
(2011) 06 DEL CK 0083

Delhi High Court

Case No: Writ Petition (Criminal) 888 of 2011 and Criminal MA 7241 of 2011 (for stay)

Shahid Khan

APPELLANT

Vs

Anjum Pasha and Others

RESPONDENT

Date of Decision: June 15, 2011

Citation: (2011) 180 DLT 597

Hon'ble Judges: Rajiv Sahai Endlaw, J; G.P. Mittal, J

Bench: Division Bench

Advocate: Saurabh Suman Sinha, for the Appellant; None, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

1. The Petitioner by this petition of habeas corpus seeks production of his son stated to be aged over 7 years from the custody of his ex-wife and her brother and mother impleaded as Respondents. It is the case of the Petitioner himself that the child is in the custody of mother at Hyderabad since May 2009.

2. It has been enquired from the counsel for the Petitioner as to how this petition would be maintainable in as much as a habeas corpus petition cannot be a substitute for a proceeding seeking guardianship of the minor child.

3. Counsel for the Petitioner has referred to [Gohar Begam Vs. Suggi alias Nazma Begam and Others](#), whereof habeas corpus petition was held to be maintainable for the reason of the Respondent in that case having no legal right to the custody of the minor child. Reference is also made to para 357 of Mulla Principles of Mahomedan Law 16th Edition laying down that the father is entitled to custody of a boy over seven years of age. Reference is further made to [Farjanabi Vs. Ayub Dadamiya](#), whereof it was observed that under the Muslim law, by which the parties hereto are governed, the father is entitled to custody of son over seven years of age. It is thus contended that the Respondent mother has no right to the custody of the minor and the Petitioner being entitled in law to custody is entitled to enforce the said

right through this petition for habeas corpus.

4. We are unable to agree and are unwilling to entertain this habeas corpus petition to adjudicate competing claims of the Petitioner as father and Respondent as mother to the custody/guardianship of the minor son and which adjudication shall necessarily entail questions of suitability and best interest of minor.

5. The Supreme Court in Gohar Begum (supra) was concerned with a case where the Respondent had no legal right to custody. Such is not the position here. Mulla itself states that there is no rule of Mahomedan law that the father is entitled to custody even if he is unfit and that the court has power to appoint mother or any other person as the guardian of the minor if the father is unfit to be a guardian.

6. The Bombay High Court in Farjanabi was not concerned with a habeas corpus petition.

7. Counsel for the Petitioner faced with the aforesaid has contended that it is for the Respondents to, upon being noticed, to take plea of the Petitioner father being unfit to have custody/guardianship of the minor.

8. We are not inclined to issue notice even in view of the aforesaid and especially when the child is in custody of Respondent mother for last over two years.

9. Writ petition is accordingly dismissed with liberty to the Petitioner to approach for a competent to adjudicate guardianship/custody matters.

CRL MA7240/2011 (for exemption).

Allowed, subject to just exceptions.