1961 *Present :* **Tambiah, J.**

B. M. KAMALAWATHIE, Petitioner, *and* N. G. DE SILVA and another, Respondents

S. C. 623 of 1960—Habeas Corpus Petition

Habeas Corpus—*Custody of minor children—Jurisdiction of Supreme Court to entertain application—Rights of father and mother respectively to custody of child—Courts Ordinance (Cap. 6), s. 45.*

The Supreme Court has jurisdiction to entertain an application for *habeas corpus* concerning the custody of minor children and is invested with the power to take away the custody of a child from the legal custody of the father and hand the same over to the mother if such a course is necessary in the best interests of the child's life, health or morals.

APPLICATION for a writ of *habeas corpus* filed by a mother claiming the custody of her five year old child from her husband.

M. T. M. Sivardeen, for the petitioner.

E. B. Wikramanayake, Q.C., with *Sir Ukwatte Jayasundera, Q.C.*, and *U. A. S. Perera*, for the 1st respondent.

Cur. adv. vult.

July 7, 1961. TAMBIAH, J.—

This is an application for a writ of Habeas Corpus filed by the petitioner claiming the custody of her child from her husband, the 1st respondent. The learned Magistrate, after a careful review of the evidence, stated: "The Petitioner appears to be a well-behaved young woman. The

whole trouble between the Petitioner and the Respondent appears to be financial. The Respondent does not give her money to run the house, so much so that when the Respondent finally left her the Petitioner had to sell up the furniture in a house at Angoda and settle his debts before finally coming back to her parents at Kandy. *The child is five years old and still needs the care and attention of his mother. He has already been deprived of a normal home to grow up in.* The Respondent is employed in Colombo and goes home once in two weeks on a Saturday afternoon to return on Sunday evening. *The child has the company of his father only for about 1½ days once in two weeks.* This is most unsatisfactory ". The petitioner had to go away from the house because the respondent developed the habit of coming home without his salary. During the period of about 2½ years after the birth of the child when the petitioner was staying with her parents at Kandy, the respondent did not come to see her and the child and did not even maintain them. The child is at present at Ahangama with the respondent's mother.

This application, together with the Report of the Magistrate, came up before me and, after careful consideration, I made order that the custody of the child be restored to his mother, the petitioner. Thereafter, both the counsel for the petitioner and the counsel for the 1st respondent saw me in chambers and the counsel for the 1st respondent submitted that I had acted without jurisdiction in this matter and consequently my order was made *per incuriam.* In order to enable the counsel to make their submissions in full, I listed this petition for argument. I have had the benefit of the submissions of both counsel and, after a careful review of the authorities cited, I am of the view that my original order should stand.

Mr. Wikramanayake, who appeared for the 1st respondent, submitted that in view of the provisions of Section 45 (*a*) and (*b*) of the Courts Ordinance (Cap. 6), this Court has no jurisdiction to take away the custody of a child from his or her father on the ground that it will be dangerous to the child's life, health or morals to remain in the custody of the father. Mr. Wikramanayake stated that although a long line of decisions have established the principle that this Court could override the father's authority and hand over the custody of a minor child to the mother in the interests of the child's life, health or morals, nevertheless these cases were all wrongly decided. He urged that in applications of this nature, under the Roman Dutch Law, the custody of the father was absolute and could not be interfered with under any circumstances by the Supreme Court. Mr. Wikramanayake also submitted that the only court which could deal with the question of custody of minor children is the District Court which has taken over the functions of the Orphan Chambers.

On the other hand, the counsel for the petitioner submitted that the *cursus curiae* in this country has established the principle that this Court has a discretion to take away the custody of the child from the legal custody of the father and hand the same over to the mother if such a course is necessary in the best interests of the child's life, health or morals.

