

Hema Vs. Parthasarathy

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Court : Chennai

Decided On : Jul-31-2002

Reported in : I(2003)DMC562; (2002)3MLJ319

Judge : A.S. Venkatachalamoorthy, J.

Acts : Code of Civil Procedure (CPC) - Sections 115

Appeal No. : C.R.P.(PD) No. 377 of 2002 and C.M.P. No. 3273 of 2002

Appellant : Hema

Respondent : Parthasarathy

Advocate for Def. : R. Subramanian, Amicus Curiae

Advocate for Pet/Ap. : K.S. Raman, Adv.

Disposition : Revision petition allowed

Judgement :

ORDER

A.S. Venkatachalamoorthy, J.

1. The respondent herein filed H.M.O.P.60 of 1997 on the file of Sub Court, Kancheepuram praying the Court to grant a decree dissolving the marriage solemnized between him and the petitioner herein.

2. The Petitioner herein filed I.A.453 of 1999 praying the court to pass an order granting interim maintenance for herself and minor son and also for litigation expenses. This application was resisted by the respondent. However, the learned Subordinate Judge, by an order dated 21.6.1999 granted interim maintenance from the period August 1997 till June, 1999 at the rate of Rs.600/- per month i.e, to say totally a sum of Rs.13,800/-. A sum of Rs.3,000/- was also granted as litigation expenses. Being aggrieved by the said order, respondent herein filed an appeal in C.M.A.4 of 1999 before the Additional District -cum-Chief Judicial Magistrate Court, Chengalpet. The appellate Court by a Judgment dated 5.1.2000, dismissed the appeal.

3. As the respondent even thereafter failed to make the payment, petitioner filed I.A.499 of 2000 in H.M.O.P.60 of 1997 on the file of Sub Court, Kancheepuram under Section 151 Code of Civil Procedure praying the Court to dismiss H.M.O.P.No.60 of 1997 for non-compliance of order passed in I.A.453 of 1999. In the affidavit filed in support of the application, petitioner has stated that she does not have sufficient funds to support herself and minor child and that they have been skipping meals now and then and they do not have proper clothing. According to her, even interim maintenance for the past period awarded, viz., Rs.13,800/- and a sum of Rs.3,000/- as litigation expenses have not been paid.

4. Respondent herein inter alia filed a counter statement wherein he has simply denied each and every averments made by the petitioner. According to the respondent, in I.A.453 of 1999, the Court has only directed her to take out separate proceeding for recovery of the said amount in the event of failure to pay the amount by the respondent. The respondent would reiterate his stand contending that he has got no source of income and he is not possessing any movable or immovable property and in fact he himself is depending on his aged father. A further contention is raised that the petitioner on earlier occasion filed a petition under Section 151 of Code of Civil Procedure and Court did not pass any order and that being so, a second petition by the petitioner for the very same relief is not maintainable. According to the respondent, inasmuch as the Court itself has clearly directed the petitioner to take out separate execution proceedings in the event of failure to pay the past interim maintenance, questioning of dismissing the

main original petition would not arise.

5. The learned Subordinate Judge, after considering the matter, dismissed the said application holding that as per the orders already passed in I.A.453 of 1999, a liberty is given to the petitioner to file separate petition, the present petition is not maintainable in law.

6. The question that arises for consideration is when there is no positive provision in the Act to the effect that in the event of husband, in this case respondent, failing to pay interim maintenance and litigation expenses awarded by the Court, is it open to the Court to dismiss the original petition or strike out the defence invoking its power under Section 151 of Code of Civil Procedure

7. Let the Court proceed to refer to some rulings and examine the question in the light of those rulings.

(a) In *Raju v. Devaki*, 1988 1 LW 44, this Court had occasion to consider a question namely when a person is directed to pay certain amount as interim maintenance pending proceedings, disobeys the same, can the Court refrain from proceeding with the trial. In that case the Court observed as under:

'It has been held by this Court that S. 151, C.P.C. could be invoked to stay the trial of an O.P., in which the petitioner fails to pay maintenance granted under S. 24 of the Hindu Marriage Act. Therefore, when a spouse fails to pay interim maintenance as ordered by Court, the court has no other alternative than to stay the trial of the O.P.' (b) The next ruling that can be referred to is the one reported in 1989 2 LW 423 (*Narayana Nadar v. Jayakodi Ammal*). In that case, the wife filed a petition praying the Court to grant a relief of restitution of conjugal rights. In the said original petition, an application was filed praying for interim alimony and so also litigation expenses. The husband resisted the same but the Court ordered interim alimony so also some amount for litigation expenses. The aggrieved husband preferred a revision, but however the same was dismissed. As the amount awarded by way of interim alimony, etc., was not paid, the wife filed an application under Section 151 of Code of Civil Procedure praying for striking out the defence in the original petition. The court accepted the request and passed an

order striking the defence of the husband. The correctness of the same was questioned by way of revision and while disposing of the said revision, the learned single Judge of this Court observed as under:

'... There is no specific provision in the Act to the effect that non-compliance with an order passed by the Court in the course of matrimonial proceedings, would enable the other party to seek the striking out of the defence of the defaulting party. Further, under S. 151, Code of Civil Procedure, which is indisputably applicable to proceedings under the Act, the Court may exercise its powers for serving the ends of justice or for prevention of the abuse of the process of Court. In this case, it may be that the petitioner had not done or failed to do anything, amounting to the abuse of the process of Court. Even so, in order to serve the ends of justice, particularly in matters relating to matrimony, it cannot be regarded that the Court is helpless when a party flouts and disobeys an order of Court for payment of interim alimony and litigation expenses and thereby puts the other party at a disadvantage in the matter of the conduct of the proceedings, necessarily leading to a delay in the conclusion of such proceedings. Under those circumstances, the order of striking out the defence of the defaulting party, would subserve the ends of justice and only such an order would enable the fulfilment of the objects of the Act of preventing inequity in the matter of conduct of the matrimonial proceedings and securing speedy relief as well. It is found that the respondent had initiated proceedings for restitution of conjugal rights and by the non-payment of the interim alimony and litigation expenses by the petitioner, if the proceedings are to be stayed till the amount is realised by execution, many years would roll by in the interval and in the absence of any effective method of stopping ageing process of the parties, the relief that may ultimately be made available, may become illusory or even futile. It seems to me that the only method by which a person opposing matrimonial proceedings under the Act, could be compelled to further the objects of the Act and to secure speedy disposal of the matrimonial causes and reliefs prayed for therein, is by striking out the defence of the defaulting party. ...' (c) The Andhra Pradesh High Court in *Atreyapurapu Venkata Subba Rao v. Atreyapurapu Venkata Shyamala*, , had occasion to consider the question whether for the default to pay interim alimony, the defence of the husband can be struck of. The Court answered in the affirmative and ruled thus,

'I am of the view that to secure the ends of justice and to prevent the abuse of the Court's process, striking out the defence can be resorted to under Section 151, CPC. The intention of the petitioner is to drive the respondent to take recourse to execution under Section 28 and to stay the main proceedings. If execution has to be resorted to staying the main proceedings, the petitioner would be achieving the object of protracting the proceedings. That would also be encouraging the parties to flout the order of the Court and to delay the proceedings which are expected to be expeditious. In such circumstances, striking out the defence of such a defaulting party would be a proper order and the trial Court was right in passing the said order.' (d) The High Court of Kerala in *Mangalam v. P.S. Krishna Pillai*, , took a similar view. In that case, the Court observed that the trial Court had inherent jurisdiction under Section 151 of Code of Civil Procedure to give effect to its order and prevent the abuse of the process of the Court by striking off the defence, even if there is no such provision in the Hindu Marriage Act.

(e) A learned single Judge of Orissa High Court also took a similar view in *Ghasiram Das v. Srimati Arundhati Das and another*, . In fact, the Court referred to the earlier ruling of the Delhi High Court in *Smt. Anuradha v. Santosh Nath Channa*, .

(f) In *Vanmala v. Maroti Sambhaji Hatkar*, , a learned single Judge of Bombay High Court pointed out the difficulties in the wife in executing the order in the following words,

'The remedy of execution is not an easy remedy. The execution does not at all provide short cuts to the destination. The difficulties of a successful litigant begin when he succeeds to obtain an order in his favour. Driving out a penniless wife to initiate a separate execution proceedings for the purpose of recovery of arrears of interim alimony and expenses of the proceedings frustrates the very purpose and spirit of Section 24 of the Hindu Marriage Act. The approach adopted by the learned Matrimonial Court makes the very purpose of Section 24 of the Hindu Marriage Act redundant and nugatory... A Court can, in exercise of its powers under Section 151 of the Civil Procedure Code, pass an order of staying the petition of divorce if it is found that the husband deliberately and contumaciously

flouts the order of the Court. Similarly, if the erring party is the respondent, the Court can strike off the defence of such a party if it is found that the respondent is deliberately flouting the orders of the Court. .. In befitting situation and in appropriate circumstance, the Matrimonial Court should not hesitate to invoke the inherent powers under Section 151 of the Civil Procedure Code in the matter of implementation of order with regard to interim alimony and the expenses of the litigation by staying the proceedings filed under the Hindu Marriage Act for non-compliance of the order passed under Section 24 of the aforesaid Act and by striking off the pleadings of defaulting party.'

(g) In *Kannamma v. Y. Subramaniam*, 1997 1 L W 637, a learned single Judge of this Court dealing with a similar question, ruled as under,

'... If the order of the court below is not obeyed, petitioner herein (wife) is entitled to initiate proceedings against the husband for disobedience of orders of Court. At the same time, the lower court also will consider whether it should continue to stay the trial or whether it should dispose of the main petition by dismissing the same for non-compliance of the order. If the Court feels that some more time has to be given for compliance of the Order, this order shall not stand in the way. In such a case, further proceedings of the main petition shall stand stayed. Even during the period of stay, respondent is bound to pay maintenance to both the children and alimony to the petitioner at the rates fixed by the earlier order of the court below. If the court below is inclined to grant some time for the husband to make the payment, it should not adjourn the main H.M.O.P. indefinitely, and it is made clear that whenever the trial begins, the entire amount due as on that date must have been paid.' (h) It will not be out of place to refer to the Division Bench decision of this Court in *Samou Jean Pierre v. Jacqueline Samou*, . In that case, wife filed a petition for restitution of conjugal rights under the Divorce Act and the same was contested by the husband. Pending proceeding, the wife sought for interim maintenance and legal expenses, which was ordered. As the said amounts were not paid, the Court struck off the defence and the question arose whether the order is sustainable. The Court in that case ruled that in the absence of such a clause in the order, the learned Judge erroneously struck off the defence, which is not entitled to in law and even if there had been such a clause, the Court should

consider whether on the facts, defence should be struck off.

(i) In a recent ruling, the Supreme Court of India in *Hirachand Srinivas Managaonkar v. Sunanda*, 2001 2 CTC 185, had occasion to consider Section 23(1)(a) of the Hindu Marriage Act, 1955, in particular, as to when the Court can hold that the husband was guilty of wrong within the meaning of the said section so as to disentitle him to the relief of divorce. That was also a case where the wife filed petition under Section 10 of the Act seeking judicial separation on the ground of adultery and judicial separation was granted. The Court ordered that the husband shall pay a maintenance of Rs.100/- per month for wife and Rs.75/- per month for the daughter. But however, that order was not complied with. Thereafter, after the expiry of two years, the husband presented a petition for dissolution of marriage on the ground that there has not been any cohabitation between the parties for a period of more than one year after passing of the decree for judicial separation. The wife contested the matter on the ground that the husband having failed to pay maintenance as ordered by the Court, petition filed by him has to be rejected as he is taking advantage of his own wrong for getting the relief. The High Court of Karnataka accepted the plea of the wife and refused to grant appellant's prayer for divorce. The said order was assailed by the husband before the Supreme Court. The Supreme Court, after referring to various provisions viz., Sections 10, 13 and 23, formed a question for consideration as to whether in a petition for divorce filed under sub-section (1-A) of Section 13, it is open to the Court to refuse to pass a decree on any of the grounds specified in Section 23 of the Act, in so far as any one or more of them may be applicable. In paragraph 18 of the said Judgment, the Court considered the question as to whether refusal to pay alimony by husband is 'wrong' within the meaning of section 23(1)(a) so as to disentitle the husband to get a decree for divorce. In that context, the Supreme Court ruled that the answer would depend upon the facts and circumstances of each case and no general principle or straight-jacket formula can be formed for the said purpose. After so holding, the Court observed thus, '... We have already held that even after the decree for judicial separation was passed by the Court on the petition presented by the wife it was expected that both the spouses will make sincere efforts for a conciliation and cohabitation with each other, which means that the husband should behave as a dutiful husband and the wife should behave

and a devoted wife. In the present case the respondent has not only failed to make any such attempt but has also refused to pay the small amount of Rs.100 as maintenance for the wife and has been marking time for expiry of the statutory period of one year after the decree of judicial separation so that he may easily get a decree of divorce. In the circumstances it can reasonably be said that he cannot only commits the matrimonial wrong in refusing to maintain his wife and further estrange the relation creating acrimony rendering any reapproachment impossible but also tries to take advantage of the said 'wrong' for getting the relief of divorce. Such conduct in committing a default cannot in the facts and circumstances of the case be brushed aside as not a matter of sufficient importance to disentitle him to get a decree of divorce under Section 13(1A).'

