
(1913) 12 CAL CK 0010
In the Calcutta High Court

Borthwick

APPELLANT

Vs

Borthwick

RESPONDENT

Date of Decision : 16-12-1913

Acts Referred:

Divorce Act, 1869 — Section 17
Penal Code, 1860 (IPC) — Section 363

Citation : AIR 1914 Cal 609 : (1914) ILR (Cal) 714

Hon'ble Judges : Imam, J;Chapman, J

Bench : Division Bench

Judgement

Imam and Chapman, JJ.—The petitioner, Mrs. Anne Elizabeth Borthwick, was arrested on the 18th October, 1913, in execution of a warrant issued by the Subdivisional Magistrate of Dinapore, the charge against her being that she had kidnapped her child from the lawful guardianship of the father, Mr. Herbert Charles Borthwick. It appears that the parties were married in 1905. Eight years later Mr. Borthwick filed a petition for divorce in the Court of the District Judge, Patna, on the ground of adultery and obtained a decree nisi on the 18th August, 1913. In that decree it was directed that Mrs. Borthwick do deliver up to Mr. Borthwick the son born of the marriage. Subsequently to the decree Mr. Borthwick, without the assistance of the Court, obtained custody of the boy, On the 10th October, 1913, the present petitioner Mrs. Borthwick, removed the child from Mr. Borthwick's house. Mr. Borthwick informed the police, and after enquiry the present case was instituted upon a police report charging the petitioner, Mrs. Borthwick, u/s 363 of the Indian Penal Code, with the offence of kidnapping the child from the lawful guardianship of Mr. Borthwick.

2. The decree nisi for divorce, dated the 18th August, 1918, was sent by the District Judge to the High Court for confirmation. The decree has not yet been unformed by the High Court, and in fact the minimum prescribed by Section 17 of the Indian Divorce Act has not yet expired. The parties are, therefore, still man and wife Warter v. Warter (1890) L.R. 15 P.D. 152.

3. The case against the petitioner, however, is that her act of removing the child from Mr. Borthwick's custody in October amounted to an offence by reason of the order of the District Judge in August to the effect that Mr. Borthwick should have the custody of the child. The question for decision is whether the order by the District Judge was of immediate effect or whether it was merely an order nisi subject to confirmation by the High Court and is, therefore, not yet in force. The material portion of the District Judge's Judgement is as follows. "The following decree is accordingly made (a) that the marriage be dissolved, (b) that the respondent Anne Borthwick do deliver up to the petitioner the son born of the marriage... (c) that the co-respondent do pay to the petitioner Rs. 300 as the costs of this suit.... It is ordered that the above decree be forwarded, u/s 17 of Act IV of 1869, to the High "Court for confirmation." The order for custody of the child formed part of the decree, and we interpret the decree to mean that the order was not to be of effect until confirmed by the High Court. There has been no such confirmation.

4. We observe that Mr. Borthwick's petition for divorce contained no prayer for the custody of the child, or any notice that application for custody would be made. The divorce proceedings were ex parts. It does not even appear that the custody of the child was asked for at the hearing. Now, according to the practice in England if the custody of the child is not prayed for in the petition, it is necessary to file a separate petition for that purpose, which must be filed and served in the same way as an ordinary petition. A similar practice prevails in this Court: *Ledlie v. Ledlie* ILR(1891) Calc. 473. Mrs. Borthwick was never served with any notice to inform her that application for custody of the child would be made, and she had no opportunity of showing cause why such an order should not be made. We cannot think that the District Judge can have intended to make such an order absolute without notice to her. This confirms us in our view that the order for custody of the child was not intended to be an order absolute.

5. Where the custody of the children is asked for at the hearing of a petition for divorce, the order for such custody forms part of the decree nisi (*Browne and Powles on Divorce*, 7th Edn., p. 413), and is not absolute until confirmed. No doubt it is open to a District Judge to make an ad interim order for custody at any time while a case is pending, but no application for ad interim order was made in the present case, and we are satisfied that the order that was made was not intended to be an ad interim order. It was an order nisi without legal effect until confirmed by the High Court. It has not been so confirmed.

6. This being so, Mrs. Borthwick committed no offence punishable under the Penal Code when she removed the boy from Mr. Borthwick's custody. The Rule is made absolute. We direct that the proceedings against the petitioner be stayed.