

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MRS. JUSTICE MARY JOSEPH

MONDAY, THE 23RD DAY OF NOVEMBER 2015/2ND AGRAHAYANA, 1937

OP (FC).No. 393 of 2015 (R)

IN OP 89/2014 of FAMILY COURT, ATTINGAL

PETITIONER(S) :

RAMABHADHAN,
S/O.SADANANDAN, RESIDING AT BINU NIVAS, AYILAM PO
THIRUVANANTHAPURAM

BY ADVS.SRI.N.DHARMADAN (SR.)
SMT.D.P.RENU
SRI.M.R.VENUGOPAL

RESPONDENT(S) :

1. BINDU R.,
D/O.RAJENDRAN, AMBADI, PERETTIL,
MOONGODU P.O., VARKALA, THIRUVANANTHAPURAM-695 144.
2. YADUKRISHNA,
D/O.S.RAMABHADHAN, AMBADI, PERETTIL,
MOONGODU P.O., VARKALA, THIRUVANANTHAPURAM-695 144
3. ASWIN,
S/O.S.RAMABHADHAN, AMBADI, PERETTIL,
MOONGODU P.O., VARKALA, THIRUVANANTHAPURAM-695 144
4. RATHNAMMA,
W/O.LATE SADANANDAN, RESIDING AT R.S.NIVAS,
MOONGODU P.O., VARKALA-695 144.
5. SUNILKUMAR
S/O.SADANANDAN, R.S.NIVAS, MOONGODU P.O.,
VARKALA-695 144.
6. BINU
S/O.SADANANDAN, R.S.NIVAS, MOONGODU P.O.,
VARKALA-695 144.

R1 BY ADV. SRI.J.JAYAKUMAR.

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 23-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

rvs.

APPENDIX

PETITIONER(S) ' EXHIBITS :

- EXT. P1 : TRUE COPY OF AFFIDAVIT DT 4/2015 BY PETITIONER'S COUNSEL BEFORE FAMILY COURT, ATTINGAL.
- EXT. P2 : TRUE COPY OF AFFIDAVIT FILED BY THE PETITIONER DT 2-5-2015 BEFORE THE FAMILY COURT, ATTINGAL.
- EXT. P3 : TRUE COPY OF AFFIDAVIT FILED BY THE PETITIONER DT 2-5-2015 BEFORE THE FAMILY COURT, ATTINGAL.
- EXT. P4 : TRUE COPY OF IA.261/2015 IN OP.1371/2013 DT 13-2-2015 BY PETITIONER BEFORE THE FAMILY COURT, ATTINGAL.
- EXT. P5 : TRUE COPY OF ORDER IN IA.259/2015 IN OP 89/2015 DT 9-7-2015 OF THE FAMILY COURT, ATTINGAL.
- EXT. P5(A) : TRUE COPY OF ORDER IN IA.258/2015 IN OP 2001/2013 DT 9-7-2015 OF THE FAMILY COURT, ATTINGAL.
- EXT. P5(B) : TRUE COPY OF ORDER IN IA.989/2015 IN OP 68/2014 DT 9-7-2015 OF THE FAMILY COURT, ATTINGAL.
- EXT. P5(C) : TRUE COPY OF ORDER IN IA.260/2015 IN OP 1154/2013 DT 9-7-2015 OF THE FAMILY COURT, ATTINGAL.
- EXT. P5(D) : TRUE COPY OF ORDER IN IA.261/2015 IN OP 1371/2013 DT 9-7-2015 OF THE FAMILY COURT, ATTINGAL.
- EXT. P6 : TRUE COPY OF ORDER IN IA.961/2015 IN OP 1317/2013 DT 9-7-2015 OF THE FAMILY COURT, ATTINGAL.

RESPONDENT(S) ' EXHIBITS:

- EXT. R1(A) : TRUE COPY OF BIRTH CERTIFICATE OF THE CHILD OF THE PETITIONER BORN IN HIS ILLICIT RELATIONSHIP WITH ANOTHER LADY.
- EXT. R1(B) : TRUE COPY OF THE ORDER DATED 12/08/2013 IN M.C.NO.72/2013 OF JUDICIAL FIRST CLASS MAGISTRATE COURT, VARKALA.
- EXT. R1(C) : TRUE COPY OF THE ORDER DATED 12/11/2014 IN OP(CRL)NO.96/2014 OF THIS HONOURABLE COURT.
- EXT. R1(D) : TRUE COPY OF THE FIR IN CRIME NO.1664/2014 OF KALLAMBALAM POLICE STATION.
- EXT. R1(E) : TRUE COPY OF THE NEWS REPORT APPEARED IN THE MATHRUBHOOMI MALAYALAM DAILY DATED 11/12/2014.
- EXT. R1(F) : TRUE COPY OF THE IA NO.961/2015 DATED 03/06/2015 IN OP NO.1371/2013 FILED BY THE 1ST RESPONDENT BEFORE THE FAMILY COURT, ATTINGAL.