8. In the background of the above rulings, let this Court consider the question in the facts and circumstances of the case. The respondent herein originally filed a petition for restitution of conjugal rights in the year 1995. Subsequently in the year 1997, he filed the present petition H.M.O.P.60 of 1997 for divorce and withdrew the earlier petition. The marriage was in the year 1993 and in 1994, petitioner gave birth to a male child. Now, admittedly, the minor son is with the petitioner. The learned Subordinate Judge, who considered I.A.453 of 1999, taking into consideration the materials available on record, came to the conclusion that the respondent must be directed to pay the amount of Rs.13,800/- being interim maintenance for the period August, 1997 to June, 1999 and also a sum of Rs.3,000/- towards litigation expenses. However, this amount was not paid. Of course, in the said order, Subordinate Judge has further directed the said amount shall be paid within a month, failing which the petitioner can file a separate petition to recover the money.

9. Now, objection by the respondent for allowing the present petition viz., I.A.499 of 2000 is two fold viz., (1) the only remedy is to file separate proceeding to recover the money, and (2) in the absence of any positive and specific provision in the Act laying down on the failure of party viz., husband in this case, failing to comply with the direction (in this case payment of maintenance and litigation expense), it will be open to the Court to dismiss the original petition and the same cannot be done by invoking the provision under Section 151 of Code of Civil

Procedure and that further applying the proposition laid down by the Supreme Court in the above said decision, the application cannot be allowed.

10. The learned Subordinate Judge in his order dated 25.7.2001 in I.A.499 of 2000, has ordered that the petitioner is given liberty to file a separate petition in the event of default on the part of the husband. But it has to be borne in mind that granting of such permission is not necessary in view of Section 28-A of the Act, which is to the effect that all decrees and orders made by the Court shall be enforced in the manner like decrees and orders in the Court made in exercise of original civil jurisdiction. It is not as if there are two courses open and the Court has directed the petitioner to follow one course and thereby debarring her to adopt the second course. Or in other words, even without granting such liberty, the petitioner can always execute the order by virtue of section 28-A of the Act. That being so, the so called first objection is not of any substance.

11. True, in the Act there is no provision to the effect that in the event of default committed by a party in complying with the order of the Court, it would be open to the Court to dismiss the petition or strike off the defence, as the case may be. But at the same time, it has to be remembered that the Court is not powerless. Under Section 151 of the Code of Civil Procedure, which is indisputably applicable to proceedings under the Act, the Court may exercise its powers for serving the ends of justice or for prevention of the abuse of the process of Court. Of course, in this case, it cannot be said that the respondent had done something which would amount to abuse of process of Court. But, in order to serve the ends of justice, in a case of this nature, the Court can consider the request to dismiss the petition filed by the respondent/husband.

12. Of course, a contention is raised to the effect that the Court may at best stay the proceedings, but cannot dismiss the original petition. The answer to this contention is that a husband may, in a given case, may not comply with the order for years and years and the only result will be the said original petition will be kept pending leaving the wife and child to starve and in such a case, the relief that Act provides will only be on paper and illusory.

13. The decision of the Supreme Court reported in 2001 2 CTC 185 (cited supra) certainly will not stand in the way, since in that case it was not the contention of the aggrieved party that by invoking Section 151 of Code of Civil Procedure on the default made by one of the party, the original petition can not be dismissed or the defence struck off, as the case may be. It has to be borne in mind the Court has not ruled that only if the husband has done a 'wrong' as contemplated under Section 23(1)(a), then alone the original petition can be dismissed or the defence can be struck off, as the case may be. In that case, the Court has only considered as to when it can be said that the husband has committed 'wrong' as contemplated under Section 23(1)(a) of the Hindu Marriage Act.

14. Hence the legal position is that if the husband fails to make payment of interim maintenance or litigation expense, as ordered by the Court, then the wife can file an application praying the Court to dismiss the petition or strike off the defence, as the case may be. In such case, the Court will consider the same and dispose it off on merits. In case if the Court comes to the conclusion that the application has to be allowed, then it should not straight away pass an order but give another opportunity giving reasonable time, minimum of three weeks, so that the husband, if he desires to make the payment, can do so. Only on his failure to make the payment, the original petition can be dismissed or defence can be struck off.

15. Coming to the present case, the proper order that has to be passed is to set aside the order of the Subordinate Judge in I.A.499 of 2000 and direct the Court to consider the matter again, in the light of the observations made above.

16. In the result, the revision petition is allowed. The order of the learned Subordinate Judge, Kancheepuram in I.A.499 of 2000 in O.S.60 of 1997 is set aside and the matter is remitted back to the trial Court for fresh disposal in the light of the observations made above. The trial Court shall dispose of the matter within a period of four weeks on receipt of copy of this order.