IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal

1. Jagath Priyantha Epa
2. Deepika Lakmali Kalansooriya
   No.S.G. 12B Gemunupura,
   Ampara

Petitioners

SC Appeal12/2018
SC (Leave to Appeal) Application No: SC/HCCA/232/17/LA
HCCA(Civil Appeal) Ampara:EP/HCCA/AMP/300/2016
DC Ampara: 374/SPL

Vs

1. Ahingsa Sathsarani Epa
   No.3A/1 Samudra,Paragahakele
   Ampara.
2. Janaka Pushpakumara Kalansooriya
3. Wijesinghe Arachchige Wasana Malkanthi
   No.3A/1 Samudra,Paragahakele
   Ampara.

4. Probation Officer
   Probation Office,
   Ampara.

Respondents

AND BETWEEN

1. Jagath Priyantha Epa
2. Deepika Lakmali Kalansooriya
   No.S.G. 12B Gemunupura,
   Ampara

Petitioner-Appellants

Vs

1. Ahingsa Sathsarani Epa
   No.3A/1 Samudra,Paragahakele
   Ampara.
2. Janaka Pushpakumara Kalansooriya
3. Wijesinghe Arachchige Wasana Malkanthi
   No.3A/1 Samudra,Paragahakele
   Ampara.
4. Probation Officer
   Probation Office,
   Ampara.

Respondent-Respondents

AND NOW BETWEEN

1. Janaka Pushpakumara Kalansooriya
2. Wijesinghe Arachchige Wasana Malkanthi
   No.3A/1 Samudra,Paragahakele
   Ampara.

2nd and 3rd Respondent-Respondent-Petitioner-Appellants

Vs

1. Jagath Priyantha Epa
2. Deepika Lakmali Kalansooriya
   No.S.G. 12B Gemunupura,
   Ampara

Petitioner-Appellant-Respondent-Respondents

Ahingsa Sathsarani Epa
No.3A/1 Samudra,Paragahakele
Ampara.

1st Respondent-Respondent-Respondent-Respondent.

Probation Officer

Probation Office,
Ampara.
4th Respondent-Respondent-Respondent-Respondent

Before : Sisira J de Abrew J
Vijith Malalgoda PC J
P.Padman Surasena J

Counsel : M.U.M. Ali Sabry PC with Shamith Fernando and Shehani Alwis for the 2nd and 3rd Respondent-Respondent-Petitioner-Appellants
Anura Gunaratne for the Petitioner-Appellant-Respondent-Respondents

Argued on : 6.3.2019

Written Submission
Tendered on :27.9.2018 by the Petitioner-Appellant-Respondent-Respondents
4.9.2018 by the2nd and 3rd Respondent-Respondent-Petitioner-Appellants

Decided on : 3.4.2019

Sisira J de Abrew J

The Petitioner-Appellant-Respondent-Respondents whose names are Jagath Priyantha Epa and Deepika Lakmali Kalansooriya (hereinafter referred to as the Petitioner-Respondents) filed action in the District Court of Ampara (case No.374/Spl) against the 2nd and 3rd Respondent-Respondent-Petitioner-Appellants whose names are Janaka Pushpa Kumara Kalansooriya and Wijesinghr Arachchige Wasana Malkanthi (hereinafter referred to as the 2nd and 3rd Respondent-Appellants)

praying, inter alia, for a declaration that the Petitioner-Respondents are entitled to the legal and physical custody of their daughter the 1st Respondent-Respondent-Respondent-Respondent in this case (hereinafter referred to as the 1st Respondent-Respondent) whose name is Ahingsha Sathsarani Epa; to give them the legal and physical custody of their daughter, the 1st Respondent- Respondent; and to return the 1st Respondent-Respondent to the Petitioner-Respondents.

The learned District Judge, by his order dated 15.12.2015 dismissing the case of the Petitioner-Respondents, gave the legal and physical custody of the 1st Respondent-Respondent to the 2nd and 3rd Respondent-Appellants. He made further order directing the Registrar General to amend the birth certificate of the 1st Respondent-Respondent by entering the names of the 2nd and 3rd Respondent-Appellants as parents' names. I have to note here that there was no application before the learned District Judge to change names of the parents in the birth certificate. Being aggrieved by the said order of the learned District Judge, the Petitioner-Respondents appealed to the Civil Appellate High Court and the said court by its order dated 6.4.2017, set aside the order of the learned District Judge and allowed the appeal of the Petitioner-Respondents. Being aggrieved by the said order of the Civil Appellate High Court, the 2nd and 3rd Respondent-Appellants have appealed to this court. This court by its order dated 7.2.2018 granted leave to appeal on questions of law stated in paragraphs 24(i) to 24(vi) of the petition of appeal dated 28.4.2017 which are set out below.

1. The said Judgment is contrary to the law and evidence placed before court.
2. Their Lordships of the High Court have failed to understand the nature of the case, and the true scope of the action presented to the District Court.

