he didn't contributed any amount of money for the maintenance. The court also considered that if the custody of the minors goes to Shah Latif then the minors would find themselves choked in the custody of stranger because they literally didn't have much contact in these years.So, the court came to a decision that the suit filed by Shah Latif was not out of affection for the welfare of the minors but was because of the grudge that he held against Zohra Begum. Therefore, as the welfare of the child lies with Zohra Begum, she was entitled with the custody of the child by the court's decision. While judging this case Yakub Ali J. also relied on the case of Muhammad Baksh v. Mst Gulam Fatima[3] where it was stated that the welfare of the minor was the dominant consideration and the rules are just supposed to try and ensure that welfare from the Muslim point of view.

Impact and significance

This case had a marvelous role in changing the conventional judgments of the court in cases like this, which resulted in arevolutionary increasement in recognizing and relying on the principles of Islamic Law. In the process, applying and elaborating Islamic social justice in a justiciable way. Yakub Ali had a much more progressive thought process for his time than that of the other judges which had a great influence in changing the view regarding these sort of cases. Hereafter, there was also the occurance of some similar instances like this where the judges had to take a stand from their own point of view whichsolidified the application of 'ijtihad'.This case was a major factor in establishing that where there is no Quranic or traditional text or an ijma on a point of view of law, and if there is a difference of views between Islamic scholars and jurists regarding this, then a court may form its own point of view.[4]Similarly in this case, it was decided that it will be permissible to differ from the rule of hizanat as there is no Quranic and traditional text on it.[5] Such ijtihad later in time became known as 'judicial ijtihad' under the enforcement of Shariah Act 1991 in Pakistan. There is no argument that the lessons learned from this case and similar cases played a vital role behind its establishment which lets the judges choose what is good from their legal and moral senses.

On answering the question of gaining the custody of the child by the parents, both the Quran and the Hadith are silent. Also, no interest was shown by the Islamic jurists in this matter. The silence of Quran and Hadith coupled with very limited access allowed to the mother by the Shariah are the reason behind this disinterest of the jurists on this matter. So, the courts of India, West Pakistan (Pakistan) and East Pakistan (Bangladesh) looked for a way to solve these custody matters, and which will not be against Shariah, as there is no direction of it in Shariah itself. In the process, judgements given in cases like Mst. Zohra begum v. Sh. Latif and Muhammad Baksh v. Mst Gulam Fatima etc. became vital in deciding such disputes in the absence of clear instruction from Quran and Hadith.It surely didn't have any contradictions with Islamic law and was done to ensure equal rights for women compared to man if not superior, as Quran was noncommittal on this subject in favor or against the members of either sex.

Previously, in many similar cases in Indian sub-continent, the father was never considered unable to have the custody of the child except the case of apostasy. Therefore, it was clear that this situation was created by conservative Muslim jurists and male dominated sub-continent which favors the

[3] PLD 1953 Lahore 73
[4] Khurshid Iqbal, The Right to Development in International Law: The Case of Pakistan, Page 197
[5]Syed Mohammed Ali, The Position of Women in Islam: A Progressive View, Page 81

father under any circumstances[6]. So, there was no existence of equality in this scenario. So, it was important tomake sure for the judges that the justice is served on an equal note, so that women will have equal rights over the custody of the child. This case was of vast importance to ensure that the welfare of the child is given more priority then the rules that were made to give men superiority over women by giving them the custody at any means. It created a precedent which enabled the courts to disentitle the father from the custody of the child if the occasion called for it. This can be seen in many cases including the case of Abu Bakar Siddique (appellant) versus S.M.A Baker and others[7] where the guardianship and custody was given to the mother not following the rules of hizanat for the child's welfare.

Conclusion

The qualification for acquiring guardianship can't be judged by age but the welfare should be the bigger concern. This case is an eye opener, a burning example regarding this matter of custody. At the end of the day, the rules are supposed to be a supporting factor for this welfare not to oppose it. And, this case will remain as a major foothold in establishing the necessity of welfare of the child.

[6] Syed Mohammed Ali, The Position of Women in Islam: A Progressive View, Page 80
[7] DLR 1986 38