1956 *Present:* H. N. G. Fernando, J.

MARTHA IVALDY, Petitioner, *and* F. P. IVALDY *et al.*, Respondents

S. C. 429—In the matter of an Application for a Writ of Habeas Corpus

Habeas corpus—*Courts Ordinance, s. 45*—" *According to law*"—*Custody of children—Contest between father and mother—Preferential right of father—Applicability of Roman-Dutch Law.*

An ultimate order granting or refusing a writ of *habeas corpus* is determined by *the law of Ceylon.*

Where a mother sought, as against the father, the custody of two minor children, who were girls of the ages of thirteen and nine—

Held, that, under the Roman-Dutch Law, where there has been no legal dissolution of the common home, the father's right to the custody of his minor children remains unaffected by the fact of the separation of the spouses, and can only be interfered with on special grounds, such, for example, as danger to the life, health or morals of the children.

APPLICATION for a writ of *habeas corpus.*

G. E. Chitty, with *Cecil Gunawardena* and *A. M. Coomaraswamy*, for the petitioner.

S. J. Kadirgamar, with *John de Saram*, for the 1st respondent.

Cur. adv. vult.

June 8, 1956. H. N. G. FERNANDO, J.—

The petitioner in this application for a writ of *habeas corpus* is the wife of the 1st respondent and the mother of the minor 3rd and 4th respondents, whose custody she seeks as against their father. The 2nd respondent is the principal of the Nuwara Eliya Convent at which institution the minor children were placed in February, 1954, by their father's authority. The minors are girls of the ages of thirteen and nine, having been born in France of parents who are respectively a Frenchman and American woman, and who married in America in 1938. There are also two male children of the marriage, one of whom is now in France and the other in America.

The husband and wife appear to have had frequent differences, particularly since the year 1948, when the wife and the children returned to America from France, and the wife had actual custody of the children until the end of 1953. Meanwhile she obtained a decree of divorce in 1952 in an American Court in an uncontested action on the ground of cruelty; but the decree was set aside in June 1953 on the ground that the husband had not been served with summons in the action. In August, 1953, the husband met the wife in America and persuaded her to come out, with one of the boys and the two girls, to Ceylon, where the husband had been appointed to a post with the World Health Organisation; and accordingly the wife and children arrived in Ceylon in November 1953. The wife alleged that she made the trip to Ceylon only on the understanding that her husband would deposit in advance the cost of return passages to America for herself and the children and that she would be free to return home with the children whenever she wished. Whether for good reason or not, the husband not only failed to honour this understanding, but also prevented the wife and the two girls from returning home even at her expense, and furthermore obtained an enjoining order from the District Court of Colombo restraining her from taking the children away from Ceylon. That order was by consent made applicable only pending the determination of the petitioner's present application to the Supreme Court. (I should add that the male child who came to Ceylon with the mother was sent to France from Ceylon sometime before this application was filed.)

At the inquiry held by the learned Magistrate of Nuwara Eliya, to whom the present petition was referred, a volume of evidence was led, much of which would have been irrelevant even in proceedings for divorce. Very much less evidence would, I think, have been adduced, if everyone concerned had appreciated the real issue which arises in a case where the wife of a marriage, which has not been the subject of a decree for divorce or judicial separation, challenges the husband's right to the custody of children of the marriage. Recent experience of the frequency of such applications makes me welcome the opportunity to consider the relevant authorities, and I appreciate the assistance which Mr. Kadirgamar has given me in this connection. The present case is fortunately not complicated by any question of the Conflict of Laws, counsel for both sides having conceded that I should apply the law of Ceylon. There is ample support for the view that a dispute as to the

custody of the children may be determined by the law of the country of residence, particularly in the absence of any competing order made by a competent court of the country of domicile. (*Halsbury*—3rd Edition, p. 126, 127 ; *Dicey : Conflict of Laws*, 6th Edition p. 480.)

The writ of *habeas corpus* was unknown to the Roman-Dutch Law, and as Schneider J. observed in the case reported in the twenty-ninth volume of the *New Law Reports* at page 52, section 45 (then section 49) of the Courts Ordinance is obviously founded on the English Law, resort to which must therefore be had in considering the purpose and scope of the jurisdiction of this Court to issue the writ. Clearly this question whether a mandate should issue under section 45 " to bring up before this Court the body of any person " must be determined in the same manner as it would be by a Court in England ; and if such only was Fisher C. J.'s opinion, when he said " we should . . . . apply English law in considering the question which has been submitted " (*Gooneratnayaka v. Clayton* [1]), I would respectfully agree. But the ultimate order made in exercise of the special jurisdiction is " to remand or discharge any person so brought up, or otherwise deal with such person *according to law* ", the section having in contemplation, in my opinion, *the law of Ceylon* relevant to the question whether the person should be remanded, discharged or otherwise dealt with. It was probably with this aspect of the matter in mind that Drieberg J. in the same case saw the need to remark that Courts under the Roman-Dutch Law had the same power as the Courts in England in respect of the particular matter with which this Court was then concerned. There have been many decisions in Ceylon which purport to follow English precedents in disputes as to the custody of children, and which, by reason of the essential similarity of the English and Roman-Dutch principles, will in all probability be found to conform with the latter. But if, as I think, the Roman-Dutch law is applicable in determining whether the right of a parent to custody should be enforced or not, then there should be *direct* resort to the Roman-Dutch law.

