Jayasree Vs. Vivekanandan

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Court : Kerala

Decided On : Mar-09-2012

Judge : K.M. Joseph &Amp; M.L. Joseph Francis

Appeal No. : Mat. Appeal. No. 672 of 2011 (B)

Appellant : Jayasree

Respondent : Vivekanandan

Judgement :

K.M.Joseph, J.

1. Appellant is the respondent in O.P.46/2009 on the file of the Family Court, Palakkad. The petition was filed before the Family Court by the respondent who is the husband of the appellant seeking custody of two children. The case of the respondent/husband in the OP is as follows inter alia. Respondent and appellant are husband and wife. Their marriage was on 26.1.1997. Within three months from the date of marriage the respondent left India to Gulf countries for continuing his job. The first child was born to them on 23.6.1999. From his hard earned money he purchased a plot for constructing a house in the year 2000. On 31.8.2002 the second son was born. During 2000-2003 the respondent constructed a house in the plot purchased spending about Rs. 9 lakhs. Since the respondent was working abroad, minors were under the custody and care of the appellant. There was a tumour in the leg of the elder son and treatment was made. The entire expenses

claimed by the appellant for treatment ie about Rs. 9 lakhs was sent by the respondent to the appellant. The respondent also bought one innova, one Scropio, one Ambassadar car and an authorikshaw thinking that it will be a good investment and further to provide better facility to the wife and children. One Mr. Santhosh was a driver of one of the vehicles. The appellant's approach towards the respondent started changing when she developed unreasonable intimacy with the driver and later on that became more strong and the money and the vehicles of the respondent is shared by Mr. Santhosh. On verifying the account the respondent found that the amount claimed for treatment of the minor is misused by the appellant by utilizing the same for the whims and fancies of Santhosh. The RC of the innova car purchased in the name of the appellant is transferred in the name of Santhosh. Appellant is not interested in the welfare of the children.

The appellant filed counter affidavit contending inter alia as follows: The parents of the appellant also spent money for the purchase of the plot and for construction of the house. It is not correct to say that the petitioner himself spent Rs. 9 lakhs for the construction of the house. The respondent has not spent a single paise for the treatment of the child. Appellant is constrained to spend huge amount for the treatment of the child. Appellant has no relationship with Santhosh other than a driver. No amount has been misused and no amount from the account of the petitioner has been spent for the whims and fancies of Santhosh. Appellant has not transferred the innova car in the name of Santhosh. Santhosh has fabricated some documents with the forged signature of the appellant and transferred the vehicle in his name. When the appellant came to know this she filed a petition before the CI of Police, Ottappalam and due to his interference the vehicle again transferred in the name of the respondent. The appellant is always giving utmost love and care to the minors. The respondent is a total drunkard and it will affect the bright future of the minors if their custody is handed over to the respondent.

2. During the pendency of the case one of the sons died. The parties are left with a 9 year old son. The Family Court has allowed the petition filed by the respondent/father and given permanent custody of the child. The Court made further arrangements which reads as follows.

"In the result, petition allowed giving permanent custody of the child Amal Anand aged 9 years to the petitioner from first April 2012 onwards (if it is a holiday on the next working day). Respondent is directed to handover the permanent custody of the minor Amal Anand to the petitioner on the said day in the morning at 11 a.m, before this court. During the current year petitioner can have interim custody of the child on every first and last Saturdays from the morning and custody shall be returned on Sunday evening. Parties can decide the venue and exact time of taking and handing over of the custody of the child. Petitioner is also entitled to have interim custody of the child for half period during the coming Onam and Christmas vacations. The period can very well be decided in between the parties. From April 2012 onwards, the respondent herein is also entitled to have interim custody of the child for half period of the summer vacation, Onam vacation and X'mas vacation. She is also entitled to have interim custody of the child on every second Saturday from the morning and Sunday and also the last Saturday and Sunday and the custody can be handed over to the petitioner on the evening of the Sundays at the time and place convenient for both parties. It is open for both parties to apply for suitable modifications of the order on change of circumstances."

