1968 *Present :* de Kretser, J.

D. ENDORIS, Petitioner, *and* D. KIRIPETTA and 2 others, Respondents

S. C. 245/67—Habeas Corpus Application

Habeas corpus—*Custody of child—Preferential right of parent.*

In a *habeas corpus* application made by the petitioner in respect of his son who was 8 years old and who had been brought up by his aunt (the petitioner's sister) from the time his mother died when he was about a month old—

***Held*, that a court will not deprive a parent of the custody of a child for the reason only that it would be brought up better and have a better chance in life if given over to another. It is for the person seeking to displace the natural right of the father to the custody of his child, to make out his case that consideration for the welfare of the child demands it.**

[1] *(1946) 74 C. L. R. 46.* [2] *(1966) 69 N. L. R. 265 P. C.*

APPLICATION for a writ of *habeas corpus*.

G. S. Marapana, for the petitioner.

C. D. S. Siriwardene, with *Miss Adela Abeynatne*, for the respondent.

Cur. adv. vult.

October 22, 1968. DE KRETSER, J.—

This application concerns the custody of the third respondent D. Wimalasiri born 7. 12. 60 who has been brought up by his aunt the first respondent and her husband the second respondent from the time his mother Baby Nona died when he was about a month old and his father Endoris the petitioner had no one else to look after the infant child.

If the truth is that the child was given, as the respondents claim, to them for adoption and it was not a case of the petitioner taking advantage of the kindness of his sister as a temporary way out of the difficulties that beset him when his wife died—on which point there is no finding of fact by the Magistrate who has contented himself with giving a resumé of the evidence given by the parties—it is a pity that the respondent took no steps under the Adoption of Children Ordinance, Cap. 61 of Vol. 3 of the L. E., to obtain an adoption order from the court having jurisdiction over the matter. As Nagalingam A.C.J. points out in *Abeywardene v. Jayanayake* [1], under the Roman Dutch Law the natural parent has a right to the custody of his child and that custody can only be terminated under the law under circumstances which are well recognised. The mere delivery of a child by its natural parent to a third party does not invest the transaction with legal consequences. If the parent has the right to hand over custody of a child then that parent would also have the undoubted right to resume the custody himself, as the authority of the parent must prevail in the latter instance as much as in the former.

In considering an application for custody the rights of the father must prevail if they are not displaced by considerations relating to the welfare of the child which is the paramount consideration that the court is there to safeguard and to which all others must yield. But as Drieberg J. pointed out in *Ran Menike v. Paynter* [2] this does not mean that a court can deprive a parent of the custody of a child for the reason only that it would be brought up better and have a better chance in life if given over to another. The court cannot have regard only to

[1] *(1953) 55 N. L. R. 54.*

[2] *(1932) 31 N. L. R. 127.*

the balance of advantages. Justice Drieberg cites with approval the passage from the judgment of Knight Bruce in the case of *In re Fynn* 2. de G. and S. 457 at 474 :

> "It (the court) must be satisfied. . . . that the father has so conducted himself or has shown himself to be a person of such description, or is placed in such a position, as to render it not merely better for the children but essential to their safety or to their welfare, in some very serious or important respect, that his rights should be treated as lost or suspended—should be superseded or interfered with. If the word essential is too strong an expression it is not much too strong."

In the instant case the Magistrate has been much impressed by the view expressed by the father of the petitioner and the first respondent that it would be in the interests of the child that it should continue in the care and custody of the first and second respondent. In recommending that the custody should so remain the Magistrate (K. Palakidnar, Esq.) says "if the third respondent were to be restored to the petitioner, it would be a rather unhappy feature that he would be thereby deprived of the maternal care which he has hitherto got from the first respondent, his aunt. The petitioner may be able to care for him, but emotionally he would be deprived of the care of his foster mother who has nurtured him from his very birth. . . . .The opinion of his grandfather Kirisantha and the reassurance of the second respondent while he gave evidence are both factors which cannot be lightly regarded. On the other hand the petitioner's new-found interest in the corpus though natural as father has to be viewed in the light of his total renunciation to any kind of paternal concern for the third respondent since his birth. The petitioner has not established any reasonable and good ground as to why the child's position should be altered in any way ". In saying so, the Magistrate has lost sight of the fact that it is for the person seeking to displace the natural right of the father to the custody of his child, to make out his case that consideration for the welfare of the child demanded it. It is in evidence that the petitioner has his own house and grown-up children live with him. His evidence that he gets an income of Rs. 40 to 50 a month from his tea land is not challenged. There is no evidence that if the child was in his custody there would be danger to its life, health or morals. It is true that the child would be deprived of the love and care of the first and second respondents but I do not think that at the age of 8 years the emotional upset of being away from them is something that he cannot get over. It may be that if left with the respondents the child would be brought up with more loving care but that is no reason to deprive the father of his rights to this child—He is a father who on the evidence has brought up many children to manhood and womanhood. One of them today is the Manager of a co-op. store and educated to the S. S. C. standard. His daughter has a child of about the same age as the third respondent. It appears to be true that it is over a quarrel with the respondents that the petitioner

has decided to ask for the custody of the child. But one must also not forget that it may well be that the quarrel only gave an opening for the petitioner to ask what he had been loath to ask from his sister earlier as he was under obligation to her for coming to his rescue at a time of need. As I said at the commencement of this order if it is true that at that time the petitioner was willing to let the respondents adopt the child, they have only themselves to blame for the sorrow they have now brought on themselves by not taking the steps the Law provides for the adoption of children.

Be that as it may, in my opinion no case has been made out that would entitle me to hold that the welfare of the third respondent demands that I should make an order interfering with the natural right of his father to have his custody. I order the first and second respondents to hand over this child to the petitioner on or before the 15th of November 1968.

Application allowed.