In order to appreciate fully the arguments adumbrated and developed by the counsel on both sides a short history of the Writ of Habeas Corpus in this country becomes necessary. The high prerogative Writ of Habeas Corpus was unknown to the Roman-Dutch Law and was developed by the English Courts. Even in South Africa, the *interdictum de libero homine exhibendo* is in effect indistinguishable from the English Writ of Habeas Corpus (vide The Roman Law and Common Law Elements in Law of South Africa and Ceylon by Professor Lee—Acta Juridica 1959—page 114 at 116). When Ceylon was ceded to Britain, the English judges, who were trained in the Anglo-Saxon system of jurisprudence, granted this Writ and, in doing so, applied the principles of English Law governing it, although there was no statutory justification for this procedure (vide *Re Shaw* [1]). Consequently, during the period 1801–1830 the Writ appears to have issued from the Courts without any express legislative authority. In 1833, on the recommendations of the Colebrooke Commission, the Charter of 1833 was enacted. Section 49 of this Charter contained the provisions relating to the issue of the Writ of Habeas Corpus and this is now embodied in Section 45 (*b*) of our Courts Ordinance (supra). Section 49 of the Charter of 1833 enacted that the Writ of Habeas Corpus was available "to bring the body of any person who shall be imprisoned . . . . and to discharge or remand any person so brought up or otherwise deal with such persons according to law".

Section 49 of the Courts Ordinance (No. 1 of 1889) introduced another ground on which the Writ of Habeas Corpus would issue from our Courts. It enacted that the Supreme Court was empowered to issue Writs of Habeas Corpus to bring the body of any person to be dealt with according to law. The same provision is now found in Section 45 (*a*) of the amended Courts Ordinance (No. 18 of 1937).

Section 45 (*a*) and (*b*) of the Courts Ordinance (Cap. 6) are based on the principles which regulate the issue of the Writ of Habeas Corpus in England. In England, prior to the Judicature Act of 1873, the Writ was issued either by the Court of King's Bench, where the common law was applied, or by the Court of Chancery, which exercised equity jurisdiction. Speaking of the latter jurisdiction, Lord Cottenham L.C., in the case of *re Spence* [2] said: "Courts of law interfere by a habeas for the protection of the person of anybody who is suggested to be improperly detained. This Court interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as parens patriae, and the exercise of which is delegated to the Great Seal". After the Judicature Act, proceedings were instituted in the Queen's Bench Division, and the Judges exercised the jurisdiction which was vested in the Court of Chancery as the guardian of all infants. The Court had the power in that capacity to supersede the natural guardianship of a parent.

[1] *(1860–62) Ram. Rep. p. 116 at 119.* [2] *(1847) 2 Ph. 247 (L.C.)*

In Ceylon. Section 45 of the Courts Ordinance enacts :

" The Supreme Court or any Judge thereof, whether at Colombo or elsewhere, shall be and is hereby authorised to grant and issue mandates in the nature of writs of habeas corpus to bring up before such court or Judge—

(*a*) the body of any person to be dealt with according to law ;

(*b*) the body of any person illegally or improperly detained in public or private custody ;

and to discharge or remand any person so brought up, or otherwise deal with such person according to law. "

When the Writ of Habeas Corpus received statutory recognition in Ceylon, it was natural for the Courts of this Island, in interpreting Section 45 of the Courts Ordinance, to resort to principles of English Law which guided the English Courts in the issue of this prerogative writ. In a multi-racial country like ours, where different systems of law such as the Roman-Dutch Law, the Kandyan Law, the Thesawalamai and the Mohamedan Law are all woven together into the fabric of our legal system, it is indeed an inevitable feature that the law governing the custody of a child should vary with the system of law applicable to the person concerned. However in applications which have come up before this Court, whatever the system of law which may have been applied to determine the custody of the child, this Court has always asserted, in unmistakable language, that it has the discretion to remove a child from the lawful custody of the father if such a course was necessary in the interests of the life, health or morals of that child.

In *Re Andrew Greig* [1], when English precedents were cited by counsel to show that the father's right to the custody of the child was paramount, Rowe C.J., observed (at page 151) : " The Supreme Court is of opinion however that this Court, acting under the authority of the Charter of 1833 and the Dutch law, is not bound by these precedents. *According to Grotius, Voet, Vanderlinden and Van Leeuwen, a much larger discretion founded apparently on the rights of community which the wife acquires on marriage— a discretion also resembling more nearly that exercised by the Chancellor in England, who as parens patriae, looks to the interests of the children as well as to the circumstances and wishes of the parents.* See the case of *Alicia Race*, as decided in the Queen's Bench and in Chancery ; 26 L. J. 176, Q.B. This view of the principle of the Dutch Law is corroborated by the case of *Farmer v. Farmer*, decided in 1843 at the Cape of Good Hope. See Menzies' Reports, pp. 241, 278. "

In *Mohamedu Cassim v. Cassie Lebbe* [2], where a Muslim child was in the custody of her maternal aunt from her infancy till the ninth year, the Court refused to restore the child to her father's custody as such a change would be to the detriment of the child's welfare. Lyall-Grant J., said (at page 138) : " I do not think that this Court

[1] *3 Lorenz Reports 149.* [2] *(1927) 29 N. L. R. 136.*

has ever felt itself compelled to order a child to be removed from the custody of relatives, who are performing their duty towards the child in a perfectly satisfactory manner, and to be handed over to the custody of its natural guardian, *where the Court is of the opinion that such a change would be to the detriment of the welfare of the child.*"

In *Gooneratnayaka v. Clayton* [1], a father sought to resume control of the custody of a girl of over sixteen years by a Writ of Habeas Corpus and it was held by a bench of three judges that it was competent for the Court to take into consideration the wishes of the girl in determining the question of custody. It was contended by the counsel in this case that the Roman-Dutch law and not the English law, was applicable to the case and, therefore, the consent of the minor is not needed. Fisher C.J., answered this question as follows :—"It is clear that the mandate referred to is equivalent to a writ of *habeas corpus*, and I think that *the principles which regulate the issue of such a mandate should be the same as those which regulate the issue of a writ of habeas corpus in England.* We should, therefore, in my opinion, apply the English law in considering the question which has been submitted to us."

In *Martha Ivaldy v. F. P. Ivaldy* [2] the Court, after reviewing the South African authorities, laid down the rule that under the Roman-Dutch Law, where there has been no dissolution of the common home, the father's right to the custody of his minor children remains unaffected by the fact of the separation of the spouses and *can only be interfered with on special grounds such, for example, as danger to the life, health or morals of the children.*

In *Padma Fernando v. T. S. Fernando* [3], this Court again laid down the rule that the father's fundamental right to the custody of his child during the subsistence of his marriage may be overridden on the ground that if the child is permitted to continue in the custody of the father there would be detriment to the life, health or morals of the child. Fernando J., while affirming the view which he expressed in the earlier case of *Ivaldy v. Ivaldy* (supra), stated (at page 263) : "No reason whatever has been made out to show that the mother is in any way unfit to carry out the ordinary duties of a mother. On the contrary the evidence which has been accepted proves that the husband has done all he can to prevent his wife from carrying out those duties. I need hardly state any reasons for forming the opinion that it would be detrimental to the life and health and even of the morals of such a young child if that child is forcibly separated from her mother and compelled to live, not even in her father's custody, but under the care of an elderly relative to whom she is not bound by any natural ties. *So long as the mother is shown to be fit to care for the child, it is a natural right of the child that she should enjoy the advantage of her mother's care and not be deprived of that advantage capriciously.*" The same observations may be made as regards the facts of the instant case.

