

1965 *Present* : H. N. G. Fernando, A.C.J.

O. J. FERNANDO, Petitioner, and T. D. FERNANDO and two others,
Respondents

S.C. 450/63 — Habeas Corpus Application

Habeas corpus—Custody of child under sixteen—Preferential right of parent.

In a *habeas corpus* application made by a father for the custody of his daughter who is under sixteen, the child is not entitled in law to consent to her continuance in the custody of others. Her wishes are relevant only to a consideration of the question whether it will be detrimental to her life, health and morals to place her in parental custody.

APPPLICATION for a writ of *habeas corpus*.

J. W. Subasinghe, for the Petitioner.

H. W. Jayewardene, Q.C., with *L. W. Athulathmudali*, for the Respondents.

Cur. adv. vult.

September 3, 1965. H. N. G. FERNANDO, A.C.J.—

Counsel for the petitioner has justifiably maintained that the petitioner and his wife did not effectively renounce their rights of parent-lord in respect of their child Dylanthie, in favour of the 2nd and 3rd respondents. It is perfectly clear on the evidence that the petitioner's wife, out of affection and sympathy for her childless sister, acceded to a request that the sister be permitted to bring up the child in her home, but without any agreement or implication, for a renunciation of parental rights. This undefined arrangement worked admirably for many years, during which the child's parents and the respondent husband and wife together shared the cares and joys of the child's upbringing. The 3rd respondent has admitted that, as frequently as possible every year, the child was sent or taken on visits to her parents and her sister and brothers, and that the parents had throughout contributed towards the welfare of the child in a substantial manner. It would be quite unrealistic to think that the parents ever ceased to regard themselves as such, from the point of view whether of duty or of affection.

In these circumstances, I am unable to say that the petitioner's application lacks good faith. While the petitioner's wife had previously been willing, on compassionate grounds, to share with her sister the affections of her child, it is not surprising that under an impression (whether valid or imaginary) that her sister no longer deserves her compassion, she should now desire to deny to the sister the favour and sympathy extended in the past. The petitioner and his wife also apparently believe that the child's mind is being poisoned against them, and for this reason as well are anxious to resume their full rights and responsibilities of custody in their own interests and in those of the child.

Prima facie, the petitioner in this case has the right to the custody of his child. The child is under sixteen, and has not attained the age accepted by this Court as the age of discretion. She is therefore not entitled in law to consent to her continuance in the custody of others (*Gooneratnayake v. Clayton*¹; *The Queen v. Jayakody*²). Her wishes are therefore relevant only to a consideration of the question whether it will be detrimental to her life, health and morals to place her now in parental custody. For this purpose I have talked to the child, and I find her to be quite normal, intelligent and of a cheerful disposition. She very definitely wishes to remain where she is, and I believe her statement that she has told her parents that she would not consent to stay with them even if they threatened to kill her. While these undoubtedly are her wishes I do not think that severe mental suffering or injury to health will ensue if she has now to live with her parents. (At the same time I would not like to form a final opinion at this stage.)

¹ (1929) 31 N. L. R. 132.

² (1890) 9 S. C. C. 148.

The child has stated that her parents and her sisters were unkind to her, and even ignored her, while she was with them last year. But it may well be that this unpleasantness was the consequence of her refusing her consent to live with her family, and I trust the family will strive to avoid such causes of discontent.

I accordingly order that the child be returned forthwith to the custody of her parents. I trust that this will be done next week without the need for any further intervention by the Court. But the petitioner will produce the child before me in chambers on Monday, 8th November 1965. In the meantime I trust that no change will be made in regard to the schooling of the child at St. Bridget's Convent, Colombo. I make no order as to the costs of the proceedings.

Application allowed.
