1958 *Present :* **Basnayake, C.J., Weerasooriya, J., and Sinnetamby, J.**

IN RE B. S. LIYANE ARATCHIE

S. C. 997—Application for a Writ of Habeas Corpus

Habeas corpus—Custody of child—Order made by District Court—Power of Supreme Court to interfere—Courts Ordinance, s. 45—Civil Procedure Code, s. 620.

Where a Court has made a wrong decision of fact or law when acting within the limits of its jurisdiction, *habeas corpus* will not be granted for the correction of such error. Accordingly, the writ will not be granted to vary an order made in a suit for judicial separation, under section 620 of the Civil Procedure Code, with respect to the custody of minor children.

APPLICATION for a writ of *habeas corpus*.

L. G. Weeramantry, with *Sirimevan Amarasinghe*, for Petitioner.

H. W. Jayewardene, Q.C., with *Lyn Wirasekera*, for 2nd, 4th and 5th Respondents.

Cur. adv. vult.

December 4, 1958. BASNAYAKE, C.J.—

This is an application for a writ of habeas corpus. The petitioner, a teacher in the Government Boys' School, Pannala, is the father of the 4th, 5th and 6th respondents to this application. The 2nd respondent is his wife who in 1948 sued the petitioner and obtained a decree for judicial separation. They had six children in all. The District Court of Chilaw in which the matrimonial proceedings were instituted ordered that the petitioner should have the custody of one child, a boy, and the 2nd respondent the custody of the other five children.

The petitioner now seeks by the present application to obtain for himself the custody of the 4th, 5th and 6th respondents who had been entrusted to the 2nd respondent, their mother.

The question for decision is 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 order for the custody of the petitioner's minor children was one made under section 620 of the Civil Procedure Code. That section reads—

"The court after a decree of separation may, upon application by way of summary procedure for this purpose, make from time to time all such orders and provisions, with respect to the custody, maintenance, and education of the minor children, the marriage of whose parents is the subject of the decree, or for placing such children under the protection of the said court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending."

2—J. N. B 3597—1,593 (3/59).

Now the petitioner is free in law to move the District Court of Chilaw which made the order with respect to the custody of his children to vary its order. The Court has power to do so. But without adopting that course he invokes the power of this Court to issue a mandate in the nature of a writ of habeas corpus.

The remedy of habeas corpus is provided by section 45 of the Courts Ordinance which reads—

"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 :

Provided that it shall be lawful for such court or Judge to require the body of such person to be brought up in the nearest District Court, Court of Requests, or Magistrate's Court, and to direct the District Judge, Commissioner, or Magistrate of such court to inquire into and report upon the cause of the alleged imprisonment or detention to such court or Judge, and to make such provision for the interim custody of the body produced as to such court or Judge shall seem right ; and such court or Judge shall, upon the receipt of such report, make order to discharge or remand the person so alleged to be imprisoned or detained, or otherwise deal with such person according to law ; and the said District Court, Court of Requests, or Magistrate's Court shall conform to, and carry into immediate effect, the order so pronounced or made by such court or Judge in the premises."

It would appear that the scope of the mandate in the nature of a writ of habeas corpus is not more extensive than the writ of *habeas corpus ad subjiciendum* known to English law. The English writ is thus described in Halsbury (Vol. 11, 3rd Edn., p. 24) :

"The writ of *habeas corpus ad subjiciendum*, which is commonly known as the writ of habeas corpus, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. It is a prerogative writ by which the Queen has a right to inquire into the causes for which any of her subjects are deprived of their liberty. By it the High Court and the Judges of that Court, at the instance of a subject aggrieved, command the production of that subject, and inquire into the cause of his imprisonment. If there is no legal justification for the detention, the party is ordered to be released."

In England the writ does not issue except upon material being placed before the Court verified by affidavit that the applicant is unlawfully detained. In the case of *Ex Parte Corke* [1] Lord Goddard C.J. stated—

> " It has always been the law, since it was laid down by Wilmot J., in giving his opinion on the writ of habeas corpus, in answer to the questions proposed to the Judges by the House of Lords in 1758, that a writ of habeas corpus is a writ of right and not a writ of course. See Wilmot's Notes of Opinions and Judgments, p. 82. That means that, before a writ can issue or leave can be given to apply for a writ, an affidavit must be before the Court showing some ground on which the Court can say that the applicant is unlawfully detained. "

The writ of habeas corpus is also not granted for the purpose of testing a decision made by a Court which has acted within its jurisdiction. There are other remedies for that. Where a Court has made wrong decisions of fact or law when acting within the limits of its jurisdiction habeas corpus will not be granted for the correction of such error. See *R. v. Commanding Officer of Morn Hill Camp, Ex Parte Ferguson* [2]. Lord Reading C.J. said in that case—

> " If the jurisdiction exercised by the Magistrate is a jurisdiction which has been conferred upon him by the statute, then, notwithstanding that he may have come to a wrong decision on the facts or upon the law, it is clear that his decision cannot be questioned by this procedure."

In the instant case the petitioner does not allege that the learned District Judge had no jurisdiction to make the order he made with respect to the custody of his children. He only seeks to have the order varied. For that he must go to the District Court which has jurisdiction to vary the order upon sufficient facts being adduced to the satisfaction of the Court that it is not in the interests of the children that they should any longer remain in the custody of their mother. 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. In the instant case there is no unlawful detention. Apart from the fact that there is no unlawful detention there is further ground on which the petitioner's application should be refused. 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 (Halsbury 3rd Edn., Vol. 11, p. 36, s. 63).

The petitioner has not resorted to the obvious remedy of invoking the jurisdiction of the Court which made the order. The application is refused with costs payable to the 2nd respondent.

WEERASOORIYA, J.—I agree.

SINNETAMBY, J.—I agree.

Application refused.

[1] *(1954) 2 All E. R. 440.*

[2] *(1917) 1 K. B. 176 at 179.*