[1] *(1929) 31 N. L. R. 132.* [2] *(1956) 57 N. L. R. 568.*
[3] *(1956) 58 N. L. R. 262.*

In the recent case of *Dayangani Weragoda v. R. Weragoda and another*[1] the same arguments which were put forward by the counsel for the 1st respondent in the instant case were placed before the Court. Sansoni J., after a review of the English, South African and Ceylon cases, came to the conclusion that under Section 45 (*a*) of the Courts Ordinance (Cap. 6), this Court had the power, on certain grounds, to take away a child from her father and hand it over to the mother. The Court also held that the principles under which our Courts would issue Habeas Corpus were the same as those which regulated the issue of such a writ in England. Having observed that Section 45 (*a*) of the Courts Ordinance was much wider than Section 45 (*b*) and enables the writ to be issued to bring up "the body of any person to be dealt with according to law", Sansoni J., proceeded to state that the Writ is issued *not in order to enquire whether the infant's liberty is restrained but in order that the Supreme Court may decide what order should be made, after inquiry, as to the child's custody, in the interests of the child.* After reviewing the more important English cases, Sansoni J., quoted with approval the dictum of Lord Simonds in the Privy Council case of *Mckee v. Mckee*[2] that "the welfare and happiness of the infant is the paramount consideration . . to this paramount consideration all others yield". Referring to *Mckee's* case, Sansoni J., said "It is true that he was there dealing with a case from Canada, but he said that the same principle should guide me in the present application also. Although in England the principle applies because, I suppose, the Court is the guardian of all infants, in Roman Dutch Law the State is regarded as the upper guardian of all minors. I do not think there is any material difference in the two concepts. In deciding what is best for the child, the Court will have regard to the rights of either parents, their character, and any other factor which the Court thinks ought to be weighed."

Much stress was laid in *Weragoda's case* (supra) by the counsel for the respondent, who relying on the ruling in *Calitz v. Calitz*[3], urged that the rights of the father were superior to those of the mother in regard to the custody of the children of the marriage and that where no divorce or separation has been granted, the Court had no jurisdiction to deprive the father of his custody, except under the Court's powers as upper guardian of all minors to interfere with the father's custody on special grounds, such as for example danger to the child's life, health or morals. Referring to this contention, Sansoni J., stated "I think that *danger to the child's life, health or morals is only an example of the special grounds which* would justify the interference of the Court. As I see it, *the Court will decide who is to have the custody of the child after taking into account all the factors affecting the case and after giving due effect to all presumptions*

[1] *(1961) 59 C. L. W. 49.* [2] *(1951) A. C. 352.*
[3] *(1939) A. D. 56.*

and counter-presumptions that may apply, but bearing in mind the paramount consideration that the child's welfare is the matter that the Court is there to safeguard. The rights of the father will prevail if they are not displaced by considerations relating to the welfare of the child, for the petitioner who seeks to displace those rights must make out his or her case."

In the instant case, too, the counsel for the 1st respondent contended that the ruling in *Calitz v. Calitz* (supra) went to the extent of holding that the Court has no jurisdiction under any circumstances to deprive the father of the custody of the child. In *Calitz's* case, the issue was whether a Court, after dismissing an action for separation, had the jurisdiction to make an order depriving a father of the custody of the child. Tindall J.A., who delivered the judgment of the Appellate Division, cited with approval the dictum in *Nicolson v. Nicolson*[1] which is as follows :—

"The legal right to the custody of a lawful child is in the father. *But that right is not absolute, it is not beyond the control of the law. It is within the power of the Court to mitigate the severity of the general rule by interfering in exceptional cases.* The exceptions must be few and must rest on clear grounds and *the grounds must be found in considerations of danger to the life, health or morals of the child. When the interests of the child in regard to life, health or morals have required it, the Court has refused to permit the father to retain the custody.*"

The term "special grounds" as used by Tindall J.A., in *Calitz's* case (supra), was further elaborated in the later cases which came up in South Africa. In *Green v. Green*[2], the Court observed that it will not hesitate to deprive the father of the custody where such custody is shown to be detrimental to the interests of the child. (vide also *Pigg v. Pigg*[3]; *Kritsinger v. Kritsinger*[4]; *Fereira v. Fereira*[5].)

The Roman Dutch text writers have given a wide discretion to the Courts of Law in interfering with the father's wishes regarding the custody of a child. Voet states (Vt. 27.2.1) "If there is a dispute as to where a ward ought to be brought up to stay, the praetor, after hearing the case, ought to decide that matter on personality, position and circumstances, so that the upbringing may take place without any evil suspicion of plots against life or chastity. Generally, indeed it takes place in the house of the person whom the father has indicated, unless for some reason he is suspect to the praetor. That is because in such a case the praetor should summon the relations of the ward take cognisance of just grounds for suspicion, and *rather pursue the interests of the wards than the written words of the will or codicil*". Voet, no doubt was here dealing with a case where the father was dead, but the principle which he enunciates is that the custody of a child can be taken away, even against the wishes of the father, from the testamentary guardian, if such a course is necessary in the best interests of the child.

[1] *(6 Sc. L. R. 692.*
[2] *(1948) 2 S. A. L. R. 1054.*
[3] *(1946) N. P. D. 481.*
[4] *(1951) 2 S. A. L. R. 11.*
[5] *(1949) W. L. D. 2 P.H.B 36.*

Van Leeuwen (1.15.6) states " After the dissolution of the marriage the matter is left to the discretion of the Judge, who will allow the father the custody of the boys, and the mother that of the girls, or will permit all the children, without distinction, to remain either with the father or the mother, according to circumstances." Vander Linden (VdL 1.4.1) states " With respect to the power of parents over their children, ours differ very much from the extensive paternal power exercised by the Romans. *This parental power is not only possessed by the father, but also by the mother and after the death of the father by the mother alone.* "

The authorities cited above show clearly that this Court can, in a Habeas Corpus application, order the father to hand over the custody of the child to the mother if such a course is necessary in the interests of the child's life, health or morals. The citations in the various cases, which have established this principle, show that our Courts have often relied on English decisions, and sometimes on the Roman-Dutch Law, to formulate this principle. Law, like race, is not a pure-blooded creature. English Law has been tacitly adopted in Ceylon in many branches of the Law such as the Law of Persons, Property and Obligations, where, according to the traditional view, the Roman-Dutch Law should apply. Referring to the inroads made by English Law into the legal system of South Africa Wessels states (vide History of Roman-Dutch Law Wessels—page 380) : " In some respects the introduction of English Law into South Africa has been slow and insidious ; in other respects it has been rapid and overwhelming. The influence exerted by English textbooks and the decisions of the English Courts has tended gradually to modify the principles of Roman-Dutch Law and to bend them as to assume the form of similar English principles ". Professor Lee, commenting on the influence of English Law in South Africa, stated (vide " The Roman Law and Common Law elements in the Law of South Africa and Ceylon " by R. W. Lee—Acta Juridica (1959) p. 114 at 115) : " If what the British took over was an amalgam of Roman Law and Dutch Law customary and statute, what remains today is a fusion of Roman Law, Dutch Law and English Law ". Referring to the interaction of Roman Law and English Law principles, Professor Lee stated : " This interplay of forces tends to become world-wide in its operation, but is most conspicuous where political conditions have brought the two systems into close and constant contact ".

Therefore, in the instant case, the contention of the learned counsel for the 1st respondent, that this Court has no jurisdiction to entertain this application, must necessarily fail. The counsel for the 1st respondent also contended that the only Court which has any jurisdiction to entertain this application is the District Court as such a power has been especially conferred on it by our Courts Ordinance (supra). The District Court, no doubt, in certain circumstances, functions as the guardian of minors and

this Court has supervisory jurisdiction over such Courts. However, in view of Section 45 (*a*) of our Courts Ordinance, this Court is invested with the power to order a father to hand over the custody of a child to the mother in the circumstances set out above.

For these reasons, I hold that my earlier order was not made *per incuriam*. The respondent is ordered to hand over the corpus to the petitioner but the petitioner should grant reasonable access to the 1st respondent to see the child. The terms and conditions of access to the corpus should be determined by the Magistrate and, for this purpose, the record will be sent up to the Magistrate.

Application allowed.