[IN REVISION.]

1943 *Present:* **Moseley S.P.J. and Wijeyewardene J.**

SILVA Applicant, *and* SILVA Respondent.

D. C. Colombo, 720 (Divorce).

Divorce—Custody of child pending action—Rights of father—Interests of child —Application for revision pending appeal—Civil Procedure Code, s. 753.

The Supreme Court has the power to revise an order made by an original Court even where an appeal has been taken against that order.

In such a case the Court will exercise its jurisdiction only in exceptional circumstances and in order to ensure that the decree given in appeal is not rendered nugatory.

The father is entitled to the custody of a child pending divorce proceedings especially where the best interests and safety of the child require that the child should continue to remain in his custody.

THIS was an application to revise an order made by the District Judge, wherein he ordered that the custody *pendente lite* of a minor child should be granted to the mother (the plaintiff) in a divorce action between the parents.

N. Nadarajah, K.C. (with him *A. H. C. de Silva*), for plaintiff, respondent, takes a preliminary objection to the hearing of the application on the ground that an appeal had already been taken from the order and the effect of this application being entertained would be to deprive the District Court of the jurisdiction already vested in it under the Code.

E. F. N. Gratiaen (with him *H. W. Jayewardene*), for defendant, petitioner.—There are exceptional reasons why this application should be entertained. The Supreme Court has the power to revise any order of a lower Court even though an appeal has been lodged. The trial has already been fixed for October 11 and it is unlikely that the appeal would be heard before that date. This being an application for custody *pendente lite* any delay in hearing the appeal would only render the ultimate order of the Supreme Court nugatory (vide *Atukorale v. Samynathan*.[1] The interests of a minor child are involved and it is desirable that this matter be disposed of as soon as possible.

The father is the lawful guardian of a child and is ordinarily entitled to the custody; the Court would however consider the interests of the child. In fact, this is the paramount consideration. The Court would not, in a pending suit, deprive the father of the custody merely on account of the natural desire of the mother to have the custody—*Cartlidge v. Cartlidge*[2]. The principles regarding custody have been laid down in *Ackemon v. Ackemon*[3] where the South African Courts have held that where the question of custody *pendente lite* arises the interests of the minor are to be looked to, but not forgetting the rights of a father to custody. In this case the father fears for the safety of his child. It cannot be said that these fears are groundless because the threats and behaviour of the plaintiff indicate that she is not incapable of doing some act which would

[1] *18 C. L. Rec. 200.* [2] *(1862) 6 L. T. R. 397.*
[3] *S. A. L. R. (1940) C. P. D. 16.*

endanger the life of the child. Moreover the mother has not satisfied the Court that she can give the child a home suited to one of his upbringing. Frequent changes of custody are also undesirable.

N. Nadarajah, K.C.—The petitioner's proper remedy is by way of appeal. He has filed an appeal but he can move that its hearing be advanced. No such application has been made and in the circumstances the application must be dismissed. *Ameen v. Rasheed*[1] see also, *Ram Sait v. Nadar et al.*[2] The interests of the child are the primary consideration. He is an infant of four and it is in his best interests that he should be restored to the mother—*Maasdorp, Vol. I, 125-128; Farmer v. Farmer*[3]. The mother's threats have not been considered as seriously made. The father is in Jaffna and the child is with the father's relations in Galle. It cannot be said that the father has the custody of the child. There is no reason why the mother should not have the custody, if the father himself does not have it—*Van Leeuwen, Vol. I, page 123.*

E. F. N. Gratiaen, in reply.—No application to accelerate an appeal can be made till the record comes up to the Supreme Court and the appeal is duly listed. A spouse can exercise his rights of custody vicariously vide *Letlhoo v. Letlhoo*[4]; *Stapelberg v. Stapelberg*[5].

Cur. adv. vult.

August 16, 1943. WIJEYEWARDENE J.—

The plaintiff filed this action on April 29, 1943, asking for the dissolution of her marriage with the defendant on the ground of malicious desertion and for the custody of her son born on July 27, 1939. The defendant filed answer denying the allegations made against him and asking for the dissolution of the marriage or of a decree of separation on the ground of "constructive malicious desertion" on the part of the plaintiff. He, too, asked for the custody of the child. The case is fixed for trial early in October.

On May 27, the plaintiff petitioned the Court for the custody of the child *pendente lite*. The defendant opposed that application and the District Judge, after inquiry, delivered his order on July 30, granting the application of the plaintiff and reserving the right of the defendant to have access to the child. The defendant preferred an appeal against that order on August 2, and also filed papers in revision in this Court on the same day.

