

1967

Present : Siva Supramaniam, J.

A. MADULAWATHIE, Petitioner, and E. A. WILPUS and another,
Respondents

S. C. 223/64—Habeas Corpus Application

Habeas corpus—Custody of child—Father's preferential right.

In an application made by a wife for the issue of a writ of *habeas corpus* against her husband in respect of the custody of their daughter who was 5 years and 9 months old—

Held, that, so long as the bond of matrimony subsists, the father, as the natural guardian, has the preferential right to the custody of a child born of the marriage. Where the mother seeks to obtain the custody, the burden is on her to prove that the interests of the child require that the father should be deprived of his legal right.

APPPLICATION for a writ of *habeas corpus*.

R. D. C. de Silva, for the petitioner.

L. W. Athulathmudali, for the 1st respondent.

Cur. adv. vult.

August 22, 1967. SIVA SUPRAMANIAM, J.—

This application concerns the custody of the 2nd respondent Daya Luxmie Edirisinghe, a girl 5 years and 9 months of age at present. The petitioner is her mother and the 1st respondent her father.

The petitioner and the 1st respondent were married in 1960 and they have another child, a boy about 3 years of age, who is with the petitioner. According to the petitioner, the 1st respondent left the matrimonial home on 9th November 1963 and, in her absence, removed the elder child Daya Luxmie on 13th November 1963. The version of the 1st respondent, on the other hand, is that he had a quarrel with the petitioner on the 11th November in consequence of which the petitioner ordered him to leave the house along with the children. Accordingly he left the house on the 12th November taking with him only the elder child, who has been with him since that date. On 9.1.64 the petitioner made an attempt to remove that child from the 1st respondent's house but was unsuccessful. Thereafter she made the present application to this Court for the issue of a writ of Habeas Corpus against the 1st respondent and for an order granting her the custody of the said child. The 1st respondent made a similar application in respect of the younger child who was in the custody of the petitioner but his application was dismissed on 6.4.1965 mainly on the ground that the child who was of tender years (being only a little over one year of age then) needed a mother's care and attention.

The grounds of the present application were set out by the petitioner in her petition as follows :—

- (a) “ The respondent cannot give proper care, attention and motherly affection to the 2nd respondent, her daughter, and in consequence the child is in a continuous state of nervous anxiety ”.
- (b) “ There is no proper person to look after the child as the 1st respondent is always away from his home ”.
- (c) “ The 1st respondent threatened me with bodily harm whenever I visited to see the child ”.

At the enquiry held by the Magistrate into this petition, the petitioner alleged that the 1st respondent was on terms of illicit intimacy with one Leelawathie but she made no attempt at all to prove that allegation, which was denied by the 1st respondent. The 1st respondent made a counter allegation that the petitioner was on terms of incestuous relationship with her step-brother, one Sirisena, which, he said, was the cause of the quarrels between himself and the petitioner culminating in his leaving the matrimonial home. He led some evidence in support of his allegation but the learned Magistrate rejected it as a fabrication.

In an application of this nature for the custody of a child, the paramount consideration is the welfare of the child. It is settled law that, subject to that consideration, so long as the bond of matrimony subsists, the father, as the natural guardian, has the preferential right to the custody of a child born of the marriage. (Vide *Calitz v. Calitz*¹, *Ivaldy v. Ivaldy*² and *Weragoda v. Weragoda*³.) Where the mother seeks to obtain the custody, the burden is on her to prove that the interests of the child require that the father should be deprived of his legal right. It would follow that unless she discharges that burden the father is entitled to the custody. In the instant case, the learned Magistrate, to whom the petition was sent for inquiry and report, appears to have overlooked this aspect of the question when he recommended that the custody of the child be granted to the petitioner.

Of the three grounds set out by the petitioner in her petition the last one, namely that the 1st respondent threatened her with bodily harm whenever she visited the child is irrelevant to the question under consideration. I should state, however, that on the evidence led by her, that allegation is without any foundation. Her first ground, that the child is in a continuous state of nervous anxiety owing to want of care and attention on the part of the 1st respondent, is also unsupported by any evidence and would appear to be false. Her second ground, that there is no proper person to look after the child as the 1st respondent is always away from his home, although it appears to have impressed the learned Magistrate, does not bear examination. The evidence of the 1st respondent is that he is a cultivator. He would be away from home when he has to attend to his duties as a cultivator. The 1st respondent stated in

¹ (1939) A. D. 56.

² (1956) 57 N. L. R. 568.

³ (1961) 66 N. L. R. 83.

evidence that he lives with his parents and younger sister and they are in a position to attend to the needs of the child in his absence. One does not expect a father who wishes to have the custody of his child to give up all employment and remain at home to be in constant attendance on the child. Besides, the child is now of school-going age and the 1st respondent will be in a better position to attend to her educational needs.

The learned Magistrate, however, has stated as an additional reason for his recommendation that if the custody of the 2nd respondent is granted to the petitioner, both children will be able to grow up together and the 2nd respondent will have a companion to play with. While it is undoubtedly very desirable that the children of a family should have the companionship of each other, particularly when they are young, that can hardly be the deciding factor in the determination of the question under consideration.

On the evidence led by the petitioner before the Magistrate, she has failed to show that the interests of the child require that the custody should be granted to her. In my view, the child will be looked after equally well by either parent and from the point of view of her welfare it would appear to be immaterial whether she is with the petitioner or with the 1st respondent. There does not seem to be any substance in the petitioner's allegation that the 1st respondent does not possess adequate means to bring up the child in reasonable comfort. There is no sufficient ground therefore to interfere with the 1st respondent's legal right and to deprive him of the custody of the child. In this view of the matter, it is unnecessary to examine the 1st respondent's allegation that the environment in the petitioner's home will be detrimental to the moral welfare of the child.

I dismiss the petitioner's application.

If the petitioner wishes to have access to the child, the 1st respondent will make suitable arrangements for that purpose. If the parties cannot agree on these arrangements, it will be open to the petitioner to make an application to the Magistrate who will give necessary directions after hearing both parties.

Application dismissed.
