

1956

*Present*: H. N. G. Fernando, J.

PADMA FERNANDO, Appellant, and T. S. FERNANDO,  
Respondent

IN THE MATTER OF AN APPLICATION FOR A WRIT OF  
HABEAS CORPUS

*Petition No. 2,239 of 1955*

Habeas corpus—*Custody of child—Contest between father and mother—Scope of fundamental right of father.*

Where a wife sought to obtain from her husband the custody of a child who was a girl of the age of four and a half years—

*Held*, that a 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. It would be detrimental to the life and health and even of the morals of a young child if that child is forcefully separated at a very tender age from her mother and compelled to live, not even in the father's custody, but under the care of an elderly relative to whom the child 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.

**A**PPPLICATION for a writ of *habeas corpus*.

*S. Nadesan, Q.C.*, with *J. A. P. Cherubim* and *M. Sirinardene*, for the petitioner.

*G. E. Chitty, Q.C.*, with *A. M. Coomaraswamy*, for the respondent.

*Cur. adv. vult.*

October 24, 1956. H. N. G. FERNANDO, J.—

This is an application by way of Habeas Corpus in which a wife seeks to obtain from her husband the custody of a child who is a girl presently of the age of four and a half years. There had been an earlier application by this petitioner for the custody of the same child and in June 1954 an agreement was reached by which the husband undertook to procure a suitable house on or before 1st August 1954, and that if he failed so to do he would deliver the custody of the child to the petitioner until such time as a suitable house was found. The husband failed to procure a suitable house within the specified period and a further settlement was reached in September 1954 by which he undertook to make habitable certain premises in Moratuwa and agreed that the petitioner could have custody of the child until those premises became available.

In pursuance of this settlement which was approved by this Court, the petitioner had the custody of the child for some months, but in November 1955 the husband forcibly regained custody of the child against the wishes of the petitioner.

The case for the petitioner, which was put forward both at the earlier inquiry and at the present one and also at the other proceedings in which the petitioner sought maintenance from her husband, has been that the husband and wife lived, not in a house of their own, but at the house of the husband's sister, herself a married woman with no children. The allegation of fact made by the petitioner is that ever since the child was weaned the petitioner has not been permitted to look after the child or even have the child in her room, but that, instead, the child has been "handed over to the husband's married sister to be brought up as her child". The petitioner has also alleged other conduct on the part of her husband amounting to cruelty and claims that the husband has brought about a situation in which it would be quite intolerable for the petitioner to live with him in the sister's house. It is in view of these allegations that the earlier settlements both provided that the husband would secure a house for the wife and child separate from the house of the married sister.

At the stage when the present inquiry was held by the Magistrate, the proceedings in the maintenance application were pending and have now been determined on appeal. By his judgment in S. C. No. 1373/55—M. C. Addnl. 37198, delivered on 6th August 1956, my brother Fernando has set aside the order made by the Magistrate in the maintenance proceedings and has made order directing the husband to pay maintenance to the petitioner. That judgment upheld the position taken by the petitioner that the husband did in fact take the child away from the petitioner and hand the child to his sister. There is therefore a decision of this Court which entirely accepts the position that the cause of the differences between husband and wife is that the husband wishes to deprive his wife of her natural right to care for and nurture the child of her marriage and to deprive the child at a very tender age of the inestimable benefit of being so cared for and nurtured. The husband's desire is to entrust the child instead to the care of a sister over fifty years of age to compensate her, apparently, for her own childlessness. On these facts the finding of which is for the present purpose incontrovertible, I have to apply the test which I adopted recently in *Ivaldy v. Ivaldy et al.*<sup>1</sup> and to ask myself whether a father's fundamental right to the custody of his children during the subsistence of the marriage is to be overridden on the ground that if the child is permitted to continue in the custody of her father there would be detriment to the life, health or morals of the child. In my opinion the answer is obvious. 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

<sup>1</sup> (1956) 57 N. L. R. 568.

the life and health and even of the morals of such a young child if that child is forcefully 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. Moreover the very fact of the forced separation and the knowledge that the mother with whom the child had lived for a fairly long period can have no part to play in the child's future is at least likely to affect the mental health of the child. For these reasons I have no hesitation in accepting the recommendation of the Magistrate who conducted the inquiry and in making order directing the respondent to deliver the custody of the child to the Petitioner.

October 29, 1956.—

My attention has been drawn to the omission to provide in the above order that the respondent may have access to the child. I direct that the respondent should have the right to visit the child once each week either at the petitioner's residence, or if the parties are not agreeable to that, at a place determined by the Magistrate after hearing the parties. The Magistrate will also fix the hour and duration of the visits.

*Application allowed.*