/TRUE COPY/

P.A.TO JUDGE

C.K.Abdul Rehim & Mary Joseph, JJ.

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O.P. (FC) No.393 of 2015

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Dated this the 23rd day of November, 2015.

JUDGMENT

Abdul Rehim, J.

1. In this original petition filed under Article 227 of the Constitution of India, the petitioner is challenging Exts.P5, P5 (a), P5(b), P6(c), P5(d) and P6 orders passed by the Family Court, Attingal. The petitioner and the 1st respondent are husband and wife. Respondents 2 and 3 are the children born out of their wedlock. The 4th respondent is the mother and the 5th respondent is the brother of the petitioner. The original 6th respondent was deleted as per order in I.A.No.16220 of 2015. Evidently, 5 cases touching the matrimonial dispute between the petitioner and the 1st respondent are pending adjudication before

the Family Court, Attingal. Two among them, O.P.Nos.2001/2013 and 1154/2014 were instituted by the petitioner. Whereas, O.P.Nos.89/2014, 68/2014 and 1371/2013 were instituted by the 1st respondent and the children. Due to default on the part of the petitioner in appearing before the Family Court and in prosecuting the cases, he was declared ex-parte in O.P.Nos.89/2014 and 1371/2013. So also O.P.Nos.2001/2013 and 1154/2014 were dismissed for default. O.P.No.68/2014 was decreed ex-parte by the Family Court. In all the cases the petitioner had filed applications either to set aside the order/decreed declaring him ex-parte or for restoration of the original petitions, as the case may be, along with application for condonation of delay. By virtue of orders passed as per Exts.P5 and P5(a) to P5(d), the Family Court had set aside the ex-parte orders/ex-parte decree as well as restored the original petitions which were dismissed for default, subject to imposition of cost and other conditions. It is illustrated that, in

all the said orders cost of ₹3,000/- each was ordered. So also a condition was incorporated directing the petitioner to make payment of educational expenses to the children amounting to a sum of ₹37,730/-. It is aggrieved by the conditions incorporated in the impugned orders, this original petition is filed by invoking the supervisory powers vested on this court. The petitioner is also challenging Ext.P6 order which is passed in I.A.No.961/2015 in O.P.No.1371/2013 through which the petitioner was directed to make payment of an amount of ₹37,730/- towards educational expenses on or before 20.7.2015.

2. Respondents 1 to 3 had entered appearance through counsel and filed counter affidavit. A preliminary objection regarding maintainability of this original petition is raised, contending that all the six orders passed in different cases (5 numbers) cannot be challenged in a single original petition instituted under Article 227. In this regard attention of this court is drawn to a decision of this court in **Preeti Yohannan v. Abraham K.Mathen (2012**

(3) KHC 76). A learned Judge of this court in the said case held that, separate and independent proceedings like dissolution of marriage, declaration of guardianship, recovery of money, custody of minor child etc. even if between the same parties, cannot be sought to be transferred by way of a single transfer petition. It is pertinent to note that, petition for transfer of a case pending before a subordinate court is filed under Section 24 of the Code of Civil Procedure, 1908. The Rules governing such petitions filed under Section 24 CPC is Rule 57 of the Civil Rules of Practice. But in the case at hand the original petition is not filed under Section 24 CPC. but the same is instituted under Article 227 of the Constitution of India, invoking the supervisory jurisdiction vested on this court. The procedure for filing such original petition, which is coming within powers vested on this court by virtue of provisions of the Constitution, is governed only by the High Court Rules. There is no provision restraining a party from challenging two or more different orders passed by

any subordinate court in connected cases in a single original petition, especially when the parties are more or less same. At the most the petitioner in such cases can be insisted upon for payment of separate court fee with respect to each of the orders under challenge.

3. Another contention raised is that the original petition is not maintainable under Article 227 since the orders impugned are one issued under Order IX Rule 9 and 13 of CPC. Learned counsel for the respondents relied on the decision of this court in **Varghese Antony v. Fr. Antony Kochuveetil and others (2012 (3) KHC 534)**. A learned Judge while deciding the above case observed that, orders issued under Rules 9 and 13 of Order IX CPC are appealable under Order XLIII Rule 1(d) CPC. Therefore an original petition under Article 227 is not maintainable before this court if the petitioner is approaching this court without resorting to the appellate remedy available, is the finding. But it is to be noticed that the impugned orders are

passed by the Family Court. Appeal from any order passed by the Family Court is maintainable only under Section 19 of the Family Courts Act. Section 19(1) imposes a ban with respect to appeals against interlocutory order. Therefore Order XLIII Rule 1 is not applicable with respect to the impugned orders and it cannot be said that there is a provision for appeal against the orders impugned in this original petition. Of course, in a case where the application to set aside the ex-parte decree or order is dismissed, probably an appeal may lie under Section 19, because the order will assume characteristics of a final order, permanently affecting rights of the parties and assumes substantive nature rather than interlocutory in nature. But in the case at hand, the petitioner is only challenging sustainability of the conditions incorporated by the Family Court while allowing the petitions. Hence we are of the opinion that there is no bar based on the appellate remedy available under Order XLIII Rule 1, in entertaining the original petition.