Spiro (*The Law of Parent and Child* p. 170) points out that there are only two exceptions to the fundamental rule of the Roman law that the parental power of the parent does not allow of any interference. " Parent " where father and mother are both alive, means of course the father who is the natural guardian of his children (*Van Rooyen v. Werner* [2]). The first exception to the rule is that a court, in authorizing the parents to have a separate home, is also competent to regulate the exercise of the parental power in accordance with the interests of the minor child concerned. This exception has received statutory force in Ceylon by sections 619 to 622 of the Civil Procedure Code, which empower a District Court to make orders for custody either pending a matrimonial action, or after a decree of divorce or judicial separation has been entered. The second exception, for a case where a separate home has not been authorized, is referred to in a recent judgment in South Africa (*Calitz v. Calitz* [3]) as follows :—" The Court

[1] (*1929*) *31 N. L. R. 132 at 133.*

[2] *9 S. C. 425.*

[3] (*1939*) *A. D. 56 at page 63.*

has no jurisdiction where no divorce or separation authorizing the separate home has been granted, to deprive the father of his custody except under 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."

The distinction between the two exceptions is, I think with respect, well explained in the judgment to which I have just referred. When a common home no longer exists in law, by reason of a matrimonial decree, the natural right of the father to custody, which flows from the duty to maintain the common home, is interrupted and the question of custody can be raised by either spouse for decision by the Court. The general principle applicable in that event is that the innocent spouse is entitled to an order for custody of the children, unless the Court, with due regard to the rights of that spouse and to the interests of the children, otherwise determines; and in this way, a father who is the guilty spouse will in ordinary circumstances, or even who is innocent *may* in extraordinary circumstances in the interests of the welfare of the children, be deprived of his natural right to custody. But where there has been no legal dissolution of the common home, the father's right to custody remains unaffected by the fact of the separation of the spouses, and can only be interfered with in *special circumstances*.

Spiro (idem pp. 171 and 172) refers to later decisions of the South African Courts which appear to have amplified the meaning of the expression "special grounds" in the principle as stated in the *Calitz case*. In particular, there was the observation made *obiter* in *Green v. Green* [1] that the Courts will not hesitate to deprive the father of custody where that custody is shown to be detrimental to the interests of the child. But even this observation underlines the distinction between the two exceptions to which I have referred. In applying the first, the Court will (with due regard to the preferent right of an innocent spouse) attempt to choose a course which will promote the interests and welfare of the child: in applying the second, the Courts will recognize the father's prima facie right, except when the element of danger or detriment is positively established.

The question I have to determine in this case, therefore, is not whether the estrangement of the petitioner from the respondent is attributable to the fault of the latter, nor whether it is in the interests of the happiness or welfare of the two daughters of the marriage that they be committed to the care of their mother. The sole question is whether the right of the father to custody is to be denied him owing to the prospective danger to the life health or morals of the children or owing to other circumstances establishing detriment to their interests. It is extremely difficult to cull from the recorded evidence the grounds upon which the petitioner relies, and I will deal with the principal grounds as stated by her counsel:—

(I.) The respondent assaulted his wife physically in the presence of the children.

[1] *S. A. L. R. 1918 (2), p. 1051.*

This alleged assault, though (as far as I can gather) not directly spoken to by the petitioner in her evidence in this case, was admitted by the respondent. It took place in the attic of a house or flat in France in September 1948 when the petitioner was packing, apparently in preparation for her departure from that country for America. According to the evidence of the petitioner in the abortive divorce proceedings in America, this assault took place without any provocation and only for the reason that the defendant was " brooding " over his failure to obtain a house on which he had set his heart. The respondent, on the contrary, stated in cross-examination before the Magistrate that he had been gravely provoked by the petitioner's allegation that he had previously threatened to kill his children. While the gravity of this assault is not denied, I find it impossible to believe the version that it was unprovoked. Moreover this assault was not made the reason for the petitioner's departure for America in November 1948, which did not in the legal sense constitute a " separation " by mutual consent. Her evidence here is that she strongly objected to going to America, and only did so because her husband desired to take some medical training and suggested that she and the children should live in America with her parents in the *interim*. It is also significant that right from the time of her return to America, the petitioner regularly and even with great frequency wrote long and affectionate letters to her husband in France, in none of which (so far as I can gather from a quick reading of them) was there any direct reference to this assault ; instead, in many of them, she regrets her own treatment of the respondent and expresses her intention to behave differently in the future. Whether the petitioner can rely upon this assault in 1948 for the purposes of divorce proceedings is doubtful ; it is much more doubtful whether she can now urge it as a reason why his custody of the children should be a source of danger to the latter.

(II.) The second allegation is that the respondent " abandoned his family in a strange country " when they arrived in Ceylon in 1953.

Assuming it to be true that the father showed a marked preference for the son and at first disregarded the two daughters after one of them failed to greet him like a daughter should, there is nothing else in the evidence to warrant this serious allegation of desertion. On the petitioner's own evidence, the father provided Hotel accommodation for the family at Galle, where he was working at the time, and there is no allegation that he failed to pay the Hotel Bills. Quite soon after, and up to date, the two girls were placed by mutual agreement at the Convent in Nuwara Eliya, and much if not all of the cost of their board and education appears to have been met by the father. I do not doubt the petitioner's statement that she spent her own money in Ceylon, but, having regard to the amount of the respondent's own income, he appears to have incurred quite reasonable expenditure on the maintenance and education of his children while in Ceylon.

Connected with this allegation is the suggestion that the respondent failed to support his wife and family while in America between 1948 and 1953. Assuming that he contributed little to the family till during

that period, the question is whether he was guilty of deliberate neglect. But it is admitted that he had then no regular or adequately remunerative employment and was trying to improve his qualifications; and the petitioner who appears to be an educated and capable woman, willingly undertook a large share of the family burden. Here again, the letters to which I have referred—there was a period during May 1950 when she wrote several pages nearly every day remembering the happiness of the past and voicing her hopes for the future—contain no complaint on the score of failure to maintain the home. The respondent was no doubt aware that the children would be adequately maintained through the mother's voluntary efforts during a period of financial stringency, but so soon as he himself obtained sufficiently remunerative employment he did again resume his normal financial obligations. I can see nothing in these circumstances to establish a case of deliberate neglect.

(III.) Thirdly it was alleged that the Respondent has contrived to evade the decison of this dispute in the American Courts by inducing the petitioner, through what was described as a trick, to bring the children to Ceylon. Connected with this is the allegation that he does not in truth desire to have charge of the two girls and is in fact utilising their presence in Ceylon in order to bargain with his wife for the custody of the eldest boy Philippe who is now in America.

In outlining the facts, I have already stated that the respondent failed to honour the understanding that monies would be deposited in advance for the return passages to America from Ceylon of the petitioner and the children. His explanation has been that the petitioner has contrary to her own agreement prevented Philippe from joining him in France. Of this there is certainly no clear evidence, the letters from Philippe and from his relatives in America indicating on the contrary that Philippe, who is now sixteen years old, is quite determined to remain in America and that owing to a serious fall from a window in May 1954, it would have been quite inadvisable for him at that time to have made the journey to France. It is impossible to set out here the various items of evidence which directly or indirectly affect the allegation of a trick, but upon a consideration of them I am of opinion that it was dishonourable on the part of the respondent to obstruct the return to America of his two daughters and that he has taken advantage of what he has been advised to be the Law of Ceylon on the subject of custody. One document is in this connection significant. In May 1955, while the present application was pending, a draft agreement was prepared by which the respondent agreed to permit the two daughters to be taken back to America but which also provided for several conditions concerning the right of the respondent to have custody and to visit the two male children. The petitioner states that she did not sign that agreement because she was not agreeable to all the terms, and there is in my opinion much substance in the suggestion that the agreement was something of a bargain. That circumstance does not however by itself establish

that the respondent does not in good faith desire to have the custody of his two daughters; at most it would indicate that, if a choice were to be forced on him, he would prefer the custody of the male children.

(IV.) A fourth ground—which I express in milder terms than those Mr. Chitty employed—is that the respondent is neurotic, liable to violence and mentally unstable.

It is said that his behaviour in Court and his reaction to cross-examination establish this. It is unfortunately true that in proceedings of this nature, when domestic grievances and unhappiness are the subject of searching examination and dispute in a Court of Law, the character and temperament of each spouse do not often emerge without blemish. Neither the husband nor the wife in this case was an exception to the usual rule.

The respondent is supposed to have consulted five different psychiatrists and to be thus estopped from claiming to be sane and mentally stable. But his explanation that he was forced to do so owing to the importunities of his wife is borne out by at least one certificate from one of the psychiatrists concerned. I do not think that the mere fact that a husband and wife, particularly when faced with differences of race, temperament and religion, do not understand each other, would be a good ground for thinking that either of them is abnormal or a proper subject for psychiatric treatment. Much more reliable evidence than that which the petitioner has been able to produce would be required to justify a court in forming such an opinion of her husband.