3. Their Lordships of the High Court have erred in law in failing to understand that the court should decide a case on the basis of 'child's welfare is paramount' when the custody of a minor child is involved.

4. Their Lordships of the High Court have completely disregarded the principle that the best interests the child was paramount.

5. Their Lordships of the High Court have failed to appreciate the analytical order of the learned Additional District Judge in relation to the custody of the 1st respondent minor child.

6. Their Lordships of the High Court have failed to appreciate that the right of the parent may be superseded by consideration of the welfare of the child though the child had not been adopted under the provisions of the Adoption of Children Ordinance by the Petitioners.

Learned President's Counsel for the 2nd and 3rd Respondent-Appellants contended that the learned Judgers of the Civil Appellate High Court in their judgment have failed to consider the welfare of the child (the 1st Respondent- Respondent) which is the most important factor in this case. He therefore submitted that the judgment of the Civil Appellate High Court be set aside. Therefore the most important question that must be considered in this case is whether welfare of the child (the 1st Respondent- Respondent) would be affected if the custody of the child is given to the Petitioner-Respondents who are the natural parents of the child. Deepika Lakmali Kalansooriya (the 2nd Petitioner-Respondent) who is the natural mother of the child is the sister of the 2nd Respondent-Appellant (Janaka Pushpakumara Kalansooriya). The natural mother of the child gave the child to the 2nd and 3rd Respondent-Appellants when the child was about 51/2 months old as she had

problems with her husband. Later when the child was about two years and one month old, the Petitioner-Respondents who are the natural parents of the child filed the present case in the District Court of Ampara seeking the custody of the child. However before this case was filed in the District Court of Ampara, the 2nd and 3rd Respondent-Appellants filed an adoption case in the District Court of Ampara seeking an order to adopt the child when the child was about one year and five months old. But they withdrew the adoption case when the natural parents objected to it.

As I pointed out earlier, the most important question that must be considered in this case is whether welfare of the child (the 1st Respondent- Respondent) would be affected if the custody of the child is given to the Petitioner-Respondents who are the natural parents of the child. Where is the evidence to support this contention? I now advert to this question. When I consider this question it is important to consider the Probation Officer's report. The Probation Officer in his report made observation to the following effect.

"Although the child has not got used to the atmosphere of the natural parents, the natural parents have the capacity and want to look after the child. This observation has been made after conducting a field investigation. The Probation Officer has recommended giving the child to the natural parents. In order for the child to get used to the atmosphere of the natural parents, he has recommended to keep the child at the Child Protection Home Ampara for two weeks; allow the natural parents to be with the child and not to allow the 2nd and 3rd Respondent-Appellants to visit the child." This was the recommendation of the Probation Officer. When the above recommendation of the Probation Officer is considered how can one argue that welfare of the child would be affected if the child is given to the natural parents.

The 2nd Respondent-Appellant admitted in his evidence that he has a maintenance case in the Magistrate Court of Ampara for not paying maintenance to a child. The case has been filed by the mother of the child as he was not maintaining the child. As a result of relationship that he (the 2nd Respondent-Appellant) had with a woman, a child was born and it is this woman who filed the maintenance case in the Magistrate Court of Ampara. The 2nd Respondent-Appellant denied the paternity of the child but the DNA test proved that he is the father of the child. This was the evidence of the 2nd Respondent-Appellant in this case. Thus it is seen that the 2nd Respondent-Appellant failed to maintain his own child and the mother of the child had to invoke jurisdiction of court to get money to maintain the child. If the 2nd Respondent-Appellant did not maintain his own child, would he maintain a child of another woman who is the1st Respondent-Respondent in this case? I doubt. Is it safe to give custody of a female child to the 2nd and 3rd Respondent-Appellants when the 2nd Respondent-Appellant enjoys this type of reputation? In this connection it is relevant to consider the judicial decision in the case of M.Jeyaraman Vs T.Jeyaraman [1999] 1 SLR 113 wherin Thilakawardena J at page 116 (judgment of the Court of Appeal) observed as follows.

> *"In 1968, in the decision of Fernando (70 NLR 534) the Supreme Court held that both the modern Roman Dutch law and English law were agreed on the principle that the interests of the child were paramount. The court declared that the modern Roman Dutch law had moved away from rules directed at penalising the guilty spouse, towards the recognition of the predominant interest of the child.*

> *Applying the principle that the interests of the child are paramount consideration, the court ruled that the custody of very young children would ordinarily be given to the mother."*

In Precla W Fernnado Vs Dudley W Fernnado 70 NLR 534 Weramanthry J held as follows.

> *In all questions of custody of children the interests of the children stand paramount. Questions of matrimonial guilt or innocence of a parent would not therefore be the sole determining factors in questions of custody, though they are not factors which will be ignored. The interests of the children being paramount, the rule that the custody of very young children ought ordinarily to be given to their mother ought not to be lightly departed from.*

According to the principles laid down in the above judicial decisions, custody of very young children ought to be given to their mother. If that is so, how can this court give custody of the child (the 1st Respondent-Respondent) to a couple who are not the natural parents of the child?

