**Court No. - 66** **A.F.R**

**Case :-** HABEAS CORPUS WRIT PETITION No. - 484 of 2020

**Petitioner :-** Aisha (Minor) And Another
**Respondent :-** State Of U.P. And 4 Others
**Counsel for Petitioner :-** Alok Kumar Srivastava
**Counsel for Respondent :-** G.A.

**Hon'ble J.J. Munir,J.**

1. This petition asks for the issue of a writ of habeas corpus ordering respondent nos. 2,3 and 4 to produce the detenue-petitioner no. 1, Aisha before the Court and to set her at liberty by giving her into the custody of the second petitioner, Abdul Azeem @ Mohd. Azeem, her father and natural guardian.

2. It must be remarked here that respondent nos. 2 and 3 are police officers who are not claimed to be holding the minor in their custody. The relief is, therefore, substantially sought against respondent no. 4, Smt. Umme Alisha d/o Abid Hussain, who is Abdul Azeem's estranged wife and the minor's mother. The 5th respondent, Abid Hussain is Smt. Umme Alisha's father, Abdul Azeem's father-in-law and the minor's grandfather (maternal). In substance, thus, a writ is prayed to be issued against the minor's mother at the instance of her father who claims the mother's custody to be unlawful.

3. Heard Sri Alok Kumar Srivastava, learned counsel for the petitioner, Sri Adil Jamal who appears for respondent nos. 4 and 5 and Sri Gyan Prakash, learned State Law Officer appearing on behalf of the State-respondents.

4. The facts in the backdrop of which this petition has arisen are these: Abdul Azeem, the second petitioner and Smt. Umme Alisha, the 4th respondent were married according to Muslim rites on 28.10.2016. The couple were blessed with a child, a baby girl on 04.09.2018. She has been introduced hereinbefore as Aisha. It is said that Smt. Umme Alisha and her husband Abdul Azeem could not get along together.

They parted ways with Smt. Umme Alisha moving out of her matrimonial home. She went back to her parents and is staying with them. The parties have turned an estranged couple. An FIR also appears to have been lodged by Smt. Umme Alisha on 08.02.2019 against her husband, Mohd. Azeem, her father-in-law, Mohd. Saleem, Mohd. Shanoo and Mohd. Naseem, both brothers-in-law (*jeth*) and Neha @ Baliga, sister-in-law (*nanad*) complaining commission of offences by them punishable under Sections 498-A, 323, 506, 306, 511, 467, 468, 471 I.P.C. and Section 3/4 D.P. Act. It was registered as Case Crime No. 21 of 2019 at P.S. Colonel Ganj, Kanpur Nagar. There is another FIR lodged by Smt. Umme Alisha against Mohd. Azeem, her husband, her father-in-law, Saleem and one unknown offender reporting offences punishable under Section 323, 354B, 452, 504, 506 I.P.C. and Section 4 of the Muslim Women (Protection of Rights on Marriage) Act, 2019, P.S. Colonel Ganj, District Kanpur Nagar. This FIR was lodged on 27.09.2019. Mohd. Azeem has filed a suit for restitution of conjugal rights against Smt. Umme Alisha that has been numbered as Case No. 1287 of 2019 on the file of the learned Principal Judge, Family Court, Kanpur Nagar. It also appears that the location of Smt. Umme Alisha's maternal home and her parents place is a walking distance. The parties are enmeshed in a quagmire of legal proceedings. They have turned utterly warry of each other. The mother holds the parties' child in her custody and the father has no access to the child. It is in the back drop of these facts that the father has moved this Court for a writ of habeas corpus, seeking his minor daughter's custody.

5. It is Mr. Alok Kumar Srivastava's submission that according to the personal law of parties that would govern the right to guardianship and custody, the father is the natural guardian. Both parties are Muslims and by their personal law natural guardianship of a minor is with the father. Learned counsel submits that in the father's presence and the parties being estranged, the mother is obliged to handover the minor child into her father's custody.

