

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

TUESDAY, THE 5TH DAY OF OCTOBER 2021 / 13TH ASWINA, 1943

MAT.APPEAL NO. 173 OF 2015

AGAINST THE JUDGMENT IN OP 304/2012 OF FAMILY COURT,

ALAPPUZHA

APPELLANT/RESPONDENT :

SHYJU.P.K
AGED 41 YEARS
S/O.KARTHIKEYAN, PUNNAVELIL VEEDU, CHERTHALA
MUNICIPAL WARD-20, CHERTHALA TALUK,
ALAPPUZHA DISTRICT.

BY ADVS.
SRI.S.SANAL KUMAR
SMT.BHAVANA VELAYUDHAN
SMT.T.J.SEEMA

RESPONDENTS/PETITIONERS :

1 NADEERA, AGED 36 YEARS
D/O.MOHANAN, MATTATHIL VEEDU, CHERTHALA MUNICIPAL
WARD NO.10, CHERTHALA TALUK,
ALAPPUZHA DISTRICT-688 524.

Mat.Appeal No.173/2015

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*2 NIKITHA, AGED 12 YEARS
(MINOR), D/O.NADEERA, MATTATHIL VEEDU, CHERTHALA
MUNICIPAL WARD NO.10, CHRTHALA TALUK, ALAPPUZHA
DISTRICT-688 524. (MINOR REPRESENTED BY HER
MOTHER, 1ST RESPONDENT NADEERA). (MAJOR)

(*THE 2ND RESPONDENT IS RECORDED AS MAJOR AS PER
ORDER DATED 28/9/2021 VIDE IA NO.4/2021)

BY ADVS.
SRI.K.S.MADHUSOODANAN
SRI.JOBY JACOB PULICKEKUDY
M.R.ARUNKUMAR

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION
ON 28.9.2021, THE COURT ON 05.10.2021 DELIVERED THE
FOLLOWING:

"C.R."

J U D G M E N T

Dated this the 5th day of October, 2021

Kauser Edappagath, J.

Whether an application for maintenance *pendente lite* u/s 24 of the Hindu Marriage Act, 1955 would lie in a proceeding other than under the said Act?

Under what circumstances can the Family Court strike off the defence for non compliance of the order to pay *pendente lite* maintenance?

These are the questions that arise for consideration in this matrimonial appeal.

2. The husband is the appellant. The wife and minor daughter are the respondents. The respondents filed OP No.304/2012 at the Family Court, Alappuzha (for short 'the court below') claiming return of gold ornaments, patrimony and maintenance. The appellant appeared at the court below and filed objection statement. During the pendency of the original petition, the respondents filed IA No.1119/2012 invoking S.24 of

the Hindu Marriage Act,1955 and S.151 of the Code of Civil Procedure,1908 (for short "CPC") claiming *pendente lite* maintenance from the appellant @ ₹7,000/- and ₹8,000/- respectively. The court below allowed the said application and directed the appellant to pay maintenance @ ₹5,000/- per month to the respondents from the date of the application till the disposal of the OP. Since the appellant failed to comply with the said order, the respondents filed IA No.918/2014 invoking S.151 of CPC to strike off the defence of the appellant. The said application was allowed and the defence of the appellant was struck off. Thereafter, the 1st respondent filed proof affidavit and marked Exts.A1 to A3 documents. Relying on the *ex parte* evidence given by the respondents, original petition was allowed as per the judgment dated 8th October, 2014. The appellant was directed to return 38½ sovereigns of gold ornaments and a sum of ₹1,80,000/-. The appellant was also directed to pay maintenance to the respondents @₹5,000/- each per month from 5/3/2012 onwards. The said judgment is under challenge in this appeal.

3. We have heard Sri.S.Sanal Kumar, the learned counsel for the appellant and Sri.K.S.Madhusoodanan, the learned counsel for the respondents.

4. The learned counsel for the appellant submitted that the order for payment of *pendente lite* maintenance passed by the court below was without jurisdiction and hence, the defence of the appellant ought not to have been struck off. The counsel further submitted that the court below even without giving an opportunity to the appellant to show cause or make the payment, hurriedly disposed of I.A. No. 918/2014. The learned counsel for the respondents supported the impugned judgment

5. Order VI Rule 16 of CPC deals with striking out of pleadings. The power under Order VI Rule 16 is intended to be exercised in three specific circumstances. They are:-

- (i) When pleadings are unnecessary, scandalous, frivolous or vexatious; or
- (ii) If the pleadings tend to prejudice, embarrass or delay the fair trial of the suit; or
- (iii) if it is otherwise an abuse of the process of the court.

Unless any of the circumstances referred above are present, the court cannot strike off the defence under Order VI Rule 16. However, the various High Courts including the Kerala High Court [see ***Mangalam v. Velayudhan Asari*** (1992 (2) KLT 553)] has held that the Court has inherent power u/s 151 of CPC to strike off the defence on failure to pay *pendente lite* maintenance ordered by the Court. The Apex Court recently referring to the judgments of various High Courts on the point upheld the power of the Court to strike off the defence if there was non compliance of the order of payment of interim maintenance. However, it was held that striking off the defence is an order which ought to be passed in the last resort, if the court finds fault to be wilful and contumacious, particularly to a dependent unemployed wife and minor child. It was also observed that contempt proceedings for wilful disobedience may be initiated before the appropriate court. Thus, the inherent power under S.151 of CPC to strike off the defence on failure to pay *pendente lite* maintenance ordered by the court can be invoked only in a case where the default is found to be wilful and contumacious, that too to an unemployed

wife and minor child.

6. IA No.1119/2012 claiming interim maintenance has been filed by the respondents u/s 24 of the Hindu Marriage Act, 1955 and S.151 of CPC. S.24 of the Hindu Marriage Act, 1955 reads as follows:

"24. Maintenance pendente lite and expenses of proceedings. *Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable:*

[Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.]

7. A reading of the above provision would show that an application for maintenance *pendente lite* and expense of the proceedings would only lie in a proceedings under the Hindu Marriage Act, 1955. Evidently, OP No.304/2012 filed by the

respondents claiming return of gold ornaments, patrimony and maintenance is not a petition under any of the provisions of the Hindu Marriage Act, 1955. The said petition has been filed u/s 7(1) Explanation (c) and (f) of the Family Courts Act, 1984. No application for maintenance *pendente lite* u/s 24 of the Hindu Marriage Act, 1955 would lie in a proceeding other than under the Hindu Marriage Act, 1955. Thus, IA No.1119/2012 is not maintainable u/s 24 of the Hindu Marriage Act, 1955. The respondents have also quoted S.151 of CPC. S.151 recognises the inherent power of the court “to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court.” The inherent powers saved by S.151 of CPC are with respect to the procedures to be followed by the court in deciding the cause before it. The said powers cannot extend to matters other than procedural. The inherent powers recognized by S.151 cannot be exercised over the substantive right of the parties. Specific powers have to be conferred on the courts for passing orders affecting the substantive right of the parties. The Apex Court in ***Padam Sen v. State of Uttar Pradesh*** (AIR 1961

SC 218) has clearly held that the exercise of powers u/s 151 of the Code are not powers over the substantive right of the parties. Hence, S.151 of CPC also cannot be invoked to maintain the application. There is no provision in the Hindu Adoptions and Maintenance Act, 1956 for granting maintenance *pendente lite* as provided for in S.24 of the Hindu Marriage Act, 1955. At any rate, no argument has been advanced before us to sustain the order under the provisions of the Hindu Adoptions and Maintenance Act, 1956. Hence, we are of the view that the order in IA No.1119/2012 passed by the court below is without jurisdiction. The order in IA No.918/2014 is only a consequential order to IA No.1119/2012. When the original order is found to be without jurisdiction, the consequential order cannot be sustained.

8. As stated already, the defence can be struck off for non compliance of an order for payment of *pendente lite* maintenance only as a last resort and if the default is found to be deliberate and wilful. Needless to say, to arrive at such a conclusion, sufficient opportunity has to be given to the person against whom the order for payment of maintenance has been

passed. Before striking off the defence for non compliance of an order of *pendente lite* maintenance, an opportunity has to be given to show cause why the defence should not be struck off or reasonable time has to be given to clear the arrears of maintenance ordered. The order in IA No.1119/2012 was passed on 11/6/2014 and the order in IA No.918/2014 was passed on 20/9/2014. There was hardly three months gap in between these orders. A perusal of the order in IA No.918/2014 would show that no opportunity was given to the appellant to show cause why his defence should not be struck off. No reasonable time was also granted for payment of the arrears of maintenance ordered. Hence, on this ground also, the impugned order cannot be sustained.

For the reasons stated above, we hold that the Court below committed illegality and irregularity in striking off the defence of the appellant. The suit was decreed solely based on the evidence given by the 1st respondent. We are of the view that an opportunity has to be given to the appellant to contest the petition on merits. Accordingly, we allow the appeal and set

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aside the impugned judgment. OP No.304/2012 is remanded to the court below for fresh disposal. The parties shall appear before the court below on 1/11/2021. The court below shall give an opportunity to both parties to adduce evidence and thereafter dispose of the petition on merits in accordance with law. Since the matter is of the year 2012, the court below shall take every effort to dispose of the petition as early as possible. The parties shall bear their respective costs.

Sd/-

A.MUHAMED MUSTAQUE
JUDGE

Sd/-

DR. KAUSER EDAPPAGATH
JUDGE

Rp

Mat.Appeal No.173/2015

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APPENDIX

APPELLANT'S EXHIBITS: NIL

RESPONDENT'S EXHIBITS

ANNEXURE A TRUE PHOTOCOPY OF BIRTH CERTIFICATE
ISSUED BY THE REGISTRAR, BIRTH, DEATH &
MARRIAGE, CHERTHALA MUNICIPALITY,
ALAPPUZHA

//True Copy//

PS to Judge