

1969

Present: de Kretzer, J.

N. A. ALGIN, Petitioner, and D. KAMALAWATHIE, Respondent

S.C. 53/68—Application for a Writ of Habeas Corpus

Habeas Corpus—*Divorce action—Decree in favour of plaintiff husband—No order of court in regard to custody of children—Right of husband to claim custody from the wife pending appeal in the divorce action.*

There is no rule of law that the plaintiff in a divorce action must necessarily ask for the custody of his children.

Petitioner obtained a decree for divorce and, during the pendency of the appeal in the divorce action, filed the present application for *habeas corpus* against his wife for the custody of his children. In the divorce action he had not sought an order for the custody of the children and the Court made no order on the application of the wife for their custody, because the decree for divorce was entered in the absence of the wife who failed to appear on the trial date.

Held, that the divorce action was not a bar to the application for *habeas corpus*.

APPPLICATION for a writ of *habeas corpus*.

Nimal Senanayake, with *M. W. Amarasinghe*, for the petitioner.

Nalin Abeysekera, for the respondent.

Cur. adv. vult.

November 20, 1969. DE KRETZER, J.—

The Petitioner in this Application is the husband of the Respondent against whom he has obtained a Decree for Divorce which is now in Appeal. In the Divorce Case he did not seek an Order for the custody of the 4 children of the marriage and the Court made no Order on the Application of the wife that she should have their custody for the Decree for Divorce was entered in the absence of the wife who was absent on the Trial date. The Petitioner filed this Application for Habeas Corpus seeking an Order that the Respondent should hand over the children into his custody.

The Magistrate of Badulla to whom Mr. Justice Weeramantry has sent the Petition for Inquiry and Report has reported that the Petitioner should be given the custody of the children. The matter was thereafter placed for further argument as Counsel wanted an opportunity to make further submissions. Counsel for the wife now submits that the remedy by way of Habeas Corpus is not open to the petitioner in that he had filed the Divorce Case No. 4298 Badulla in which he should seek any Order he wants in regard to the custody of the children of the marriage. He relies on the Case *In re B. S. Liyana Aratchie*¹.

¹ (1958) 60 N. L. R. 529.

The question for decision in that Case was whether the proper procedure for obtaining the *custody of a child entrusted to a parent by a competent Court of Law* in the exercise of its matrimonial jurisdiction is by way of Habeas Corpus. The Court decided it was not, for the Writ is not granted for the purpose of testing a decision made by a Court which has acted within its jurisdiction. Halsbury Third Edition Vol. 11 Page 36 Section 69 which points out that the Writ is not granted where the effect of it would be to question the decision of an inferior Court on a matter within its jurisdiction or where it would falsify the Record of a Court which shows jurisdiction on the face of it was quoted with approval.

In the present Case the Plaintiff shows that the Plaintiff did not seek an Order from the District Court of Badulla in regard to the custody of the children when he filed his Divorce Case No. 4298. There is no Rule of Law that a Plaintiff in a Divorce Case must necessarily ask for the custody of the children for it may well be that he is satisfied by the fact that the Law recognizes him as the natural guardian of his children and therefore entitled to their legal custody in preference to all others.

It will be seen that the question of the Court having made an Order in regard to the custody of the children does not therefore arise in the present Case.

A Parent or Guardian or other person who is legally entitled to the custody of a child can regain that custody when wrongfully deprived of it, the unlawful detention of the child being regarded as equivalent to unlawful imprisonment.

The Law recognizes that the father is the natural guardian of his children and entitled to their legal custody unless he has been deprived of it by the Order of a competent Court. Anyone keeping the children without his consent unless armed with the Order of a Competent Court can be said to be keeping them in unlawful detention. His remedy would be by way of Habeas Corpus.

It is not the fact that a Divorce Case was filed but the fact that the Court made an Order in regard to custody of children in it that is the bar to a Habeas Corpus Application being filed in reference to that same custody.

It appears to me therefore that the Petitioner is entitled to bring this Application. A perusal of the Report of the Magistrate satisfies me as to the correctness of his conclusion. I order the Respondent to hand over the children to the Petitioner in the presence of the Magistrate in the Magistrate's Court of Badulla on such date as the Magistrate will find convenient or to satisfy the Magistrate on that date that this Order has been complied with. I make no order as to Costs. The Respondent will be entitled to see the children on each Poya Day.

Application allowed.