

1972

*Present : Deheragoda, J.*

RAJALUXUMI, Petitioner, and V. SIVANANDA IYER, Respondent

*S. C. 254 of 1971—Habeas Corpus Application**Habeas corpus—Custody of a girl—Contest between her mother and father—  
Considerations applicable.*

In a contest between the petitioner and her husband (1st respondent), who were living apart, for the custody of their daughter, aged 9, who was living with the 1st respondent—

*Held*, that the fact that the 1st respondent was living in open adultery with a mistress was a factor to be taken into consideration in deciding whether the child should remain in the same home. Moreover, as a general rule, the custody of young children and of girls of any age will be given to the mother.

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

*K. Thevarajah*, for the petitioner.

*C. Motilal Nehru*, for the respondent.

*Cur. adv. vult.*

March 20, 1972. DEHERAGODA, J.—

The petitioner Rajaluxumi is the wife of the 1st respondent Sivananda Iyer of Thondamanar. The 2nd to 6th respondents, namely Selvachandran, a boy of 11 years, Selvarani, a girl of 9 years, Selvamalar, also a girl of 8 years, Selvarasan, a boy of 6 years, and Selvamani, a girl of 4 years, are their minor children.

The petitioner stated in her petition that, owing to the habitual cruelty of her husband, the 1st respondent, and owing to his life of open adultery with one Nagapooshani, she was compelled to leave her home where the husband and their minor children resided. She alleged that it was "dangerous" for the 2nd to 6th respondents to live with the 1st respondent, and that she was a fit person to have the custody of the 2nd to 6th respondents. She prayed that the 1st respondent be ordered to hand them over to her care and custody.

The learned Magistrate, Point Pedro, to whom this petition was referred for inquiry and report, has recommended to this Court that the custody of the 4th, 5th and 6th respondents (misdescribed by him as 3rd, 4th and 5th respondents) be granted to the petitioner "as they are of tender years", and the 2nd and 3rd respondents (misdescribed as 1st and 2nd respondents) be allowed to remain with the 1st respondent "as they are of an age to look after themselves and because of the fact that the 1st respondent is very fond of his children". The learned Magistrate has suggested further that some arrangement should be made for both parents to make frequent visits to their children.

The facts as disclosed at the inquiry are briefly as follows:—The petitioner married the 1st respondent 15 years ago and the 2nd to 6th respondents are the children born of that marriage. They lived happily together until her husband took in one Nagapooshani as a tenant of her dowried house. Thereafter, her husband began to keep Nagapooshani as his mistress and started to treat the petitioner with cruelty. On 23.4.1971 her husband caned the children on suspicion that they had removed a needle from the sewing machine belonging to his mistress. When the petitioner protested against this caning, the 1st respondent had assaulted her severely, pushed her down and stood on her chest. He chased her out threatening to take her life if she remained. Thereupon she went away to her elder sister's house and from there she entered the Government Hospital, Urani. She made a statement to the Police about

this incident. Thereafter the 1st respondent brought his mistress to his house and continued to live with her. The children remained with the 1st respondent. The petitioner was, at the time of the inquiry, living with her uncle, whom she described as "a person who advises people in Court matters". She had a house at Thondamanar, which was her dowried property. The petitioner also alleged that the 1st respondent got menial work out of the 2nd to 6th respondents and engaged them to do odd jobs for his mistress.

The case of the 1st respondent, who described himself as a "priest of Sellasannithi Temple, Thondamanar", is that the petitioner's behaviour was somewhat abnormal after the birth of the last child in 1967, she showed signs of mental aberrations at times, and she used to assault the children frequently while she was in that condition. According to him, the lives of the children would be in danger if they were placed in her charge.

On this question of the petitioner's mental aberrations, Dr. Upendran, Medical Officer, Valvettiturai, whom the 1st respondent had summoned to give evidence at the inquiry, stated that he attended on the petitioner when she was admitted to hospital after the alleged assault by her husband and described her condition as follows:—"At no stage was she violent when she was there. If a normal woman is assaulted by her husband, her children 'move' (apparently a misrecording for 'removed') from her, and her husband lives with a mistress, these are circumstances that will bring mental disturbances. Environment is important. *When these circumstances disappear she becomes normal. In this case it is a temporary emotional disturbance.* After this period when she was discharged from the hospital she was well."

Apart from the opinion expressed by the doctor, the 1st respondent had to admit that he did not mention his wife's mental aberrations either to the Police who came on two occasions to record statements when complaints of assault on the petitioner were made, or to the doctor who treated her at the Indrani Hospital. The learned Magistrate's finding is that the allegation that the petitioner was suffering from mental aberrations has been falsely made.