(V.) The last allegation to which I propose to refer is that the respondent has been guilty of cruelty to the eldest daughter, Anne.

Some of the items of evidence relied on are trifling and even absurd, such as the statement that Anne was reluctant to go out riding because the respondent made the horse gallop too fast. The principal fact established in this connection was that in December 1954 the respondent forcibly held down Anne for about two hours and spanked her thereafter. Apparently the respondent had requested Anne to lay a cloth on the dining table which Anne had refused to do. Anne became violent when the respondent insisted on her obedience and he then seized hold of her, insisting that she would be not released unless she laid the cloth. The child was certainly the first and very much to blame; but even if the whole story as related by the petitioner be true, this one instance of physical interference with Anne surely cannot establish either habitual cruelty or even a tendency towards cruelty or hatred to the children on the part of the respondent.

There is, however, another aspect of this matter which has given me much anxiety. There is ample evidence on the record to show that Anne has often been disrespectful to her father even in the presence of third parties and that she undoubtedly shows a marked preference in affection for her mother. What concerns me is whether this antipathy

to her father is so strong or so deep rooted that it will induce her to do violence to herself or will seriously affect her mental health if she is now compelled to return with her father to France.

This Court has previously applied the English principle that the wishes of a child under sixteen are not as a general rule to be consulted in determining a question of custody. (*Gooneratnayaka v. Clayton* [1]). But examination by the judge of a child and an indication of her own wishes in the matter can I think be of assistance in deciding whether custody by a particular parent would be detrimental to the child's interests. And in these circumstances I felt it necessary to summon nd examine both children.

In the case of the younger child, Elaine, while it became clear to me she would choose to be with her mother rather than with her father, tated in answer to me that she was fond of the latter and I formed ut hesitation the opinion that there would be no danger whatever mmitting her to his custody even if it meant separation from the her. The case of the elder child Anne is somewhat different. She now thirteen years of age and appears to be thoughtful and mature r her years; between the ages of five and eleven she has been under he care and in the company of the mother (almost to the total exclusion f the father) at Nebraska, which she still describes as "home"; she is ware of the differences between her parents and is naturally concerned nd affected by her mother's unhappiness over the family disputes; she complains also that her father makes "scenes" at table and has not been, generally speaking, "fair" to the family; far from entertaining the natural affection of a child for a father she appears to have a fairly strong dislike for him. One important cause of her distrust is that her ther failed to keep his promise that they would be free to return from lon to America whenever they wished; and she was quite unable to preciate the suggestion I made to her that what might seem to have en a dishonourable trick in other circumstances might be viewed in a ferent light in the case of a parent who is anxious to recover custody of his children. But despite this antagonism, which was ink due partly to the unfortunate separation from the father as erhaps as to the faults of both parents, I cannot say that the com- of Anne to the custody of her father would involve reasonable danger or detriment to herself. She readily agreed that the oth incident (which she said was one of many but nevertheless st serious) was a case where both she and her father behaved badly. l, in answer to Mr. Chitty, that she was "afraid" of her father, as clear that this did not mean fear of physical violence or injury ther an anticipation of "scenes", criticisms and disagreements. stress and unhappiness which is often likely to arise in the course relations with her father would not, I feel sure, provoke her to ce or cause her to brood unduly over her misfortunes. The sister e convent in Nuwara Eliya who has good opportunities of obser- n agreed that Anne is quite a normal child and that her relations r father are not likely to be deleterious to her character. While,

[1] (1929) 31 *N. L. R. at p. 132.*

therefore, it is abundantly clear that Anne would very much prefer to live with her mother and that in America, it cannot be said that her antagonism to her father is so serious that her committal to his custody would be a source of danger to her life, health or morals or even that (if the principle should be more widely expressed) it would be detrimental to her interests. In the result the petitioner has failed to establish sufficient grounds upon which a court can exercise the power to deprive the father of his natural right of custody. She herself undoubtedly would be anxious to promote the happiness of the children, and Anne was confident that the mother would accompany the children to France in the event of their having to go with the father. As was remarked in the *Calitz case*, it still lies with the mother, at least for the present, to return to her husband and thus avoid the disadvantage which the children might otherwise suffer in consequence of their separation from her. I trust that the advisers of both parties will attempt to secure such a solution to the present difficulties.

The petitioner's application is refused and the 1st respondent will be entitled to the custody of the two children. The order made on 11th March, 1955, by my brother Sansoni lapses with the determination of this application and the 1st respondent may, when he so desires, remove the children from the custody of the 2nd respondent and remove them from Ceylon. The order made by the Magistrate, Nuwara Eliya, on 26th March, 1955, will no longer apply against the 1st respondent.

Application refused.

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