MUTHIAH JEYARAJAN
v.
THUSHIYANTHI JEYARAJAN AND OTHERS

COURT OF APPEAL
ISMAIL, J. (P/CA),
TILAKAWARDANE, J.
C.A. NO. 698/98 (REV)
D.C. COLOMBO NO. 108/HCA
SEPTEMBER 17, 1998.

Custody of a minor child – Applicability of Roman Dutch Law – English Law – Preferential right of the father – Traditional approach – Modern approach – Predominant interest of the child.

Held:

1. The modern Roman Dutch Law and English Law were agreed on the principle that the interests of the child were paramount. The modern Roman Dutch Law had moved away from rules directed at penalising the guilty spouse, towards the recognition of the predominant interest of the child.

2. The ultimate criterion to be considered as having importance is the consideration which require that the child's sense of security should be ensured.

Per Tilakawardane J.

> "Courts should look for cogent and substantial evidence to effect a change in the life of the child, especially in the light that she had for more than two years not even seen the petitioner-petitioner. The person who have acted as "Parents" where she is concerned have been her maternal grand mother and her mother – it is in this home that the child's sense of security has been built upon."

APPLICATION in Revision from the judgment of the District Court of Colombo.

Cases referred to:

1. *Calitz v. Calitz* – 1939 AD 63.
2. *Ivaldy v. Ivaldy* – (1956) 57 NLR 568.
3. *September v. Karriem* – 1959 3 SA 687.
4. *Weragoda v. Weragoda* – (1961) 59 CLW 59.
5. *Fernando v. Fernando* – (1968) 70 NLR 534.
6. *In Re Dunsterville* – 1946 NPD 594.
7. *In Re Green* 1948 SA 1054.
8. *In Re Gordon* 1953 – 2 SA 41.
9. *In Re French* 1971 4 SA 298.

M. K. Jayakrishnam with *Ms. C. J. Jeyakrishnan* for the petitioner.

Cur. adv. vult.

October 08, 1998.

SHIRANEE TILAKAWARDANE, J.

The petitioner-petitioner instituted an action in the District Court of Colombo seeking custody of the 1st respondent-respondent, who is his daughter by the 2nd respondent-respondent.

In his application he has stated that he left for Canada in September, 1995, leaving his family behind. He avers that whilst he was in Canada he had been informed that his wife had attempted to abort his 2nd child and that she was having a relationship with another man.

By order delivered on 15.7.98 the trial judge has made order refusing the application made by the petitioner-petitioner for custody.

The petitioner has made application to this court to have the said order reversed. The counsel for the petitioner-petitioner contended that the 1st respondent-respondent is not a suitable person to be the mother of the child concerned as she had "murdered" her 2nd child,

and as she has had an illicit relationship with another man. It was also stated that she is presently in remand custody in the Welikada prison. In these circumstances, it was argued that the petitioner-petitioner is entitled to claim the custody of the child under the preferential right that the father has for custody of his child. The child is said to be with the grandmother.

The allegations made against the 1st respondent-respondent is not supported by documentation especially as most of the matters contended does not have the validity of its authenticity by reference to documents that are required to be maintained in the ordinary course of events. The petitioner-petitioner has averred that he was informed "of these facts whilst he was in Canada. . . .", but does not disclose either the name of the person/s who made the disclosures to him, nor has any corroborative material or any evidence, direct or otherwise been adduced which would have substantiated these allegations.

It appears from his petition that after he had left for Canada the 1st respondent-respondent had attempted at aborting the 2nd child that she was carrying. It is not clear from the pleadings whether the allegations of "murder" relate to the said abortion alleged.

In considering the custody of the child the counsel for the petitioner-petitioner has referred this court to the principles of the Roman Dutch law in an attempt at supporting his contention that the father "has preferential right". He has submitted that as the Roman Dutch law is the operative law should set aside the order refusing the custody to the petitioner-petitioner.

The traditional Roman Dutch viewpoint that the father has a preferential right to the custody of his minor child during the subsistence of a marriage is reflected in *Calitz v. Calitz*[1] in South Africa and *Ivaldy v. Ivaldy*[2] in Sri Lanka. Even then, the courts have clearly held that the father's "power" over the child, was neither absolute nor beyond the control of the law and could only be interfered within

exceptional circumstances, such as the danger to life, health and morals of the child.

However, this line of authority in South African law was changed in 1947, when the Appellate division declared that danger to life, health and morals were only examples of instances in which the courts could interfere with the father's *prima facie* right to the custody of his child, and that *Calitz* did not warrant so restrictive an interpretation.

By 1959 a South African court had empahatically asserted in the case of *September v. Karriem*[3] that if the courts were of the opinion that the interest of the child demanded interference in the rights of the parents, that it should be "at large" to act in a manner suited to further the interests of the child. In Sri Lanka too in *Weragoda's* case[4] it was held that the courts must decide on who should have custody depending on all the factors affecting the case, the presumptions and counter presumptions, but bearing in mind that the paramount consideration was the welfare of the child.

In 1968, in the decision of *Fernando*[5] the Supreme Court held that both the modern Roman Dutch law and English law were agreed on the principle that the interests of the child were paramount. The court declared that the modern Roman Dutch law had moved away from rules directed at penalising the guilty spouse, towards the recognition of the predominant interest of the child.

Applying the principle that the interests of the child are paramount consideration, the court ruled that the custody of very young children would ordinarily be given to the mother.

This concept of the welfare of the child should be the paramount consideration, was followed in several cases *Dunsterville*[6], *Green*[7], *Gordon*[8] and *French*[9] and developed on the basis that the ultimate criterion to be considered as having importance is the consideration which require that the child's sense of security should be ensured.

It is clear therefore that the courts should look for cogent and substantial evidence to effect a change in the life of the child, especially in the light that she had for more than two years not even seen the petitioner-petitioner. The persons who have acted as "parents", where she is concerned have been her maternal grandmother and her mother.

It is in this home that the child's sense of security has been built upon.

All allegations against her mother are not substantiated, and even if charges have been made against her, she is considered as innocent unless and until she is proven guilty. When the child appeared in court, she seemed to display a close bond with her grandmother. There does not appear to be any need or reason to change the present circumstances she is placed in.

Accordingly, this court finds no reason to interfere with the Order of the trial judge. Consequently, the application for revision is dismissed with costs.

ISMAIL, J. (P/CA) – I agree.

Application dismissed.