The 1st respondent, while admitting that he was living in open adultery with Nagapooshani who had a child by him, stated that his children were being well looked after by Nagapooshani who was an educated girl and who had studied up to the S. S. C. She gave them tuition and tailored their clothes.

Selvachandran, the eldest child, a boy of 11 years, also gave evidence. He stated that he did not wish to live with his mother for the reason that she used to assault him when he did not take his meals in time. His father and Nagapooshani, whom he called "Anty", looked after him very well and looked after his brothers and sisters too. She helped him in his studies and tailored his clothes and those of his brothers and sisters.

He preferred to remain with his father. I agree with the learned Magistrate that not much weight could be given to his evidence as he appeared to be under the influence of his father.

It is well settled law that so long as the bond of matrimony subsists, the father, as the natural guardian, has the preferential right to the custody of a child born of the marriage. Where the mother seeks to obtain the custody, the burden is on her to prove that the interests of the child require that the father should be deprived of his legal right. Unless she discharges that burden the father is entitled to the custody. (*Vide Madulawathie v. Wilpus and another* <sup>1</sup>.) Sansoni, J. in the case of *Weragoda v. Weragoda and another* <sup>2</sup>, after referring to the Court's powers as upper guardian of all minors to interfere with the father's custody on special grounds, such for example as danger to the child's life, health or morals, goes on to say, "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 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 a petitioner who seeks to displace those rights must make out his or her case." (*Vide also Kamalawathie v. de Silva and another* <sup>3</sup>.)

When applying these principles, the matters that should be taken into account are set out by Hahlo in his treatise on *The South African Law of Husband and Wife* (Second Edition—1963) at page 446 as follows:—

"All the circumstances are taken into account in determining what is likely to be best for the child: its sex, age and health; its educational and religious needs; the social and financial position of each parent; his or her character, temperament and past behaviour towards the child. Where the child has reached the age of discretion its personal preferences will also be taken into account. The question in every case is which of the spouses would best care not only for the physical well-being of the child, but for its moral, cultural and religious development.

"As a rule, the custody of young children and of girls of any age will be given to the mother. It is a truism that maternal affection is better adapted to the care of a young child than that of the father. But where the mother's character or past conduct are such as to render it undesirable to leave the children in her care, or where the home and

<sup>1</sup> (1967) 70 N. L. R. 90 at 91.

<sup>2</sup> (1961) 66 N. L. R. 83 at 86.

<sup>3</sup> (1961) 64 N. L. R. 252 at 257.

circumstances of the father are more satisfactory than hers, the custody will be given to him.”

Learned counsel for the petitioner submits that the evidence led at the inquiry before the Magistrate and specially that of Dr. Upendran clearly shows that the allegation of mental aberration attributed to the petitioner is false and made with the express purpose of depriving the petitioner of the custody of the children. He also argued that there is the evidence of the petitioner, uncontradicted by the 1st respondent, that Nagapooshani, the mistress, gets menial work done by the children and that it is in the best interests of the children that they should not live in an environment in which their father is leading a life of open adultery.

Learned counsel for the 1st respondent resists the handing over of the children to the petitioner on the ground that the petitioner suffers from mental aberrations, and for that reason the life and health of the children might be endangered if their custody is given over to the petitioner. I do not think there is any basis for this argument in view of the learned Magistrate's finding that the allegation of mental aberrations has been falsely made. He also attempted to meet the contention of the learned counsel for the petitioner by advancing the view that leading a life of continuous adultery with a mistress who lives in the company of the children is less detrimental to the moral well-being of the children than the case of isolated and indiscriminate acts of adultery committed by one of the parents. I do not agree.

In my view, it is detrimental to the interests of the 3rd respondent Selvarani, being a girl and only 9 years old, to remain in the custody of the 1st respondent and that it will not be conducive to her moral well-being that she should live in a home in which her father is leading a life of open adultery with a mistress who, moreover, has a child by the 1st respondent.

While endorsing the recommendation of the learned Magistrate that the custody of the 4th, 5th and 6th respondents should be handed over to the petitioner, I direct that the custody of the 3rd respondent too should be handed over to the petitioner. This would also be in accord with the general rule enunciated by Hahlo that custody of young children and of girls of any age will be given to the mother.

It is not alleged that the petitioner does not have sufficient means to provide the children with the ordinary comforts of life, and I assume that she is in a position to do so. The custody of the 2nd respondent, who is a boy of 11 years, will remain with the father, as the learned Magistrate seems to think that the boy is well looked after by the father.

I leave it to the learned Magistrate to make suitable arrangements for the petitioner as well as the 1st respondent to pay periodical visits to the child or children in each other's custody.

*Application mainly allowed.*