3. We heard the learned counsel for the appellant and learned counsel for the respondent. This is a case where the appellant had filed her objections. It appears that, the case was listed for trial. There were adjournments. The Family Court would state that when the case came up, I.A.599/2011 was filed by the respondent on 18.3.2011 seeking interim custody of the minor child for 15 days. The child was produced on 30.3.2011. The case was posted to 18.4.2011. The child was produced till 1.30 P.M on 18.4.2011. The child interacted with the father. Thereafter, the matter was posted to 28.4.2011. The child was produced for 2 hours. According to the appellant, the child was laid up due to fever on 6.5.2011. The appellant was directed to produce medical certificate or the child. The matter was adjourned to 7.5.2011. According to the appellant, the appellant was absent on 7.5.2011 while the respondent was present on 7.5.2011. On 9.5.2011 again the respondent was present. A medical certificate from a Government Homeo Practitioner was produced. Then the case was posted to 11.5.2011. The doctor apparently advised seven day's rest starting from 4.5.2011. The appellant was

asked to produce the child on 11.5.2011. On 11.5.2011 the respondent was present. But, the appellant was absent and the child was also not produced and the matter was taken up for orders to 13.5.2011. It is noted in the order that, in fact, the counsel for the appellant submitted to take the petition for orders. On 13.5.2011 an order was passed directing the appellant to produce the child for giving short term custody of one week to the respondent/father and the respondent was also directed to hand over custody of the child to the appellant at 11 A.M on 23.5.2011. It appears that, the appellant did not produce the child. Thereupon, the respondent/husband filed I.A.1299/2011 under the Guardian and Wards Act for arresting the child and giving custody of the child. The said petition was allowed. It is noted by the court that the warrant was returned un-executed. In the meantime, the school re-opened and the warrant was recalled. Thereafter, the court noted that I.A.1298/2011 dated 18.5.2011 was filed under Order 6 Rule 16 of the Code of Civil Procedure to strike off the defence of the appellant since she has violated the order of the court. As per the order dated 8.6.2011 the court allowed the application and struck off the defence of the appellant. The court took note of the chief affidavit of the respondent and he was examined as Pw1.The extract of statement of account of State Bank of Travancore, Pathirippala branch in the name of the appellant was marked as Ext.A1. Ext.A2 is the statement of account of another account in the name of the respondent. After appreciating the evidence and obviously without looking the defence the court proceeded to find that the respondent was in the gulf and the children were looked after by the appellant/mother. The court relied on the evidence and found that the respondent/husband was looking after the wife and children and he has spent Rs. 9 lakhs for the treatment of the elder child. The court referred to the evidence of the respondent that he has purchased some vehicles and one of the vehicles has been transferred in the name of one Santhosh who was a driver in one of the vehicles without his consent which would reveal that the allegation that misuse of amount is correct. The court notes the death of the elder child due to illness despite treatment given to the child on the basis of money given by the respondent/father. It is further noted that the attitude of the appellant in showing reluctance in giving short term custody cannot be tolerated. It is stated that the court notes the grievance of the respondent that the appellant is trying to take the

child along with the driver Santhosh. The court also noted as follows: The petitioner also sworn in about the intimacy developed between the respondent and driver Santhosh. The attitude of the respondent also shows that she is not a law abiding citizen. Interest of the child will not be protected if custody of the child is permanently given to such persons.

4. This is a case where admittedly the defence of the appellant has been struck off and it is after appreciating evidence of the respondent inter alia as already stated the court has proceeded to pass an order giving permanent custody of the surviving son after the tragic death of the elder son to the respondent. Learned counsel for the appellant would submit that the court below by cryptic one line order struck off the defence of the appellant. Learned counsel would attempt to find fault with the court for resorting to the provisions of Order 6 Rule 16. He places reliance on three decisions of the Apex Court. They are Iqbal v. His Holiness Dr.Syedna Mohd.Burhanuddin Saheb (2005 (13) SCC 759), Sathi Vijay Kumar v. Tota Singh (2006 (13 SCC 353), Abdul Razak v. Mangesh Rajaram Wagle (2010 (2) SCC 432).This is a ground which is taken in the memorandum of appeal also. He would further point out that, in fact, the court proceeds to provide in the judgment the reasons for dismissing the application under Order 6 Rule 16. He would submit that in regard to the remittance of money as is said to be proved by Exts.A1 and A2 the appellant has a case in the counter affidavit and it is denying the appellant opportunity to substantiate her case the defence was struck off.

