

Pricella Prim Vs. Bashir Masih

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Court : Punjab and Haryana

Decided On : Oct-05-1994

Reported in : II(1995)DMC301

Judge : H.S. Bedi, J.

Acts : [Guardians and Wards Act, 1890](#) - Sections 25; [Constitution of India](#) - Article 226

Appeal No. : Criminal Writ Petition No. 107 of 1994

Appellant : Pricella Prim

Respondent : Bashir Masih

Advocate for Def. : R.N. Moudgil, Adv.

Advocate for Pet/Ap. : H.S. Bakshi, Adv.

Disposition : Petition dismissed

Judgement :

H.S. Bedi, J.

1. The petitioner Pricella Prim, has sought the custody of her son Javed @ Kiki aged 10 years, who is stated to be in the illegal custody of his father's brother and sister namely Bashir Masih and Mills Alice respondents in this case. The case of

the petitioner is that the marriage between her and Nazar Masih took place in the year 1983 and the parties lived together at Tanda Urmur till 1988. It is alleged that Nazar Masih was admitted in Christian Medical Hospital, Ludhiana in June, 1988 and was discharged after a period of 30 days after having been treated for a disease which had led to damage of the brain and it was after his return back to his home in August, 1988, that the petitioner was allegedly turned out at the instance of the respondent and the child Javed was retained by them and the father. The petitioner, thereafter, filed an application under Section 25 of the Guardians and Wards Act, in the Guardian Court at Ludhiana, but on November 18, 1991, the Judge returned the application to the petitioner for presentation in the proper Court holding that the Court at Ludhiana had no territorial jurisdiction to entertain the same. It is the admitted case that no further application under that Act, has so far been filed.

2. Notice of the present petition was given to the respondents and a reply has been filed in response thereto while denying the allegations on facts, the respondents have also taken a preliminary plea that a writ of habeas corpus seeking release of the child Javed was not the proper remedy as the petitioner ought to have moved the Guardian Court, more particularly as she had already done so at Ludhiana.

3. Mr. Bakshi, learned Counsel for the petitioner has urged in response to the preliminary plea that the writ of habeas corpus was, in fact, the only efficacious remedy available to the petitioner and in a writ of habeas corpus, the question of detention of a minor child be gone into. In support of this argument, has cited Smt. Usha Devi and Anr. v. Kailash Narain Dixit and Ors., AIR 1978 MP 24, Km. Sunita and Anr. v. Smt. Shyam Kali, AIR 1982 Allahabad 1, and Dr. Mrs. Veena Kapoor v. Varinder Kumar Kapoor, AIR 1982 SC 792.

4. Mr. Moudgil, learned Counsel for the respondent has controverted this plea and has placed reliance on Dr. Mrs. Veena Kapoor case (supra) and in addition on Kiran Rani v. Krishan Kumar and Ors., 1994 (2) PLR 721.

5. After hearing the learned Counsel for the parties, I find no merit in this petition. There can be hardly any doubt that a writ of habeas corpus under Article 226 of

the [Constitution of India](#) would lie in every case of illegal or forced detention but this principle has to be applied to the facts of each case. Admittedly, the child Javed has been living with the respondents since the year 1988 after the petitioner was allegedly turned out of the house. I had also talked to the child in Chambers and it appears to me that he is fully aware of his surroundings and categorically stated that he wished to remain with the respondents. Mr. Bakshi's argument is that the Will of the child should not determine the matter but it was the welfare of the child that must primarily be taken into consideration. There is no quarrel with the proposition, but I am of the view that this cannot be possible in this writ petition. The judgments cited by the learned Counsel for the petitioner as a matter of fact go against him. In these cases, it has been held that the right of the parties to the custody of the minor child is not the determining factor in such matters as it is the welfare of the child which is of primary concern. In Dr. (Mrs.) Veena Kapoor's case, the Supreme Court declined to give a finding as to which of the two parties ought to be given the custody of the minor and for that purpose had sought a report from the District Judge, concerned. I, therefore, deem it appropriate that should the petitioner seek the custody of Javed, the proper remedy would be under the Guardians and Wards Act. The present petition is, therefore, without any merit and the same is dismissed. However, should the petitioner file an application before under the Guardians and Wards Act, that Court will ensure that the same is decided within six months from the date of its filing.