

ATUKORALA
v.
ATUKORALE AND OTHERS

COURT OF APPEAL.

ABEYWARDENE, J. AND GOONEWARDENA, J.

C.A. No. 194/86, H.C.A.

FEBRUARY 2, 1987.

Habeas Corpus—Article 141 of the Constitution—Custody of children—Interim order for custody—S. 5 of the Judicature Act No. 2 of 1978, as amended by Act No. 71 of 1981.

In terms of the s.5 of the Judicature Act No. 2 of 1978 as amended by Act No. 71 of 1981 the District Court being deemed to be the Family Court has original and exclusive jurisdiction regarding the custody of minor children. Where the petitioner and her husband, the 1st respondent were trading allegations regarding morals, misbehaviour and adultery against each other the dispute regarding the custody of their minor children could properly be dealt with by the District Court. Under Article 141 of the Constitution the Court of Appeal may, if satisfied that any dispute regarding the custody of minor children may be more properly dealt with in the District Court, direct the parties to make their application to that Court.

M. A. Mansoor with K. S. Ratnaval for petitioner.

Dr. H. W. Jayewardene, Q.C. with Chula de Silva and Miss S. Mivanapalana for respondents.

February 2, 1987.

THE COURT DELIVERED THE FOLLOWING ORDER

The petitioner has filed an application in terms of Article 141 of the Constitution for a writ of Habeas Corpus against the five respondents named in her application, the 1st respondent being her husband, the 2nd and 3rd respondents being the children of the petitioner and 1st respondent, the 4th and 5th respondents being the father and mother respectively of the 1st respondent.

In her petition, the petitioner has prayed for an interim order for the custody of the two children, the 2nd and 3rd respondents so that they remain with the petitioner pending the inquiry and thereafter, for the custody of the 2nd and 3rd respondents.

The 1st respondent had filed a petition and affidavit and prayed that the petitioner be directed by this Court to make an application to the appropriate Court for the remedy that she is seeking. When this matter

was taken up for argument, Dr. H. W. Jayewardene, Q.C., for the 1st respondent submitted that in terms of Article 141 of the Constitution—

“If provision be made by law for the exercise by any court of jurisdiction in respect of the custody and control of minor children, then the Court of Appeal, if satisfied that any dispute regarding the custody of any such minor child may more properly be dealt with by such Court, direct the parties to make an application in that Court in respect of the custody of such minor child.”

It was his contention that this is an application made by the petitioner for the custody of her children who are also the children of the 1st respondent, her husband. The petitioner had in her petition made allegations against the 1st respondent regarding his extra marital relationship, his association with other women, and constant quarrels between them regarding his behaviour, whereas, the respondent has stated that the petitioner is not a fit and proper person to have the interim custody of the children as she is guilty of having committed adultery which has been admitted by the petitioner herself to the Police and that if the petitioner be granted the custody of the children it would cause serious harm and damage to the physical safety, health, morals and well-being of the children.

There are allegations regarding immoral behaviour and the commission of adultery alleged by the petitioner and the 1st respondent against each other and proof of such acts being committed by any one of them could render the other unfit to have the custody of the minor children when considering their well-being.

The date for the filing of objections by the 1st respondent is the 23rd of February, 1987 and the 1st respondent has in his petition reserved the rights to file objections if so advised. The petition and affidavit filed by the 1st respondent are in respect of the application made by the petitioner for an interim order regarding custody.

This matter was mentioned as the 1st respondent has filed a petition and affidavit praying that the application for an interim order be rejected.

In terms of the Judicature Act, No. 2 of 1978 the Family Court shall have sole and exclusive jurisdiction in respect of matters regarding the custody of minor children. By the judicature (Amendment) Act, No. 71 of 1981, section 5 of the principal enactment is amended and

a "District Court" is deemed to be the "Family Court" and it is the District Court that has to exercise original and exclusive jurisdiction regarding the custody of minor children.

In view of the allegations made by both parties regarding morals, misbehaviour and adultery, we are satisfied that the dispute regarding the custody of the minor children could properly be dealt with by the District Court, wherein parties making the allegations could be cross-examined in order to test the veracity of the witnesses and for this reason, in terms of Article 141 of the Constitution of the Democratic Socialist Republic of Sri Lanka, we direct the parties to make application to the District Court in respect of the two children concerned.

Parties referred to District Court.
