

MATRIMONIAL JURISDICTION.

Before Mr. Justice Fletcher.

BOMWETSCH

v.

BOMWETSCH.*

1908

Feb. 19.

Marriage, nullity of—Deceased wife's sister—Illegitimate child—Custody of the child—Maintenance.

Where a decree for nullity of marriage had been made on the ground that the petitioner was the sister of the deceased wife of the respondent:

Held, that the child was the illegitimate child of the petitioner and that she was entitled, unless a strong case was made out to the contrary, to the custody of the child.

Maintenance for a child may be rightly and properly spent for the purpose of maintaining a joint home for the infant and his or her parent, and an account of the amount allowed for maintenance will not be ordered so long as the infant is properly maintained.

APPLICATION.

A decree for nullity of marriage was made on the 16th May 1907 on the petition of Isabel Edua Bomwetsch, on the ground that the petitioner was the sister of the deceased wife of the respondent, G. S. Bomwetsch. A reference was directed to the Registrar to enquire and report what would be a fit and proper amount to be allowed for the maintenance of the infant daughter of the petitioner, and the Registrar reported that Rs. 75 a month during the hot weather and Rs. 50 a month during the cold weather would be a proper allowance for the maintenance of the infant; and the petitioner was given the custody of the infant.

The respondent now applied to vary that order on the ground that the petitioner was not a fit and proper person to have the custody of the child.

Mr. Mehta, for the respondent. Under s. 44 of the Indian Divorce Act the Court has jurisdiction in the case of nullity of marriage to make orders with respect to the custody of minor

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children. The only point the Court will consider is—what will be best for the benefit of the child? The mother is an unfit and improper person to have custody of the infant, and the father is financially in a better position: see *Witt v. Witt*(1) and *Barnardo v. McHugh*(2).

[*Fletcher J.* referred to *Gordon v. Gordon*(3).]

Mr. Godfrey (*Mr. Gregory* with him), for the petitioner. Inasmuch as the marriage was declared null and void *ab initio*, the child must be considered in law illegitimate. It follows that the natural right to the custody of the infant lies with the mother: *Barnardo v. McHugh*(2) and *In re Dareys*(4).

Mr. Mehta, in reply.

FLETCHER J. This is an application made by the respondent, in a suit brought in this Court for nullity of marriage to have the custody of the child of the petitioner. A decree for nullity was made in May last year on the petition of the petitioner on the ground that the petitioner was the sister of the deceased wife of the respondent.

A reference was directed in chambers to the Registrar to enquire and report what would be a fit and proper amount to be allowed for the maintenance of the child of the petitioner, and the Registrar reported that Rs. 75 a month during the hot weather and Rs. 50 a month during the cold weather would be a proper allowance for the maintenance of the infant, and the petitioner was given the custody of the infant.

The respondent now applies to vary that order on the ground that the petitioner is not a fit and proper person to have the custody of the child. It is to be noticed in the first instance that this is not a case in which the Court made a declaration of nullity of a marriage which was voidable. The marriage in the present case is one which was void *ab initio*.

The child in law is the illegitimate child of the petitioner and she is entitled, unless a strong case is made out to the contrary, to the custody of the child.

(1) [1891] P. 165.

(2) [1891] A. C. 395, 399.

(3) [1903] P. 92.

(4) (1860) 11 Ir. C. L. 298.

What is the evidence produced on the present application? The only material allegation is the one made in the affidavit of Mrs. Fooks that in April 1906 the petitioner misconducted herself with a Mr. Musgrove, but that was some time before the order for the custody of the child was made. In my opinion, no evidence has been given that since the order giving the petitioner the custody of the child and the order allowing maintenance, the petitioner has misconducted herself.

The real point seems to be that the lady is practically without any means and naturally the maintenance is spent by her in maintaining a home for herself and her child. The respondent seems to object to this and he wishes that the maintenance should be solely spent for the child. That is not a good ground of objection. It has been decided over and over again in the Chancery Courts that maintenance for a child may be rightly and properly spent for the purpose of maintaining a joint home for the infant and his or her parent, and an account of the amount allowed for maintenance is not ordered so long as the infant is properly maintained. It seems to me that no grounds have been made out for re-opening the question as to the custody of the infant. I, therefore, dismiss this application with costs.

Application refused.

Attorneys for the petitioner: *Carruthers & Co.*

Attorney for the respondent: *K. M. Rukhā.*

J. C.

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