5. The learned counsel for the respondent on the other hand would support the order. He would submit that this is a case where the respondent was working in the gulf. With the money earned he had purchased vehicles. He had also provided a driver. Amounts were being remitted for the treatment of the elder child. The case of the respondent is that the conduct of the appellant cannot be countenanced. More importantly, he would justify the order of the Family Court striking off the defence. He would further submit that there is power with the court to strike off the defence outside the four walls of Order 6 Rule 16 CPC, that is to say, the court can strike off the defence in exercise of the inherent power.

6. The first question to be considered is whether the court has acted illegally in striking off the defence by virtue of the order passed in the interlocutory application dated 8.6.2011. We would refer to Abdul Razak v. Mangesh Rajaram Wagle (2010 (2) SCC 432). That is a case where the Court referred to the provisions of Order 6 Rule 16 CPC and discountenanced the striking off the defence. Order 6 Rule 16 CPC reads as follows:

"16. Striking out pleadings.--The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading-

(a) which may be unnecessary, scandalous, frivolous or vexatious, or

(b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or

(c) which is otherwise an abuse of the process of the Court." The court proceeded to hold as follows:

A reading of the plain language of the above reproduced provisions makes it clear that the court's power to strike out any pleading at any stage of the proceedings can be exercised in either of the three eventualities ie. where the pleadings are considered by the court unnecessary, scandalous, frivolous or vexatious; or where the court is satisfied that the pleadings tend to prejudice, embarrass or delay the fair trial of the suit or which is otherwise considered as an abuse of the court.

17. Normally, a court cannot direct or dictate the parties as to what should be their pleading and how they should prepare their pleadings. If the parties do not violate any statutory provision, they have the freedom to make appropriate averments and raise arguable issues. The court can strike off the pleadings only if it is satisfied that the same are unnecessary, scandalous, frivolous or vexatious or tend to prejudice, embarrass or delay the fair trial of the suit or the court is satisfied that suit is an abuse of the process of the court. Since striking off the pleadings has serious adverse impact on the rights of the party concerned, the power to do so has to be exercised with great care and circumspection."

7. On the same lines are the other judgments which is relied on by the appellant Iqbal v. His Holiness Dr.Syedna Mohd.Burhanuddin Saheb (2005 (13) SCC 759)

and Sathi Vijay Kumar v. Tota Singh (2006 (13 SCC 353). We are of the view that the learned counsel for the appellant may not be justified in seeking to draw sustenance from the principle laid down by the Apex Court in the aforesaid decisions. The court has power to strike off defence under Order 6 Rule 16 CPC. The power which is declared in Order 6 Rule 16 CPC is intended to be exercised in certain specific circumstances. There can be quarrel with the proposition that if the power is sought to be exercised under Order 6 Rule 16 then the power is confined to the conditions which are referred to in Order 6 Rule 16. Unless any of the circumstances which are referred to in Order 6 Rule 16 are present the court cannot strike off the defence. The learned counsel for the appellant is correct in referring to the Supreme Court judgments for the said proposition. But, outside of Order 6 Rule 16 the court has inherent power to strike off defence. A court is meant to do justice, no doubt, within the confines of law and principles which are settled from time to time. A court is intended to be an effective adjudicator of disputes. If the court is to be an effective adjudicator of disputes it must inevitably be clothed with necessary power to deal with situations which may arise where the court must have power to strike off defence so that the people will continue to repose faith in the system and resort to lawful means which are provided by the courts. It is for the purpose of preserving its power and effectiveness that the courts have recognized inherent power to strike off defence outside Order 6 Rule 16 . It is on the said lines a learned Single Judge of this Court (Varghese Kalliath, J.) has in Parukutty Amma v. Thankamma Amma (1988 (1) KLT 883) proceeded to hold as follows:

"5. The next question is, should such a power with the court include a power to strike off the defence in deserving cases for meeting the ends of justice. If the court feels that to meet the ends of justice such a course is necessary, namely, to strike off the defence, I am of the view that such a power inhers with the court from its very constitution as a court and that power is absolutely necessary in certain circumstances to meet the ends of justice. I make it clear that the question is not res integrata. This matter has been considered by other courts also. I shall cite two decisions. In the decision reported in Venkatacharyulu v. Yesobu (AIR 1932 Madras 263) the court held that:

"that the striking off of the defence was within the jurisdiction of the Court in the exercise of its inherent powers under S.151 although it was not the only order which the Court could pass under the circumstances of the case".

