

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

In the matter of an application for the issue of
a mandate in the nature of a writ of Habeas
Corpus under and in terms of Article 141 of the
Constitution of Sri Lanka.

CA (Habeas Corpus) Application No:

CA/HCA/ 03/22

Kamburuwala Kankanamalage Ramya
Priyanthi Mendis,
No. 101/2, Station Road,
Kelaniya.

Petitioner

Vs.

Don Jesan Pubudu Roshan Kulasekera *alias*
Pubudu Roshan Kulasekera,
No 23/F, Kandy Road,
Dalugama, Kelaniya

Respondent

Don Meneth Rehan Kulasekera,
No 23/F, Kandy Road,
Dalugama, Kelaniya.

(Currently in the custody of the Respondent)

Respondent Corpus

Before: D.N. Samarakoon, J.
B. Sasi Mahendran, J.

Counsel: Thilina Wariyapperuma for the Petitioner
Neville Abeyrathne, PC with Hettiarachchilage Nirmali Jenifa for the 1st
Respondent

Supported

On : 12.12.2022

Written

Submissions: 25.01.2023 (by the Petitioner)

On

Order On : 08.02.2023

B. Sasi Mahendran, J.

The Petitioner, the birth mother of the corpus (the 2nd Respondent), has filed an application in terms of Article 141 of the Constitution for a writ of Habeas Corpus against the 1st Respondent (her husband) directing the production of the Corpus and to release him to the custody of the Petitioner. The Petitioner prayed for the following reliefs:

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- a. Issue notice on the Respondent;
- b. Grant and issue a mandate in the nature of a Writ of Habeas Corpus directing the Respondent, Don Jesan Pubudu Roshan Kulasekera (Alias Pubudu Roshan Kulasekera) to produce the Corpus, Don Meneth Rehan Kulasekera before Your Lordships' Court to be dealt with according to law;
- c. Grant and issue an order to deal with the corpus Don Meneth Rehan Kulasekera according to law.
- d. Grant and issue an Interim Order allowing the Petitioner to have access to the corpus Respondent.

- e. Grant and issue an Interim Order granting the custody of the corpus to or with the Petitioner until final determination of this matter.
- f. Grant and issue an order directing the Respondent Don Jesan Pubudu Roshan Kulasekera (Alias Pubudu Roshan Kulasekera) to hand over the custody of the corpus, Don Meneth Rehan Kulasekera to the Petitioner; or
- g. In the Alternative to prayer (f) abovementioned, Grant and issue an order granting custody of Don Meneth Rehan Kulasekera to or with the Petitioner,
- h. Grant and Issue an Order for the Petitioner to have access to the Corpus Respondent.
- i. Award costs in a sum determined by Your Lordships' Court;
- j. Make such other order/direction, as your Lordship's Court shall seem just and equitable;
- k. Grant such other and further reliefs as to Your Lordships' Court shall seem fit."

Accordingly, in summary, the Petitioner has prayed for the following interim reliefs:

- a. To allow the Petitioner to have access to the corpus;
- b. To grant either sole or joint custody of the corpus to the Petitioner until the final determination of this matter.

The Petitioner and the 1st Respondent got married on the 1st of December 2011. She gave birth to their son (the corpus) on the 11th of October 2012. They resided in an annex in the Respondent's parents' home.

The Petitioner claims that as a result of her in-laws' continuous intrusion or interference in the private and family life of the Petitioner and the 1st Respondent, especially their excessive interference in the upbringing of the corpus, she was forced to leave the matrimonial home on the 3rd of April 2021. She was prevented from taking her son with her.

It must be noted that despite her decision to leave, she is not willing to end the marriage. She does not make any allegation of cruelty or ill treatment against the 1st Respondent. Her grievance is against the 1st Respondent's family for their continuous intrusion in their married life. Although she resorted to making a Police complaint on the 21st of September 2021 no settlement was arrived at.

Despite leaving the matrimonial home, the Petitioner continued to visit the corpus every weekend until 13th March 2022. Yet, she claims, those visits were under the scrutiny and watchful eyes of the 1st Respondent's family. This obstructed her from having meaningful access to the corpus.

The 1st Respondent had instructed the son's school teachers to not permit access to the corpus. Therefore, the Petitioner commenced legal action by filing an action in the District Court of Mahara (bearing no. CU-04-2022) for access and shared custody of the minor child. By an Order dated 29th August 2022 ("P10") that action was dismissed under Section 46(2) of the Civil Procedure Code for non-compliance with Sections 620 and 621 of the Civil Procedure Code, among other reasons. Thereafter, she filed a leave to appeal application.

According to her, the corpus presently does not participate in his usual sporting and extra-curricular activities. This, according to her, is causing a detrimental impact on the health and well-being of the corpus. The corpus has also been absent from class, and not participated in the term tests.

Most recently, the Petitioner was not allowed access to the corpus on his birthday, even for a few hours. The main relief she seeks is custody of the corpus, as per prayers (f) and (g) quoted above.

We are mindful of the second proviso of Article 141 of the Constitution which provides:

Provided further that if provision be made by law for the exercise by any court, of jurisdiction in respect of the custody and control of minor children, then the Court of Appeal, if satisfied that any dispute regarding the custody of any such minor child may more properly be dealt with by such court, direct the parties to make application in that court in respect of the custody of such minor child.

This provision was discussed in the case of Atukorala v. Atukorale [1987] 1 SLR 388. This case dealt with an application, similar to the instant case, praying for custody of two children. The Court refused interim relief and directed the parties to make application to the District Court. Their Lordships held:

“In terms of the Judicature Act, No. 2 of 1978 the Family Court shall have sole and exclusive jurisdiction in respect of matters regarding the custody of minor children. By the judicature (Amendment) Act, No. 71 of 1981, section 5 of the principal enactment is amended and a “District Court” is deemed to be the “Family Court” and it is the District Court that has to exercise original and exclusive jurisdiction regarding the custody of minor children.”

Further:

“... we are satisfied that the dispute regarding the custody of the minor children could properly be dealt with by the District Court, wherein parties making the allegations could be cross-examined in order to test the veracity of the witnesses and for this reason, in terms of Article 141 of the Constitution of the Democratic Socialist Republic of Sri Lanka, we direct the parties to make application to the District Court in respect of the two children concerned”.

Their Lordships refused to grant interim relief because of the allegations of immoral behaviour made by each party against the other; behaviour that would render them unfit to have custody of the minor children. The relevant excerpt reads:

“The petitioner had in her petition made allegations against the 1st respondent regarding his extra marital relationship, his association with other women, and constant quarrels between them regarding his behaviour, whereas, the respondent has stated that the petitioner is not a fit and proper person to have the interim custody of the children as she is guilty of having committed adultery which has been admitted by the petitioner herself to the Police and that if the petitioner be granted the custody of the children it would cause serious harm and damage to the physical safety, health, morals and well-being of the children.”

Therefore, in terms of the Article this Court is not prevented from entertaining an application for habeas corpus concerning custody of minor children. However, when entertaining an application, this Court must make an assessment of the facts to determine whether the District Court would be better equipped to handle the case. One paramount consideration when making that assessment is the best interest of the child.

Accordingly, we direct the Petitioner to make an application to the District Court in respect of the custody arrangements of the corpus. On this ground, we cannot provide any substantive relief prayed for, especially relief seeking full custody of the child.

Interim Relief

We are mindful that both parents are equally entitled to custody of the child unless the Court acting in the capacity of the “Upper Guardian” of the child finds otherwise. We are also mindful of the “best interest” of the child paramount principle enshrined in Section 5(2) of the International Covenant on Civil and Political Rights Act No. 56 of 2007.

The relationship between both parties is not acrimonious, although the documents appear to show that the 1st Respondent is on nonspeaking terms with the Petitioner. There is no allegation against each other regarding immoral conduct (the reason for which interim relief was denied in the case of Atukorale (supra)). There was no suggestion of cruelty or ill treatment by either party towards the corpus either. From what is before us, the issue arose because of meddling relatives.

Considering the best interest of the child, we cannot idly stand by and watch the minor undergo severe mental and physical toll as a result of the state of the relationship of his parents. The child cannot be treated as an object and deprived of parental love and affection, merely because the parents are not on speaking terms. In the absence of a judicial inquiry determining the custody of the child, and the necessary arrangements thereto, which may involve depriving one parent access to the child, to selfishly deprive one parent’s access to the child is frankly repulsive, in a case such as this where there is no allegation of harm, cruelty or ill treatment of the child by either parent. This must not be read to apply generally, as each case must be looked at in its own circumstances.

Therefore, we grant relief to the Petitioner to access the corpus as prayed for in prayer (d), subject to both parties arriving at an interim shared custody arrangement. Both parties are, therefore, directed to decide on a suitable arrangement that allows meaningful access of the Petitioner to the corpus, and submit to this Court within one week from the date of this Order the proposed shared custody arrangement.

The Petitioner, is advised as mentioned above, to commence proceedings in the District Court to make arrangements for the custody of the corpus. The District Court is advised to expeditiously hear and determine this matter, in the best interest of the child.

The Registrar is directed to see that this matter is mentioned one week from the date of this Order.

This application is partly allowed.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL