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

In the matter of an application for writ in the nature of Habeas Corpus under Article 141 of the Constitution read with section 5 and 24 of the Judicature Act No. 2 of 1978 as amended by Act No. 71 of 1981.

C.A.(HB) Application No.03/2017

Karunkalage Chandana Silva
490/A, Ihala Biyanwila,
Kadawatha.
Petitioner

Vs.

1. N Sudharshani
2. Darveena

Both of 52/23, Badulla Road,
Haputale.
Respondents

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI, J.

COUNSEL : W. Dayaratne P.C. with R. Jayawardena for the Petitioner.

Dharshana Weraduwage for the 1st respondent.

ARGUED ON : 07th May, 2019

ORDER ON : 28th June, 2019

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ACHALA WENGAPPULI, J.

This is an application by the Petitioner seeking issuance of a mandate in the nature of writ of Habeas Corpus against the 1st Respondent to bring the 2nd Respondent, a girl child of seven years of age, before this Court. The Petitioner states that she is the daughter of the 1st Respondent. The Petitioner also prayed for an order from this Court which would permit him to make an application in the District Court of *Bandarawela* to inquire into the dispute with regard to the illegal detention of the 2nd Respondent by the 1st Respondent and to make order granting access to him to see the 2nd Respondent.

It is stated by the Petitioner that he met the 1st Respondent, who already had a male child elder to the 2nd Respondent, in Colombo during 2008 when his services, as a three wheeler driver, was obtained by her. The

1st Respondent's marriage to her husband was already "estranged". At that time, her husband was employed in a foreign country and the Petitioner's regular interaction with the 1st Respondent transformed their relationship in to an "affair" and "... as a result of the said affair the 2nd Respondent above named was born on 25th April 2010." He believed that he is the "natural father" of the 2nd Respondent. After the 2nd Respondent's birth, the Petitioner claimed that he had looked after the welfare of the 1st Respondent and her two children. The Petitioner had then left Sri Lanka for foreign employment in 2015 and left his ATM card with the 1st Respondent to facilitate him to remit some of his earnings for their maintenance. Whilst engaged in his employment overseas, the Petitioner had maintained his relationship with the 1st Respondent as he was "very attached to his daughter", the 2nd Respondent.

Upon his return to Sri Lanka in March 2016, the Petitioner was told by the 1st Respondent that she did not wish to continue their "affair". She returned his ATM card and already had shifted her residence out of Colombo and thereby deprived the Petitioner of any access to the 2nd Respondent.

The 1st Respondent filed her objections resisting the application of the Petitioner and moved Court to dismiss it *in limine*. She denied the claim of paternity of the Petitioner and stated that her husband was in Sri Lanka during the period May to July 2009 and she became pregnant with the 2nd Respondent during this time. The 2nd Respondent was born on 25th April 2010 at a private hospital in Colombo and it was her husband who funded her hospital bill of Rs. 150,150.00. The 1st Respondent with her two

children visited her husband in Dhabi, United Arab Emirates, where he was employed in 2012.

The 1st Respondent's description of the relationship between her and the Petitioner is limited only to obtain his services frequently for the transportation needs of her family. In addition, the Petitioner was helpful in her interaction with the members of *Modera* neighbourhood since her familiarity in the Sinhala language was limited due to her up country Tamil origin.

In explaining the reason for the Petitioner's act of leaving his ATM card in her possession, the 1st Respondent stated that he was in need of funding for his air ticket upon his request, she had pawned some items of jewellery to give around Rs. 45,000.00 to him with the promise of repayment with his salary, which undertaking he fulfilled during the subsequent period. In addition, a sum of Rs. 60,000.00 was also paid to another person from whom the Petitioner had obtained some financial assistance. Once the Petitioner returned to the island, the ATM card was duly returned to him.

As a preliminary objection to the application of the Petitioner, the 1st Respondent states that there exists an equally effective alternative remedy to the Petitioner by way of Section 24(3) of the Judicature Act No. 2 of 1978 as amended.

The Petitioner, in his counter affidavit, denied the position taken up by the 1st Respondent and tendered copies of the remittances he made to the account on which the ATM card was issued.

It is in this factual backdrop that this Court must venture to consider the application of the Petitioner.

The application of the Petitioner is based on the premise that he is the natural father of the 2nd Respondent. He does not dispute the fact that the marriage of the mother of the 2nd Respondent to her husband remained legally valid even at the time of his application to this Court. The marriage certificate of the 1st Respondent is tendered as 'X3' while the birth certificates of both her children are marked as 'X4' and 'X7' respectively. Clearly the Petitioner is a stranger to the contract of marriage that exists between the 1st Respondent and her husband. With his claim of paternity, the Petitioner seeks to challenge the legitimacy of the 2nd Respondent and the presumption under Section 112 of the Evidence Ordinance in her favour.

A similar situation arose for consideration of Court in ***Ubeyratne v Karunawathie and Others*** (1999) 3 Sri L.R. 16 except for the motive of institution of action. This was a matter where the Defendant-Appellant, a third party, claimed that one *Gunaratne* was separated from his legal wife (the 1st Plaintiff-Respondent) and her three children (2nd to 4th Plaintiff-Respondents) who were born subsequent to the said separation are therefore illegitimate. It is contested by the Defendant-Appellant that as such they are not entitled to any rights over the estate of said *Gunaratne.*

In this judgment, their Lordships have identified the dispute before Court as an instance where *"... a third party is attempting to deny paternity of the children and question the legitimacy of children born during the continuance of a valid marriage"* as the Petitioner before us did in the instant matter.

In consideration of this issue, *Jayawickrama* J states in the said judgment;

> *" ... the question of legitimacy and paternity should be decided between the parties who are directly affected by such a question. A third party may only lead evidence of such facts elicited in a contest between the parties in a Court of law regarding such matter. A third party who is not a party to a contract of marriage when he files an action in a Court of law to canvass the validity of a marriage or the legitimacy or paternity of the children born during that valid marriage is trying to import his opinion on what had taken place. The question of validity of a marriage, paternity and legitimacy of the children are personal matters to be decided by a Court of competent jurisdiction amidst the parties affected by the marital contract. A third party should not have any legal right to attack the validity of such a contract of marriage nor its consequences. Of course, a third party may make use of the facts proving the relationship that existed between the contracting parties, provided they are relevant to the matters in issue."*

His Lordship further stated;

> *"... in law, the marriage between the Plaintiff Respondent and her husband continued to be a valid marriage until her husband's death. Therefore, the*

children born during the continuance of that valid marriage are presumed legitimate children. In deciding such facts, a Court will always consider what is best in the interest and welfare of the children. In such a situation the mere denial of paternity by the husband will not make the children illegitimate. In the instant case there is no proof of the dissolution of the marriage between the Plaintiff Respondent and her husband. Hence, the presumption under Section 112 of the Evidence Ordinance is applicable to the children born to such marriage ... as the 2nd to 4th Plaintiff Respondents were born during the continuation of a valid marriage between the parents mentioned in their respective birth certificates that fact is to be deemed as conclusive proof that they are the legitimate children of their putative father. This is a statutory recognition of the principle underlying the maxim 'Pater is est quem nuptiae demonstrant', which is recognised both Roman Dutch and English law . . . The question of no access in Section 112 of the Evidence Ordinance should be raised and canvassed only by a disputing father, not by a third party."

In applying the principles of law that had been enunciated in the said judgment, the Petitioner cannot be allowed to challenge the paternity of the 2nd Respondent who was born to the 1st Respondent during a legally valid marriage. The 2nd Respondent is clearly entitled to the protection of her presumed paternity as reflected in her birth certificate under Section

112 of the Evidence Ordinance. Even in relation to an illegitimate child, a third party cannot generally override the natural rights of its mother.

The judgment of ***Premawathie v Kudalugoda Arachchi*** 75 N.L.R. 398, deals with this point. *Weeramantry* J, having stated that *"... the principles of the Roman Dutch law it is clear that the mother of an illegitimate child is the natural guardian and entitled as such to the custody of the child as against a stranger"* also observed that *" ... the overriding importance of the welfare of the child even in cases where the natural guardian's claim is resisted by a stranger".*

As such, there is no acceptable legal basis on which the Petitioner could rely on, in claiming the relief that he had prayed for. The judgment of ***Atukorala v Atukorala and Others*** (1987) 1 Sri L.R. 388 that had been relied upon by the Petitioner in support of his application is clearly distinguishable from the fact that it concerns a dispute regarding the custody of minor children between husband and wife and not with a third party. The considerations that are applied in relation to conducting DNA testing to determine paternity in ***Weerasinghe v Jayasinghe*** (2007) 2 Sri L.R. 50 also cannot be applied to the matter before us since it is a matter where paternity is disputed in an application for maintenance.

Proviso to Article 141 enables this Court, if it is satisfied that any dispute regarding the custody of a minor child may more properly be dealt by a Court, to which the jurisdiction in respect of the custody and control of minor children is invested by provisions of law and then it could direct the parties to make application to such Court.

The Petitioner has failed to satisfy us that there exists a legally recognizable dispute regarding the custody of the 2nd Respondent, a minor child.

Therefore, we are of the view that the application of the Petitioner had been made without a proper legal basis. His application is accordingly refused.

The petition of the petitioner is dismissed with costs fixed at Rs. 25, 000 /=.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL