Karunawathie v. Wijesuriya & Another

COURT OF APPEAL.
RATWATTE, J. AND L. H. DE ALWIS, J.
H.C. APPLICATION 100/78.
JANUARY 17, 1980.

Writ of Habeas Corpus—Custody of child—Subsisting marriage—Welfare of the child—Preferential right of the father.

The petitioner applied for a writ of habeas corpus against her husband in respect of the custody of her daughter, 4 years and 4 months of age. The marriage between the parties was not dissolved. No allegation had been made by the petitioner that her husband was not a fit and proper person to have the custody of the child. The learned Magistrate recommended that custody be granted to the petitioner on the ground that the child needed her care and affection, in view of its tender years.

Held

It is the Roman-Dutch Law which governs the principles applicable to the custody of minor children in this country and where the bond of matrimony subsists, the father has the preferential right to custody of the child, subject to a paramount consideration namely, the welfare of the child. The burden of satisfying the court that such consideration arises would be on the mother. As no such case has been made out by the petitioner in this case, the father (1st respondent) would be entitled to custody.

Cases referred to

(1) *Jayaldy v. Ivaldy, (1956) 57 NLR 568 ; 53 C.L.W. 81.*
(2) *Premawathie v. Kudalugoda Aratchi, (1970) 75 NLR 398.*
(3) *Kamalawathie v. De Silva (1961) 64 NLR 252 ; 60 C.L.W. 21.*
(4) *Padma Fernando v. T. S. Fernando, (1956) 58 NLR 262.*
(5) *Weragoda v. Weragoda, (1961) 66 NLR 82 ; 59 C.L.W. 49.*
(6) *Mckee v. Mckee, (1951) A. C. 352.*
(7) *Calitz v. Calitz, (1939) A.D. 59.*
(8) *Short v. Naisbu, (1955) (3) S.A. 572.*
(9) *Percia Fernando v. Dudley Fernando, (1968) 70 NLR 534.*
(10) *Madulawathie v. Wilpus, (1967) 70 NLR 90.*
(11) *Rajaluxmi v. Sivananda Iyer, (1972) 76 NLR 572.*

APPLICATION for a Writ of Habeas Corpus.

A. A. de Silva, for the petitioner.

F. Mustapha, for the respondent.

Cur. adv. vult.

February 15, 1980.

L. H. DE ALWIS, J.

The petitioner, in this application for a writ of habeas corpus seeks to have the custody of the 2nd respondent, her daughter, named Monica, presently of the age of 4 years and 4 months. The child is with the 1st respondent, who is the husband of the petitioner and the father of the child.

The petitioner and the 1st respondent were married on 29.11.74 and the child was born on 6.9.75. There appears to have been constant quarrels between the couple, though not of a serious nature, which ultimately led to the 1st respondent getting down the petitioner's parents and sending her away on 1.4.78. On that occasion a complaint and a counter-complaint were made to the Grama Sevaka of the area, before the parties separated. No allegation of immorality is made by either party against the other. The petitioner alleges interference by the 1st respondent's mother and other members of the family in their domestic affairs while the 1st respondent complains of neglect of the home and the child on the part of the petitioner. These allegations however have not been established.

The petitioner had asked for the custody of the child before the Grama Sevaka, but the 1st respondent had refused to hand over the child and he is presently keeping the child with him. It is in these circumstances that the petitioner filed this application for a writ of habeas corpus on 9.5.78.

The Magistrate to whom the petitioner was referred for inquiry and report has recommended that the custody of the child be given to the petitioner on the ground that it needs the care and affection of the mother, in view of its tender years.

It is contended on behalf of the 1st respondent that the Magistrate's approach to the question of the custody of the child was wrong. He has posed the sole question for determination as whether the child needed the care and affection of the mother, totally ignoring the rights of the 1st respondent as father to its custody, since the marriage had not been dissolved. It is further contended that the consideration of the child's interest as paramount in questions of custody is a concept of English law which is foreign to the Roman-Dutch Law.

It is settled that the principles which govern the custody of minor children in this Country is the Roman Dutch Law and not the English Law. In *Ivaldy v. Ivaldy* (1), H. N. G. Fernando, J. said " 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 the 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 Roman-Dutch Law."

In *Pemawathie v. Kudalugoda Aratchi* (2) the Supreme Court held that the question who has the right to the custody of a child must be determined by the law applicable to the parties in question and once it is determined by the legal system applicable that the right to custody exists, it is then that the writ of habeas corpus would issue. The consequence of the issue of the Writ, the manner of its issue and the procedure and practice to be followed would of course be determined by the English Law. See also *Kamalawathie v. De Silva* (3). The question that arises now is whether Roman-Dutch Law recognizes the concept of the best interests of the child as a paramount consideration in matters pertaining to the custody of children.

Lee in—*An Introduction to Roman-Dutch Law*—5th Edn. p. 34, says that in Roman Dutch Law the custody, control and education of minor children belong to the father during his lifetime, unless the Court orders otherwise and subject to the paramount consideration of the children's welfare.

In *Ivaldy v. Ivaldy* (1) it was held that under the Roman Dutch Law, where there has 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. See also *Padma Fernando v. T. S. Fernando* (4).

Sansoni, J. as he then was, in *Weragoda v. Weragoda* (5) cited with approval the dictum of Lord Simonds in the Privy Council case of *Mckee v. Mckee* (6) on the question of custody of minors as follows: "the welfare and happiness of the infant is the paramount consideration.....to this paramount consideration all others yield." That was a case from Canada but as Lord Simonds observed, it is also the law of England. Sansoni, J. went on to say "I have no doubt that this is the principle that should guide me in the present application also. Although in England the principle applies because, I suppose, the Court is the guardian of all infants in Roman-Dutch Law the State is regarded as the upper guardian of all minors. I do not think there is any material difference in the two concepts. In deciding what is best for the child, the Court will have regard to the rights of either parent,

their character, and any other factors which the Court thinks ought to be weighed." Referring to the Roman-Dutch law principle enunciated in *Calitz v. Calitz* (7) that the rights of the father are superior to those of the mother in regard to the custody of the children of the marriage, where no divorce or separation has been granted and that the Court has no jurisdiction 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, he said, "I think 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 these rights must make out his or her case."

In *Short v. Naisby* (8) Henochsberg, A. J. said "Such special grounds included danger to the child's life, health or morals, but these are not the only grounds on which a Court will interfere. Good cause must be shown before a Court will interfere, but good cause is not capable of precise definition. Each case must, therefore, be considered on its merits."

Tambiah, J. in *Kamalawathie v. De Silva* (3) after reviewing all the authorities which recognised the right of the Court to order the father to hand over the custody of the child to the mother if such a course is necessary in the interests of the child's life, health or morals, said, "the citations in the various cases, which have established this principle, show that our Courts have often relied on English decisions and sometimes on the Roman-Dutch law, to formulate this principle. Law, like race, is not a pure blooded creature."

Weeramantry, J. in *Precia Fernando v. Dudley Fernando* (9) cited the dictum of Lord Simonds in *Mckee v. Mckee* (6) and observed that "there can be no doubt that in all questions of custody, the interests of the child stand paramount, a principle on which the English and modern Roman-Dutch Law are agreed." The same Judge in *Pemawathie v. Kudalugoda Aratchi* (2) said "There is no dearth of authority in the recent decisions of this Court recognizing the overriding importance of the welfare of

the child even in cases where the natural guardian's claim is resisted by a stranger.....A review then of the decisions of this Court for a period of well over hundred years specially recognizes that the right of the parent may be superseded by considerations of the welfare of the child."

Thus in an application for a writ of habeas corpus for the custody of a child, the paramount consideration is the welfare of the child. It is settled law that, subject to that consideration, 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. *Madulawathie v. Wilpus* (10).

In the present application, the marriage of the petitioner and the 1st respondent has not been dissolved so that the 1st respondent as the father has the preferential right to the custody of the child. The question now is whether the rights of the 1st respondent should be displaced by considerations relating to the welfare of the child.

The law presumes that where the legal custody is, no restraint exists, and that where it is shown to be to the contrary, a counter-presumption exists. Since legal custody is in the 1st respondent the presumption is in his favour. The petitioner who seeks to deprive him, as the father, of his right to the custody of the child must therefore prove that the interests of the child require it. Unless she discharges that burden the 1st respondent is entitled to custody, *Madulawathie v. Wilpus* (10). See also *Weragoda v. Weragoda* (5) *and Rajaluxmi v. Sivananda Iyer* (11).

No allegation has been made by the petitioner that the 1st respondent is not a fit and proper person to have the custody of the child. The 1st respondent is a postal peon attached to the Kottegoda Post Office and draws a salary of Rs. 400 per month. He comes home daily at ten in the morning and again at two in the afternoon after his duties are over for the day. He has ample time to spend with his child at home. His mother and elder sister also live with him, and they could bestow a mother's care and affection on the child. It is true the mother is about 75 years old and herself needs to be looked after by her daughter. But that does not prevent her daughter from looking after and attending to the needs of the child also. Besides, the child is now attending a Nursery School and is not wholly dependent on a mother's care and attention.

In *Fernando v. Fernando* (9), Weeramantry, J. posed the question whether the father's right to the custody of the child should yield to the circumstance that children of such tender years as

three or four, are ordinarily entitled to a mother's comfort and care. He answered it in the affirmative citing *Hahlo, South African Law of Husband and Wife*—2nd Edn. 446—for the rule that the custody of very young children ought ordinarily to be given to the mother. Deheragoda, J. also refers to this rule in *Rajaluxmi v. Sivananda Iyer* (11). But Hahlo there is dealing with the rights of parents to the custody of children after the dissolution of the marriage. At that stage the preferential right that the father has to the custody of the child before the dissolution of the marriage is not taken into account. Here the marriage has not been dissolved so that the father's fundamental right to custody continues. The Magistrate however has deprived the 1st respondent of his right to custody and granted the custody of the child to the mother, solely on the basis that the child is of tender years and needs the care and affection of its mother.

In *Calitz v. Calitz* (7) the trial Court had dismissed the wife's action for judicial separation against her husband, but gave her the custody of the female child 2¼ years on the sole grounds that the interests of the child would best be served by such an order as to custody. It was held in appeal that the Court has no jurisdiction, where no divorce or separation authorising the separate home has been granted, to deprive the father of his custody, except under the Court's power 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. There was no finding that the father was not a fit and proper person to have such custody and the fact that the child was of tender years and would be better looked after by the mother did not, under the circumstances justify the order made. It will be observed that the child in that case was a girl aged only 2¼ years.

The learned Magistrate who enquired into this petition has failed to consider the interests of the child in relation to the father's fundamental right to its custody during the subsistence of the marriage. In any event the petitioner has not made out a prima facie case for this Court to interfere with the right of the 1st respondent to custody on the grounds that it is in the best interests of the child.

The petitioner's application is refused. She is however entitled to reasonable access to the child and the Magistrate will make an appropriate order in regard to it after hearing both parties.

RATWATTE, J.—I agree.

Application dismissed.