In Fernando Vs Fernando 58 NLR 262 at page 263 this court observed as follows.

> *"I need hardly state any reasons for forming the opinion that it would be detrimental to the life and health and even of the morals of such a young child if that child is forcefully separated from her mother and compelled to live, not even in her father's custody, but under the care of an elderly relative to whom she is not bound by any natural ties. So long as the mother is shown to be fit to care for the child, it is a natural right of the child that she should enjoy the advantage of her mother's care and not be deprived of that advantage capriciously."*

Mother's love to her child is something that can be explained by words even by the mother. Thus no court would lightly deprive the mother of such love. In the present case, the 2nd Petitioner-Respondent is the mother of four children. Her 4th child is the 1st Respondent- Respondent. According to her evidence, she looks after her three children well. One child has sat for the scholarship examination and the other child will be sitting for the scholarship examination in the coming year. Thus it shows that the natural mother of the child is a fit person to look after her children. In the present case both the natural mother and the natural father request the custody of the child.

Learned President's Counsel for the 2nd and 3rd Respondent-Appellants highly relied on the judicial decision in the case of G. Premawathi Vs A. Kudalugoda 75 NLR 398 Wherein Weeramanthry J observed as follows.

> *Where the law governing the right to the custody of an illegitimate child is the Roman-Dutch law, the mother of the child is the natural guardian and is entitled as such to the custody of the child as against a stranger. If, however, the interests of the child would be gravely affected by an interference with its present custody, the claim of the stranger to custody would be preferred to the claim by the mother.*

It has to be noted here that the child in the above case was an illegitimate child. In the present case the child is a legitimate child and that both natural parents are asking the custody of the child. In my view, the facts of the above case are different from the facts of the present case. Therefore I hold that the judicial decision in G. Premawathi Vs A. Kudalugoda (supra) has no application to the present case.

In Ran Menika Vs Paynter 34 NLR 127 Drieberg J held as follows.

> *The Supreme 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 to another. The Court must be satisfied that it is essential to its safety or welfare that the rights of the parent should be superseded or interfered with.*

In the case of D Endoris Vs D Kiripetta 73 NLR 20 de Kretser J held as follows.

> *"Acourt 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."*

de Kretser J at page 21 further held as follows.

> *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 the case of D. Endoris Vs D. Kiripetta (supra), the mother of the child died when the child was one month old. Father of the child gave the child to his sister and her husband to look after the infant child as he had no one else. When the child was eight years old, the father made an application to court for return of the custody of the child. The Magistrate refused the application of the father. In appeal de Kretser J setting aside the order of the Magistrate gave custody of the child to the father. de Kretser at page 22 observed as follows.

> *"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."*

From the evidence of the present case, it cannot be concluded that the child's (the 1st Respondent-Respondent) welfare would be affected if the custody of the child is given to her natural parents. There is also no evidence to suggest that the child would be brought up better and would have a better chance in life if she is given to the 2nd and 3rd Respondent-Respondent. Assuming without conceding that the child would be brought up better if the custody of the child is given to the 2nd and 3rd Respondent-Appellants, court cannot, applying the principles laid down in above legal literature, deprive natural parents of the custody of the child. At this juncture I am mindful of the fact that I would be giving the custody of the 1st Respondent-Respondent who is a girl to the 2nd and 3rd Respondent-Respondent if I affirm the order of the learned District Judge.

When I consider all the above matters, I hold that the welfare of the child would not be affected if the custody of the child is given to the natural parents and that the child would be brought up better if the custody of the child is given to the 2nd and 3rd Respondent-Appellants.

The Petitioner-Respondents are the natural parents of the child. Thus they have the legal right to keep the child in their custody. No argument can be brought forward to deprive the said legal right of the natural parents. The 2nd and 3rd Respondent-Appellants do not have any adoption order issued by a court. The adoption case filed by them was withdrawn when the natural parents objected to the said adoption case.

Thus their (the 2nd and 3rd Respondent-Appellants) custody of the child is not legal. They cannot take up the position that since the natural mother handed over the child to them, they have the lawful custody of the child. The principle that is to say that 'mere delivery of a child by its natural parent to a third party does not invest the transaction with legal consequences and that 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' enunciated by de Kretser J in the case of D Endoris Vs D Kiripetta (supra) operates against such contention.

For all the aforementioned reasons, I hold that learned Judges of the Civil Appellate High Court were right when they set aside the order of the learned District Judge and allowed the appeal of the Petitioner-Respondents. For the above reasons I answer the above questions of law in the negative.

For all the aforementioned reasons, I affirm the judgment of the Civil Appellate High Court dated 6.4.2017 and dismiss this appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

V.K. Malalgoda PC J

I agree.

Judge of the Supreme Court.

P. Padman Surasena

I agree.

Judge of the Supreme Court.