When the matter came up in revision before us, the plaintiff's Counsel took a preliminary objection. That objection, as I understood it, was that this Court had no jurisdiction to exercise its revisionary powers in this case especially in view of the appeal taken against the order. A similar objection taken in *Atukorale v. Samynathan*[6] was not entertained by Moseley S.P.J. and Soertsz J. In the course of his judgment Soertsz J. said:

"The power by way of revision conferred on the Supreme Court of Ceylon by sections 21 and 40 of the Courts Ordinance and by section 753 of the Civil Procedure Code are very wide indeed, and clearly, this Court has the right to revise any order made by an original Court,

[1] *6 C. L. W. 8.*
[2] *13 C. L. W. 52.*
[3] *1 Menzie's 278.*
[4] *S. A. L. R. (1942) O. P. D. 148.*
[5] *S. A. L. R. (1939) O. P. D. 129.*
[6] *18 C. L. Rec. 200.*

whether an appeal has been taken against that order or not. Doubtless, that right will be exercised in a case in which an appeal is pending only in exceptional circumstances. For instance this jurisdiction will be excercised in order to ensure that the decision given on appeal is not rendered nugatory."

I am in respectful and full agreement with the view expressed in that case. It must take some time for the appeal to be heard. Even after the appeal is perfected and sent to this Court, it has to remain on the list of pending appeals for, at least, fourteen days before it is heard and, normally, it should be taken "in the order of its position on the roll". No doubt, provision is made for a party "to accelerate the hearing of an appeal", but an application for such a purpose can be made only after it has been numbered and entered on the roll. It is, therefore, most unlikely that the appeal will be heard before the trial in the District Court. It will serve no useful purpose to hear the appeal after the trial as the appeal itself is from an interim order. I think, therefore, that this is a matter in which our revisionary powers should be exercised.

As the main dispute between the parties has to be decide at the trial, it is desirable to avoid a detailed discussion of the evidence led at the inquiry. It is admitted that both the parents are very much attached to their child. There are, however, certain matters which cause me some anxiety, when I consider the advisability of entrusting the child to the plaintiff pending the action. There is evidence that, when the child was quite young, she attempted or threatened to take the child from his cot and jump from the upper floor of the house, as her husband went to a birthday party shortly after her father's death. There is also evidence that, a few days after the defendant removed the child stealthily from their home to his sister's place in Galle, she made a statement to Mr. Manickawasagar which was understood by him as a threat to harm the child in certain circumstances. There is also the proved fact that she drank or made a serious effort to drink iodine when she quarrelled with her husband over the removal of the child. The defendant has spoken of his "genuine fear" as to what might be done to the child, if, after the child is given to the custody of the plaintiff on the interim order, the Court enters a decree at the end of the trial for the restoration of the child to the defendant. Considering her attachment to the child, there is no doubt that such an adverse order will cause her the greatest anguish. Would she have sufficient will power to face the situation and part with the child in obedience to the order of Court or would she, in a moment of despair, feeling that nothing should separate her from her child, kill the child and kill herself as the defendant says she threatened to do? It may perhaps be most unlikely that the plaintiff will be guilty of such rashness as feared by the defendant, but I am not prepared to question the sincerity of the defendant when he says that he entertain such a fear. In view of the evidence as to her temperament and the incidents to which I have made a brief reference, it cannot be said that the defendant's fears are groundless and that there is no risk whatever of her acting in a rash manner. Counsel for the plaintiff has undertaken that, if the order of the District Judge is affirmed, the child will be handed over to approved custody a given number of days before the hearing. While

such a course would no doubt remove the child from any threatened danger, it would involve a number of moves which would have an unsettling effect upon the child. Under these circumstances, is it necessary to interfere with the present arrangements made by the defendant? The father has, undoubtedly, a better right to the custody of a child in the absence of any special reason. It cannot be said that the arrangements made by him are unsatisfactory so far as the interests of the child are concerned. Since March 18 the defendant has kept the child with his sister and mother. It is admitted that these ladies are very fond of the child and are bringing him up in very comfortable surroundings. There is also the fact that, as a result of certain definite views the plaintiff holds with regard to the upbringing of children, the boy's life was so regulated at home that he is not likely to feel the loss of his mother's company very much. Moreover, there is a possibility of more changes in the custody of the child if the interim order is sustained.

I think that, in all the circumstances of this case, it is best that the child should continue to remain in the defendant's custody during the pedency of this case. Adequate arrangements should be made by the defendant to enable the plaintiff to see her child twice a month in Galle or, if the plaintiff prefers it, once a month in Colombo. The details of these arrangements will be laid down by the District Judge, if the parties cannot agree.

I set aside the interim order of July 30, 1943, so far as it affects the custody of the child and direct an order to be made as indicated in the preceding paragraph.

MOSELEY S.P.J.—I agree.

Set aside.