4. Learned counsel for the respondents also contended that, imposition of cost is a matter upon which courts have got wider discretion keeping in view of the particular facts and circumstances of each case, while deciding the cause. The discretion so exercised in imposing the cost cannot be assailed under Article 227 of the Constitution, is the contention. He had placed reliance on **Varghese Antony's** case (*supra*) in order to canvass the above position. It is observed by the court therein that, the cost normally fixed as a condition for allowing applications under Order IX Rule 9 and Rule 13 should not be substituted by the higher courts. The courts below had all the advantage of verifying merit of the *lis* and the conduct of the parties in fixing the cost. It is true that normally in the matter of fixation of cost for allowing an application under Order IX Rule 9 or Rule 13, interference by invoking supervisory jurisdiction, which is visitorial in nature, is not warranted. In the case at hand, it is evident that, earlier the applications filed seeking to

set aside the ex-parte order were dismissed for default of the petitioner herein. Those applications were restored on the basis of separate affidavits filed by the lawyer as well as the party. Main contention taken for default in prosecuting the interim applications is that the petitioner was implicated in a case registered by the local police and his application for anticipatory bail before the Sessions Court as well as before this court were dismissed. It is stated that, at the time when the interim applications were considered the petitioner happened to be arrested and remanded to judicial custody.

5. Learned counsel for respondents 1 to 3 had pointed out that the petitioner had inflicted brutal assault and grievous injuries on the 1st respondent and the case registered was on the basis of such an incident. Having considered the entire circumstances and the nature of the proceedings and also the attitude of the petitioner in conducting the cases before the Family Court, we are of the opinion that the Family Court was fully justified in imposing

cost of ₹3,000/- each for allowing all the petitions. It is to be taken into consideration that in such circumstances, the prejudice and loss which will be caused to either side need to be compensated on proper terms. We do not find any error of jurisdiction committed by the Family Court in imposing such condition, which warrants interference by invoking the supervisory jurisdiction vested on this court under Article 227.

6. However, we notice that apart from the cost of ₹3,000/- ordered in Ext.P5, P5(a) to (d) orders, in certain orders a further condition for payment of the educational expenses is also incorporated. Ext.P6 order is under challenge in this writ petition. The said order is passed in I.A.No.961 of 2015 in O.P.No.1371 of 2013. It is an original petition filed by the 1st respondent seeking for return of money and maintenance for respondents 1 to 3. As on the date of passing Ext.P6 order, the petitioner herein was remaining ex-parte in the said case. The application for setting aside the order of ex-parte filed as

I.A.No.961 of 2015 was considered only on 9.7.2015. But it is evident from Ext.P6 that on the same day the Family Court had considered I.A.No.961 of 2015, even before setting aside the order of ex-parte and directed the petitioner to pay an amount of ₹37,730/- towards educational expenses. Further, the said direction was incorporated as a condition for setting aside the order/decreed and for restoration of the case which was dismissed for default. The said application ought to have considered independently on its own merits, rather than clubbing the issue for payment of educational expenses, which was agitated in I.A.No.961 of 2015. However, we take note of the fact that a condition is incorporated in Ext.P6 order passed in I.A.No.961 of 2015, to the effect that the original petitions filed for divorce and other reliefs will also be dismissed on default on payment of the educational expenses. We feel that the question regarding payment of educational expenses *pendente lite* is a matter which ought to have been adjudicated by the Family Court

independently, after restoration of the original petitions, after setting aside the ex-parte orders and decree. Hence we are inclined to interfere with the impugned orders to the extent of rectifying such an irregularity.

7. Therefore the above original petition is disposed of on the following terms:

(i) Challenge against Exts.P5, P5(a) to (d) are dismissed to the extent of declining interference with respect to the order imposing payment of cost of ₹3,000/- each. But the conditions contained in those orders to the extent of directing payment of educational expenses to the tune of ₹37,730/- is hereby set aside. Learned Senior Counsel appearing for the petitioner submitted that the cost of ₹3,000/- each has already been paid within the date stipulated in the impugned orders. Hence we direct the Family Court to restore all the cases and

to deal with them in accordance with the procedure.

(ii) Ext.P6 order is hereby set aside. The Family Court is directed to pass fresh orders in I.A.No.961 of 2015 in O.P.No.1371 of 2013 and dispose of the same after affording opportunity to the petitioner herein to contest the relief sought for therein. Needless to observe that the said application being the one seeking interim relief, shall be dealt with by the Family Court at the earliest possible.

C.K.Abdul Rehim, Judge.

Mary Joseph, Judge.