6. Mr. Adil Jamal on the other hand says that the father may be the natural guardian under the personal law applicable to the parties but under that law, a mother, notwithstanding the right of the father, is entitled to a minor girl's custody till she attains the age of puberty. Mr. Adil Jamal says that the right to hold custody under the personal law of parties is subject to the overriding provisions of the Guardians and Wards Act, 1890. He further submits that the provisions of the last mentioned Act and the law that has developed on the subject mandates that welfare of the minor is of paramount consideration. If, therefore, the welfare of the minor requires a course of action to be taken that is not in accordance with the personal law of parties, it is the welfare of the minor that has to be given precedence. It is his submission that the minor here is a young girl of two years, who needs the mother and her care the most. Her welfare can alone be secured in the hands of the mother and not the father, who is far less suited to look after the young minor's interest.

7. It is further argued by the learned counsel for the 4$^{th}$ respondent that the mother and the father are both natural guardians. None of them can, therefore, be said to hold custody of the minor unlawfully. As such, a writ of habeas corpus would not be available to the second petitioner claiming custody from the 4th respondent who is the minor's mother and a natural guardian, like the second petitioner. He submits that in a case where the parents are pitted against each other and seek to establish a better right to custody, the appropriate remedy is to move the Court under Section 25 of the Guardians and Wards Act, 1870. A writ of habeas corpus would be available where the minor is in the custody of an utter stranger or a kindred who is not entitled to it.

8. This Court has thoughtfully considered the rival submissions advanced by parties. It would be apposite to deal with the objections about maintainability of this petition for a writ of habeas corpus in a custody dispute between the mother and the father. This question

arose for consideration before the Supreme Court in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others, (2019) 7 SCC 42**. It was held in **Tejaswini Gaud** (*supra*) thus:

> "19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.
>
> 20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

9. I had occasioned to consider this issue in **Sahil (Minor) & Another vs. State of U.P. and 3 others**, in **Habeas Corpus Writ Petition No. 387 of 2020, decided on 03.09.2020,** where it was held:

> 20. It would be noticed from a perusal of the decisions of the Supreme Court in Nithya Anand Raghavan (supra) and Syed Saleemuddin (supra) referred to by the Division Bench of this Court in Manuj Sharma that the remedy of a habeas corpus to an estranged parent has not been held unavailable, even against the other parent. All that appears to be the requirement is to show that the child with the other parent or with some other member of the family is in detention and that detention is unlawful. It is but logical that in a case where one has to judge the legality of the minor's detention by the other parent or some other relative, the nature of the applying parent's right, vis-a-vis the detaining parent or relative's is decisive. The decision of their Lordships of the Supreme Court in Tejaswini Gaud also says that the jurisdiction of the High Court in granting a habeas corpus is limited by the fact whether the detention of the minor is by a person who is not entitled to his legal custody. It is true that the Supreme Court has held in Tejaswini Gaud that habeas corpus can be issued in exceptional cases. It is not that the writ is completely unavailable in matters where a parent claims custody, to which he/ she is lawfully entitled.
>
> 21. In this Court's opinion, where there is not much of a debatable right available to the other parent or some other relative, who is detaining the child contrary to the wish of the applying parent, the writ ought to issue. However, if the parent or the other relative detaining the minor has a reasonable right that he/ she can show on affidavits, the parties ought to be left to pursue their remedy under the Guardians and Wards Act. As such, what this Court has concluded hereinabove that this petition is maintainable, proceeds on valid principles.

10. The maintainability of a petition for a writ of habeas corpus in custody disputes between parents recently engaged the attention of the Supreme Court in **Yashita Sahu Vs. State of Rajasthan and others, (2020) 3 SCC 67**, where it has been held:

> **10.** It is too late in the day to urge that a writ of habeas corpus is not maintainable if the child is in the custody of another parent. The law in this regard has developed a lot over a period of time but now it is a settled position that the court can

> invoke its extraordinary writ jurisdiction for the best interest of the child. This has been done in *Elizabeth Dinshaw* v.*Arvand M. Dinshaw* [*Elizabeth Dinshaw* v. *Arvand M. Dinshaw*, (1987) 1 SCC 42 : 1987 SCC (Cri) 13] , *Nithya Anand Raghavan* v. *State (NCT of Delhi)* [*Nithya Anand Raghavan* v. *State (NCT of Delhi)*, (2017) 8 SCC 454 : (2017) 4 SCC (Civ) 104] and *Lahari Sakhamuri* v. *Sobhan Kodali* [*Lahari Sakhamuri* v. *Sobhan Kodali*, (2019) 7 SCC 311 : (2019) 3 SCC (Civ) 590] among others. In all these cases, the writ petitions were entertained. Therefore, we reject the contention of the appellant wife that the writ petition before the High Court of Rajasthan was not maintainable.

11. The objection raised by the learned counsel for the respondent that this petition is not maintainable as it relates to a custody dispute between two parents, where custody of either cannot be said to be unlawful, in the sense that it is understood in the jurisdiction for a writ of habeas corpus, cannot be accepted. The validity of a minor's custody with a parent can be examined in a petition for a writ of habeas corpus with reference to the law governing the right to that custody. The question of welfare of minor too, can be examined within the scope of these proceedings. The only limitation appears to be that the inquiry should not involve fine and intricate details, the assessment of which may require such a detailed inquiry which is not traditionally associated with the exercise of the Court’s writ jurisdiction. Where a very detailed inquiry is required to be made, the parties ought to be left free in the first instance to go to the Civil Court.

12. Now, in the facts of the present case it has to be seen whether the custody of the mother is apparently unlawful, so as to entitle the father to ask for a writ of habeas corpus.

13. It is true that the mother by the personal law of parties is not the natural guardian of the minor. Rather, it is the father who is the natural guardian. But under the personal law of parties who are Muslims, there is a distinction made between the natural guardianship that is with the father and the right to custody of the minor that vests in the mother, until the age of puberty in case of a minor girl. In the case of a minor boy that right to custody for a mother extends until the boy turns seven years.

14. It must be noted that under the personal law of parties, there is a distinction about the law relating to guardianship of the minor's person and that of his/her property. A reference in this connection may be made to **Mulla's Principles of Mahomedan Law (Nineteenth Edition) by M. Hidayatullah and Arshad Hidayatullah.** Section 352 of Mulla's Mahomedan Law, which falls under Part B of Chapter XVIII dealing with 'Guardians of the Person of a Minor', provides:

> **"352. Right of mother to custody of infant children.** - The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father."

15. Again, sections 353, 354 and 355 that have material bearing on the issue are extracted below:

> **"353. Right to female relations in default of mother.-** Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:-
>
> (1) mother's mother, how highsoever;
>
> (2) father's mother, how highsoever;
>
> (3) full sister;
>
> (4) uterine sister;
>
> (5) consanguine sister;
>
> (6) full sister's daughter;

(7) uterine sister's daughter;

(8) consanguine sister's daughter;

(9) maternal aunt, in like order as sisters; and

(10) paternal aunt, also in like order as sisters.

**354. Females when disqualified for custody.**- A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody -

(1) if she marries a person not related to the child within the prohibited degrees (ss. 260-261), e.g., a stranger, but the right revives on the dissolution of marriage by death or divorce;

or

(2) if she goes and resides, during the subsistence 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.

**355. Right of male paternal relations in default of female relations.**- In default of the mother and the female relations mentioned in sec. 353, the custody belongs to the following persons in the order given below:-

(1) the father;

(2) nearest paternal grandfather;

(3) full brother;

(4) consanguine brother;

(5) full brother's son;

(6) consanguine brother's son;

(7) full brother of the father;

(8) consanguine brother of the father;

(9) son of father's full brother;

(10) son of father's consanguine brother;

> Provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her (ss. 260-261).
>
> If there be none of these, it is for the Court to appoint a guardian of the person of a minor."

16. The vivid difference about the law governing guardianship of the person of a minor and that relating to his/her property can be clearly noticed from how it is set out in **Part C of Chapter XVII of Mulla's Mahomedan Law.** Section 359 of Mulla's Mahomedan Law provides:

> "359. Legal guardians of property.- The following persons are entitled in the order mentioned below to be guardians of the property of a minor:-
>
> (1) the father;
>
> (2) the executor appointed by the father's will;
>
> (3) the father's father;
>
> (4) the executor appointed by the will of the father's father."