A similar view has been taken in a decision reported in East Indian Railway Company v. Jit Mal (AIR 1925 All.280). Kukerji, J said:

"Where payment of costs is made a condition precedent of adjournment granted to the defendants it is open to the Court to strike off the defence and proceed ex parte, when the costs are not paid as directed."

6. I have no doubt that in cases where a party who deliberately disobeys the orders of the court has to incur the liability of his defence struck off by the court. This is essential because if this power is not acceded to the court, it will create great difficulty for the court to control the proceedings of the court and to obtain the co-operation of the parties."

8. We may also refer to the judgment of another learned Singe Judge of this Court in Mangalam v. Velayudhan Asari (1992 (2) KLT 553) where Paripoornan,J. (as his Lordship then was) has held as follows.

"To hold that the levying of execution is the only remedy for enforcement of an order made under S.24 of the Hindu Marriage Act may result in making such order wholly nugatory and ineffective. Even in the absence of a provision in the Hindu Marriage Act for striking off the defence in case one of the parties to the proceedings willfully refuses to comply with the order of the court, there is inherent power in the court to pass such orders as are necessary for the ends of justice or to prevent the abuse of the process of the court. S.151 of the Code of Civil Procedure saves the inherent powers of the court and, in exercise of that power, the court can strike off the defence in deserving cases for meeting the ends of justice. The court below had inherent jurisdiction under S.151 of the Code of Civil Procedure, to give effect to its order. It had inherent jurisdiction to prevent the abuse of the process of the court. In giving effect to its order, the court below would have been justified to strike off the defence, even if there is no such provision in the Hindu Marriage Act."

9. We must bear in mind the distinction between the inherent power to strike off the defence and the power under Order 6 Rule 16 CPC to strike off the defence. In the case of striking of the defence under Order 6 Rule 16 the court has to pose a question as to whether the pleadings are scandalous, frivolous, vexatious or whether they tend to embarrass or delay the fair trial of the suit. Further more, the court can strike off the defence if it (the pleadings) constitute an abuse of process of court. Necessarily, the distinction between striking off defence under Order 6 Rule 16 and in exercise of the inherent power lies in this. When the court proceeds to exercise under Order 6 Rule 16 the principle which governs the court is whether the pleading is of such a nature as to attract the vice which is contained in the provisions. Therefore, the focus is on the nature of the pleadings. The most important feature of litigation in a system of courts is the right available for every party to establish his case which is done by settling pleadings. It is on pleadings that parties go to trial after settling of issues. Therefore, the right to plead a case is a very important step in the right to establish a party's case. It is for that reason that the court would jealously guard the right to set up pleadings. It is only in the exceptional circumstances that the court would undertake the exercise of striking off pleadings which are objectionable with reference to the criteria laid down in Order 6 Rule 16 CPC. That is a far cry from a case where the court is invited to exercise its inherent power for the purpose of attaining justice. A party may be found to have willfully flouted its orders. In Mangalam v. Velayudhan Asari (1992 (2) KLT 553), maintenance at the rate of Rs. 200/- per month was not paid for several months besides litigation expenses. This warranted invocation of inherent power. It is a threat held out to unscrupulous litigants who do not respect the Majesty of the court, that they will do so at the peril of their not able to establish their case. Therefore, the considerations which weigh with the court in a petition under Order 6 Rule 16 CPC and in a case of inherent power are completely different and that is the reason we reject the contention of the learned counsel for the appellant that the order passed by the court in this case cannot be supported for the sole reason that it was not warranted under Order 6 Rule 16.

10. The further question to be considered is whether the order cannot be sustained for the reason that the respondent had actually invoked Order 6 Rule 16. Learned counsel for the appellant would contend that since the petitioner

invoked Order 6 Rule 16 the court cannot go beyond Order 6 Rule 16 and invoke its inherent power. The question to be considered is whether there is total want of power or there exists power. The mere fact that a power which exists is not cited or cited wrongly, cannot avail a litigant to contend that exercise of power is bad for the reason that the source of power is either wrongly cited or not stated. We are of the view that the mere fact that the respondent in the application only cited Order 6 Rule 16 cannot stand in the way of the court invoking its inherent powers provided inherent powers were otherwise available to it.

11. Learned counsel for the appellant would however later submit that he finds that his submission that the court has dismissed the application by a cryptic order is not correct. He submits that actually the court had indeed passed a considered order and what is more giving reasons including reference to the judgment of the learned Single Judge in Mangalam v. Velayudhan Asari (1992 (2) KLT 553).

12. We went through the order. In the order the Family Court, in fact, after referring to the petition and the counter affidavit finds that the appellant has not produced any document of proof that the child was undergoing treatment in a Government hospital. The Family Court refers to the certificate caused to be produced on 7.5.2011 and that direction to produce the child on 11.5.2011 was after 7 day's rest advised by the Homeo Doctor. But, it is further noted that the child was not produced on 11.5.2011. It is also stated thereafter that there is no medical certificate or any document produced by the appellant to prove that the child is still under treatment and it was because of the same order was passed directing the appellant to produce the child on 17.5.2011. In spite of the said order the appellant did not produce the child and hence summer vacation was already over and the respondent was prevented from getting custody of the child. It is found that the act of the appellant is clearly an abuse of the process of court. Thereafter, the court refers to its inherent powers and that the appellant openly disobeyed the order of the court without producing the child as directed by the court and it is found to be a fit case for striking off the defence.

13. Therefore, there is no merit in the complaint of the appellant that the court has given reasons for passing an unreasoned order in the judgment. In fact, the Family

Court has given reasons for allowing the application to strike off the defence in the order by which the defence was struck off.

14. Learned counsel for the appellant would submit that, even then this is a case where the defence was struck off for non-compliance with the order to produce the child on a single day. He also points out that this is a case where the appellant was co-operating in giving custody of the child to the respondent/father on earlier occasions.

15. As far as the decision in Parukutty Amma v. Thankamma Amma (1988 (1) KLT 883) is concerned, the learned counsel for the appellant would point out that, it turned on the facts presented before the learned Judge. Therein a suit injunction was laid. The court, initially passed an order directing the defendant to give her thumb impression. That was allowed. However, the impression which was given was found to be blurred by the expert. The plaintiff moved the court again to direct the defendant to give her thumb impression. The application was allowed. There was an application to review which was dismissed. The defendant was asked to appear and notice was issued. She did not appear. Her husband filed an affidavit stating that she is unable to appear on account of illness. The court did not apparently accept the affidavit of the husband. In the circumstances the plaintiff filed application stating that the first respondent has deliberately disobeyed the order of the court and he prayed for striking off defence. It is the said application which was allowed by the trial court. The learned Single Judge proceeded thereafter to consider the case law. The learned Single Judge found that what had happened in the case was amply justifying the court to resort to the power of striking off the defence. However, we notice that the court was inclined to grant one more opportunity to the first defendant to comply with the order of the court and the court ordered that if the first defendant satisfies the court that she was really ill and that she cannot appear before the court the court can take appropriate steps in the matter. Further, the court also directed that if the first appellant was in a position to appear and if she refused again to appear the order already passed will take effect.

16. As far as Mangalam v. Velayudhan Asari (1992 (2) KLT 553), is concerned, the learned Single Judge was dealing with a case where the respondents in a proceeding under Section 24 of the Hindu Marriage Act had been directed to pay maintenance and litigation expenses. The respondent husband was bound to pay Rs. 200/- per month towards maintenance and Rs. 500/- towards litigation expenses. It was also a case where Rs. 5,200/-was outstanding as balance and the amount was not paid in spite of long lapse of time. The learned Single Judge found that the respondent had flouted the orders of court and failed to pay maintenance and expenses due to the revision petitioner without reasonable cause.

17. This is a case where the defence has been struck off by order passed in the interlocutory application. The order striking off the defence has a tremendous impact on the fate of litigation and the rights of the parties. No doubt, we have repelled the argument that there is no power but the existence of power and legality/propriety of exercise are two different concepts. In this case, as already noted, the matter relates to the custody of the child. The child was aged 9 years. There is a case for the appellant that the child was ill and there was a medical certificate. In fact, the first medical certificate appears to have been acted upon and that is why excluding those days the appellant was directed to produce the child on 11.5.2011. No doubt, on 11.5.2011 the appellant was not present, the child was not produced and the case was taken for orders to 13.5.2011 and on 13.5.2011 there was an order to give short term custody for one week and it was on 18.5.2011 I.A.1298/2011 was filed to strike off the defence. The order was passed on 8.6.2011 as already noted striking off the defence. Therefore, we take it that it must be the events prior to 18.5.2011 which is the date of application seeking striking off defence which must have weighed with the court.

18. We would think that this is a case where the matter must be viewed in the context of the totality of facts. It would appear that, the appellant had been complying with the earlier orders for producing the child though for few hours and the father was interacting with the child also. The court itself accepted apparently the medical certificate issued by the Homeo Doctor which was produced on 7.5.2011 and it was accordingly that the child was directed to be produced on

11.5.2011. On 11.5.2011 admittedly the appellant did not produce the child. Thereafter, the matter was taken up for orders on the petition filed by the respondent for giving 15 days' custody. This the court did on 13.5.2011. On 13.5.2011 the court directed the appellant to give custody for one week from 17.5.2011 and the respondent/father was to hand back custody of the child on 23.5.2011. The said order was violated.

19. Learned counsel for the appellant would point out that there is a subsequent medical certificate. It covers the entire period. From the records we find that the appellant has produced another certificate dated 21.5.2011 issued by the very same Homeo doctor. Therein, it is stated by the doctor that the child is having Spasmodic Bronchities and that he considers the period of absence from duty of 10 days with effect from 10.5.2011 to 21.5.2011 is absolutely necessary for the restoration of his health. This certificate, it appears, is produced under a memo of the Advocate dated 7.6.2011. This certificate is not referred to by the Family Court. Apparently, even there appellant cannot blame the Family Court as correctly pointed out by the learned counsel for the respondent the Family Court had taken up the interlocutory application for striking off the defence for orders on 6.6.2011. Therefore, actually the appellant should have brought the certificate to the notice of the Family Court and sought re- hearing of the matter which the appellant did not do.

20. In view of the issues involved, namely, the custody of the child the fact that the appellant has filed counter affidavit setting up a specific case in relation to the use of the funds and other contentions we feel that an opportunity should be given. There is a medical certificate produced. May be if the said certificate dated 21.5.2011 as aforesaid had been brought to the notice of the Family Court, the Family Court may not have passed the order. We would think that in the circumstances of this case we ought to give an opportunity by interfering with the order. If the medical certificate is to be acted upon then clearly the child was not well on 11.5.2011 and 17.5.2011. Therefore in the circumstances of this case we feel that the matter should be considered with the pleadings of the appellant. Since apparently the judgment is essentially premised on the pleadings being struck off, we must necessarily set aside the judgment. We accordingly overturn the order

allowing striking off the defence. The judgment also will stand set aside subject to the following conditions.

(i). The appellant will pay Rs.6,000/- as costs by depositing the amount before this Court within a period of ten days from today. Upon deposit, it is open to the learned counsel for the respondent to withdraw it.

(ii). We further direct that, the respondent can have custody of the child on the first and last Saturdays from the morning and custody shall be returned on Sunday evening. The respondent will take custody of the child through Family Court and for that purpose the appellant will bring the child to the Family Court, Palakkad at 10.30 A.M. The handing over of custody when the child is handed back will be done by the respondent/father at 5 P.M. at the house of the appellant.

(iii). While the appellant can keep custody of the child during the first half of the summer vacation till 10.4.2012 the appellant will hand over the custody of the child to the respondent father on 10.4.2012 at 10 A.M and the respondent can keep custody till 1.5.2012. Taking and giving back custody will be done by the same procedure as we have indicated earlier.

The parties will appear before the Family Court, Palakkad on 30.3.2012. The Family Court will finally dispose of the matter with opportunity to the parties by 30.6.2012.