

(1891) 04 CAL CK 0008
In the Calcutta High Court

Ledlie		APPELLANT
	Vs	
Ledlie		RESPONDENT

Date of Decision : 23-04-1891

Acts Referred:

Divorce Act, 1869 — Section 42

Citation : (1891) ILR (Cal) 473

Hon'ble Judges : Wilson, J

Bench : Single Bench

Judgement

Wilson, J.—Where the petitioner in a suit for judicial separation desires an order as to the custody of the children of the marriage, it is clear, I think, that Section 42 of the Indian Divorce Act contemplates that, after the decree has been made, the intervention of the Court shall be sought by petition. Generally speaking, the Court will not act ex parte, but the petition must be served, or in some sufficient form notice must be given in order to show the respondent what the Court is to be asked to do. On the other hand, it has been held in England that, if that notice has been given in an earlier stage of the case, then notice of the petition itself need not be given. In the case of *Horne v. Horne* 30 L.J.P. & M. 200 a decree nisi for dissolution of marriage had been made, and, at the time of applying to have the decree nisi made absolute, counsel for the petitioner asked the Court whether notice ought to be given to the respondent of an intended application to the Court with respect to settled property, and added that a copy of the petition for dissolution of the marriage which prayed for such an order, had been served on the respondent, but he had not entered an appearance. On that the Judge ordinary said, "as a copy of the petition praying for an order as to the settled property was served on the respondent, and he has not entered an appearance, I think no notice of the application need be given. If the petition had not contained such a prayer, notice to the respondent would have been necessary". In a note to the same case is cited the case of *Wilkinson v. Wilkinson*, which is to this effect:

Where the respondent was served with a petition for dissolution of marriage containing a prayer for the custody of children, but did not appear on making the decree absolute, the Court gave the custody of the children to the petitioner, though no notice of the application had been given to the respondent.

2. In the present case the original petition for judicial separation did not actually contain a formal prayer for the custody of the child; but it did what I think was more correct as being in accordance with Section 42. The petition warned the respondent that this application would be made; for what it says in paragraph 28 is this: "That your petitioner is desirous by reason of the matters hereinbefore stated to be enabled to live apart from her husband and to have the custody of her child". This is, I think, a sufficient warning that she intended to apply at the proper time for the custody of the child. And that being so, I think, under the authority of the English cases, notice is not necessary of this application. This is strengthened by the fact that the respondent in his answer deals with paragraph 28, and is also strengthened by the application for ad interim custody of the child, in which she said: "Your petitioner, therefore, humbly prays your Lordship for an order that the respondent do deliver the said child into her custody, or for an order that the said child be placed under the protection of this Honourable Court pendente lite in the custody of a guardian to be appointed by this Honourable Court, and that your petitioner be allowed full and free access to the said child". The result is that I think the petitioner need not give any further notice. On the merits she is clearly entitled to the custody of the child. The costs of this application will be costs in the cause.