17. It would be seen that so far as the right to custody of a minor girl under the personal law of parties is concerned, it is provided that it ought to remain with the mother till she attains the age of puberty. Thereafter, in India the Law that has emerged is that custody must be ordered not just by the letter of the personal law but by judging where the welfare of the minor best lies. I had occasion to consider this question in **Sahil (Minor)** (*supra*) where after doing a survey of authority on the point, it was held:

> 13. This entitlement of the mother to the custody of a minor male child (as well as female, which is not relevant here) fell for consideration of the Privy Council in **Imambandi and ors. vs. Sheikh Haji Mutsaddi and ors., (1918-19) 23 CWN 50,** where it has been held by their Lordships:
>
> > "It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the

> father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant..…"
>
> "As already observed, in the absence of the father, under the Sunni law the guardianship vests in his executor. It the father dies without appointing an execute or (wasi) and his father is alive, the guardians hip of his minor children devolves on their grandfather. Should he also he dead, and have left an executor, it vests in him. In default of these de jure guardians, the duty of appointing a guardian for the protection and preservation of the infants' property devolves on the Judge as the representative of the Sovereign (Baillie's "Digest," ed. 1875, p. 689; Hamilton's Heddya, Vol. IV, p. 555). ....…"

14. This then is the position about the entitlement to the custody of a minor male child under the Muslim Law. But, it must be remembered that the personal law of parties is not the final word about entitlement to custody or guardianship in India. The right is regulated by statute. The statute is the Guardians and Wards Act, 1890. The principle that the provisions of the Guardians and Wards Act would prevail over the personal law of parties in the matter of appointment or declaration of a guardian of the person or the property of a minor, is a principle that has been accepted without cavil by consistent authority. The point was considered and the law expounded in **Rafiq vs. Smt. Bashiran and another, AIR 1963 Raj 239. In Rafiq** (*supra*), Jagat Narayan J. after doing a survey of the provisions of Sections 17 and 19 of the Guardians and Wards Act and relying on a decision of this Court in **Mt. Siddq-un-Nissa Bibi v. Nizam-Uddin Khan(1) Sulaiman, AIR 1932 All 215**, held:

> "The learned Senior Civil Judge ignored the provisions of Sec. 19 of the Guardians and Wards Act, which runs as follows:--
>
> > "Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person--

(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or

(b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor."

He did not come to a finding that the father is unfit to be the guardian of the person of the minor.

It may be mentioned here that where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act the latter prevail over the former. It is only where the provisions of the personal law are not in conflict with the provisions of the Guardians and Wards Act that the court can take into consideration the personal law applicable to the minor in the appointment of a guardian. The provisions of Sec. 19 of the Guardians and Wards Act prevail over the provisions of Sec. 17 which runs as follows:--

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) The Court shall not appoint or declare any person to be a guardian against his will."

(3) In Mt. Siddq-un-Nissa Bibi v. Nizam-Uddin Khan, ILR 54 All 128 : (AIR 1932 All 215), Sulaiman, Acting C.J. observed at page 134 (of ILR All) : (at p. 217 of AIR): –

> "The personal law has been abrogated to the extent laid down in the Act. Where, however, the personal law is not in conflict with any provision of the Act, I would not be prepared to hold that it has necessarily been superseded."

and at page 131 (of ILR All) : (at p. 216 of AIR)--

> "There can be no doubt that so far as the power to appoint and declare the guardian of a minor under Sec. 17 of the Act is concerned, the personal law of the minor concerned is to be taken into consideration, but that law is not necessarily binding upon the court, which must look to the welfare of the minor consistently with that law. This is so in cases where Sec. 17 applies. In such cases the personal law has to this extent been superseded that it is not absolutely binding on the court and can be ignored if the welfare of the minor requires that some one else, even inconsistently with that law, is the more proper person to be appointed guardian of the minor. Sec. 19 then provides that "Nothing in chapter shall authorise the Court ..... to appoint or declare a guardian of the person (a) of a minor who is a married female and whose bus-band is not, in the opinion of the court, unfit to be guardian of her, person, or (b)..... of a minor whose father is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor." The language of the section, as it stands, obviously implies that when any of the three contingencies mentioned in the sub-clauses exists there is no authority in the court to appoint or declare a guardian of the person of the minor at all; that is to say, the jurisdiction of the court conferred upon it by Sec. 17 to appoint or declare a guardian is ousted where the case is covered by Sec. 19."

(4) There is nothing on record to show that the father of the minor is unfit to be the guardian of her person. As

was observed in B.N. Ganguly v. G.H. Sarkar, AIR 1961 Madh-Pra 173 there is a presumption that the parents will be able to exercise good care in the welfare of their children."

15. The entire law about the right of the mother to the custody of her minor children, a son and a daughter, where the parties were an estranged Muslim couple, was considered by the Bombay High Court in **Mohammad Shafi vs. Shamin Banoo, AIR 1979 Bom 156.** It must be remarked that the facts of the case in **Mohammad Shafi** show that it was truly a custody dispute between the estranged parents of the two minors, where the application by the mother for custody appears to be one made under Section 25 of the Guardians and Wards Act. She had asked for the custody of her minor son, aged four years and a minor daughter, aged two and a half years, at the time of commencement of action. The facts of the case founded on pleadings of parties can best be understood by a reference to their statement in paragraph nos.2 and 3 of the report, that read:

"2. An application for appointment of herself as guardian and for the custody or returning the minors to her custody was filed by Shamim Banu against her husband Mohomed Shafi under sections 7 and 25 of the Guardian and Wards Act. She alleged therein that she was married to Mohomed Shafi and bore three children from respondent Mohomed Shafi, namely Mohomed Raees whose age was given as 4 years, Waheeda Begum, whose age was given as 2½ years and Farooque who was aged 1½ years at the time when this application was presented. She then stated that she was given very cruel treatment by the respondent who wanted to marry another woman and drove her out and at that time snatched Mohomed Raees and Waheeda Begum from her. Farooque was then only a month old and was allowed to be retained with her. She, therefore, filed this application for custody or return of the custody of the minors to herself, namely, Mohomed Raees and Waheeda Begum and for appointment of herself as the guardian under section 7. She also stated in the application that the respondent has married Sajjidabegum after the petitioner was driven away and that the respondent and his newly married wife are living together along with the minors who were, according to her, treated cruelly by the wife, step-mother and the respondent.

3. The respondent filed his written statement to this application and denied that the petitioner was driven away and was treated cruelly. He claimed that he was the natural father of the minor children whose ages were not disputed and was, therefore, entitled to their custody. He contended that the petitioner was divorced by him on 7th November, 1975 and that she was a woman of suspicious character and had connections with others and used to leave the house of the respondent at night in the company of somebody secretly. That she has left him with a view to carry on her affair with her boy friend. In these circumstances and also under the personal law to which the parties belong, namely, Mahomedan Law, he claimed that he was entitled to the custody of the children and was the proper and legal guardian of the minors. It is his claim that the application is motivated by the proceedings which she has commenced under section 125 of the Code of Criminal Procedure against him. He did not deny that he has married a third time, but denied that either the minors were given cruel treatment by him or his new wife. Lastly, he contended that the minors are being properly looked after and that the petitioner who is staying with her father has no means of income as also her parents which could be sufficient to bring up these minor children. That they would be practically starving whereas the respondent has sufficient earnings of his own. That there are other members in his family who come to him and look after his children by the petitioner."

16. After a searching analysis of the provisions of the Guardians and Wards Act and review of well-known authority on the point, R.D. Tulpule, J. held, summarizing the principle:

"33. In my opinion, as pointed out, the provisions of the personal law applicable to the parties stand superseded to the extent to which a provision is made and which is inconsistent or contrary to that personal law in the Guardians and Wards Act. If the definition in section 4(2) is capable of including the person who is not a natural or legal guardian at the moment, but has the care of the minor, then it seems to me that he can maintain an application under section 25 of the Act. If such an application can be maintained and if the minor was in the custody of such person, as in the present case, a legal

> guardian cannot say if it is in the interest of the minor and for the welfare of the minor that the custody should be handed over to such guardian as contemplated under section 4 of the Guardians and Wards Act, that such custody should not be granted. It seems to me, therefore, that if it was in the interest of the minor and for its welfare to award the custody to such guardian as defined under section 4(2) to him, its custody should be given. It seems to me that even the personal law applicable to the parties in this case recognises the right to the custody of the mother in spite of the father being a legal and natural guardian during certain period. As I pointed out that could not be upon any other consideration except that the mother is the best person suited to take care of the minor. If that is so, I am inclined to think that she comes within the definition of ''guardian' as contemplated under section 4. In that view I do not think particularly in the present circumstances any other conclusion can be reached as regards what is in the interest and welfare of the minors."

> 17. It is clear from the position of law as it stands that so far as the custody of a minor child is concerned, the mother is entitled to it until the child is of tender age, unless there be a clear disentitlement inferable. This right of the mother to the child's custody is not based on the personal law of parties alone, but on a well acknowledged principle arising from human nature - and if this Court may dare say from the animal nature of man - that the mother is best oriented to look after the welfare of her infant or young child. The mother has always been regarded to be best equipped to take care of the needs of a young child, and secure his/ her welfare compared to a father. This right of the mothers is subject only to known exceptions, like her marriage to a stranger or the mother living a demonstrably immoral life. The mother's right is so well established, that in case of a minor of tender years, any other relative holding the child in his/ her custody while the mother is around, would be unlawful custody. Of course, the principle would not apply if the mother is disentitled under some reputed exception.

18. In the present case, this Court finds that the child is a two year old girl. The mother and the daughter as they appeared before the Court seem to be inseparable at this stage. The mother, Smt. Umme

Alisha stays with her family comprising her mother and brothers. It is urged in the petition that Smt. Umme Alisha's brothers are drunkards but there is no tangible evidence about the fact, brought to the Court's notice. Nothing has been brought to the Court's notice that would disentitle the mother of the availability of that strong presumption that she is best suited to look after the welfare of a young child of two years, particularly a girl.

19. Notwithstanding the fact that the mother has been found better entitled to the minor's custody, the second petitioner, Abdul Azeem is admittedly the minor's father and the natural guardian. He is entitled to meet his daughter and interact with her as she grows up. He would, therefore, be entitled to visitation rights.

20. This Court, therefore, finds that welfare of the minor that is of paramount consideration is best secured in the hands of her mother, Smt. Umme Alisha. It is far better secured in her hands than the father, who has asked for the minor's custody through a writ of this Court.

21. It is, however, made clear that whatever has been said in these proceedings is tentative. If the father feels for the present or at a later stage that he has a better right to the minor's custody, it would always be open to him to institute appropriate proceedings before a Court of competent jurisdiction under the Guardians and Wards Act, 1890 as may be advised. In case, he seeks custody of the minor by moving the Court of competent jurisdiction, nothing said here would affect the rights of either party to establish their case on merits. The Court concerned shall be free to decide the issue of custody of the minor on the basis of evidence led and in accordance with law.

22. In the result, the *rule nisi* issued cannot be made absolute. It is discharged. The petition stands **dismissed**.

23. The second petitioner, Abdul Azeem @ Mohd. Azeem, the minor's father shall have visitation rights in terms that Smt. Umme Alisha d/o Abid Hussain and the minor's grandfather, Abid Hussain

shall permit the father, Abdul Azeem to meet the minor Aisha once a month on the second Tuesday between 10:00 a.m. to 01:00 p.m. During these visits, the 4th and the 5th respondent shall extend due courtesy to the father, Abdul Azeem and shall facilitate the meeting.

24. Let this order be communicated to the learned District Judge, Kanpur Nagar and the S.S.P., Kanpur Nagar by the Joint Registrar (compliance).

**Order Date :-** 8.10.2020

BKM/-