1958 *Present :* **H. N. G. Fernando, J., and T. S. Fernando, J.**

K. SINNATHAMBY, Appellant, *and* YOKAMMAH, Respondent

S. C. 396—D. C. Jaffna, 154/D

Divorce—Action instituted by wife—Alimony pendente lite*—Failure of husband to pay it—Can Court refuse to hear defence ?—Civil Procedure Code, ss. 85, 109, 839.*

When, in divorce proceedings instituted by a wife, an order for the payment of alimony *pendente lite* is flouted by the husband, the Court has no power to strike out the defence and to place the defendant-husband in the same position as if he had not appeared.

APPEAL from a judgment of the District Court, Jaffna.

C. Ranganathan, for the Defendant-Appellant.

S. Sharvananda, for the Plaintiff-Respondent.

Cur. adv. vult.

[1] *(1957) 53 N. L. R. 479.*

December 5, 1958. H. N. G. FERNANDO, J.—

The plaintiff, who is the wife of the defendant, instituted this action for divorce on the grounds of malicious desertion. The defendant in his answer alleged that the plaintiff had committed adultery and asked on that ground for a decree of judicial separation. On 25th February 1957 the parties agreed upon alimony *pendente lite* at the rate of Rs. 25 per month and order for alimony was made accordingly. The case was fixed for trial on several dates, and on 24th July 1957 arrears of alimony amounting to Rs. 100 were paid in Court.

The case was ultimately taken up for trial on 9th March 1958. On that day Counsel for the plaintiff stated that the defendant had failed to pay alimony for a period of eleven months, and moved to lead evidence to show that the defendant had the means to pay the alimony and called the plaintiff as a witness for the purpose. After a brief examination of the plaintiff, Counsel for the defendant moved " that the defendant be given some time, at least one hour, to find the money to pay the alimony ".

Objection to the grant of time having been taken, the District Judge held that the alimony was in arrear and he made order striking off the defence. Thereupon the plaintiff's Counsel framed the relevant issues only on the question of malicious desertion, and the District Judge proceeded to hear the case *ex parte* and thereafter entered decree for divorce. The present appeal is against that judgment and decree.

At the trial the plaintiff relied on the decision of this Court in *Asilin Nona v. Peter Perera* [1]. In that case, the plaintiff husband had failed to pay alimony even though the wife had already a writ in her hands for the recovery of the amount due. On the trial date application was made on behalf of the wife that the Court should stay the hearing of the action until the alimony was paid.

The District Judge refused that application on the ground that no such power was conferred by the Code. In appeal however the order refusing the application to stay proceedings was set aside and the case was remitted to the District Judge, firstly to consider whether the husband had refused to pay the alimony while being in possession of the means to pay, and secondly to exercise his discretion to stay the action until the payment of the alimony.

Keuneman J. in *Asilin Nona v. Peter Perera* [1] referred to the English case of *Leavis v. Leavis* [2]. In that case the wife filed a petition for restitution of conjugal rights. Orders were thereafter made against the husband for the payment of taxed costs, for security pending the suit, and for alimony. The husband failed to comply with these orders and while in default took out summons under the Divorce Rules to stay the suit on the ground that he was willing to return to cohabitation. A preliminary objection to the hearing of this summons was taken on behalf of

[1] *(1945) 46 N. L. R. 109.* [2] *L. R. 1921 Probate 299.*

the wife, on the ground that the husband was in contempt. This objection was upheld by the Court and the summons to stay the suit was dismissed. In *Cooper v. Cooper* [1] a wife who had sued for judicial separation on the ground of cruelty subsequently returned to her husband. When the husband moved for the dismissal of the wife's petition, on the ground of a return to cohabitation, the wife did not oppose the application for dismissal but only asked for costs. The Court ordered that the application be dismissed upon payment of the wife's costs.

In *P. V. P. and T.* [2], which was also referred to by Keuneman J., the Court ordered a stay of a husband's petition for divorce until the husband paid arrears of alimony *pendente lite*. In *Chappell v. Chappell* [3] the wife had obtained a decree nisi for dissolution. Nine months after the decree nisi the husband moved to have the decree made absolute. It was contended that although the husband had a right to so move, his motion should be dismissed because he was in arrear in the matter of alimony and costs. The Court, while being of opinion that his contempt would debar the husband, dismissed the motion on another ground, namely that on the facts, the case was not one in which the discretion of the Court to enter decree absolute should be exercised.

The English cases to which I have referred all appear to be based on the principle that a husband is in contempt if by failing to comply with an order for the payment of alimony he deprives his wife of the means to carry on the litigation. In the Ceylon case Keuneman J. did not hold that the power to stay proceedings flows from the contempt, and the ground of his decision was that contempt may be regarded as an abuse of the process of the Court, thereby bringing Section 839 of the Civil Procedure Code into operation. That Section preserves 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 ". With respect I agree that an order staying proceedings conditionally is one eminently within the scope of such an inherent power. If the Court is judicially satisfied that an order for the payment of alimony has been flouted by a plaintiff husband despite the fact that he has the means to comply with it and that thereby the wife is deprived of the means to contest the action, then an order staying the hearing of the action effectively *prevents* the abuse of the process of the Court, because the husband is thereby compelled to comply with the alimony order if he desires his action to be tried. There is no question of any denial of justice, for the plaintiff in such a case can secure that trial is held merely by making the payment which it is within his power to make.

The present case is in my opinion clearly distinguishable. To strike out the defence is to expel the defendant from the action : it is to punish, rather than to prevent, abuse, for it does not operate to enforce or secure compliance with the flouted order. The effect of this striking out of the

[1] *English Reports 164 at page 1327.* [2] *(1910) 26 T. L. R. 607.*

[3] *(1938) 4 A. E. R. 814.*

defence is to place the defendant in the same position as if he had not appeared, and thus to bring into operation the provisions of Section 85 under which an *ex parte* trial is held. One provision in the Code, to which we have been referred, which empowers a Court to strike out a defence is that in section 109 which takes effect upon a failure to comply with an order to answer interrogatories, or for discovery, production or inspection. Although this same section provides that such a failure constitutes a contempt, yet the power to strike out the defence is expressly conferred.

An order dismissing a plaintiff's action, or striking out a defence, has the effect of either a *final* termination of the proceedings or of *finally* refusing to hear a party. It is doubtful whether such an order can be made by virtue of inherent as opposed to express power. In any event we have not been referred to any precedent in Ceylon or in England for such an order being made in the event of the failure by a husband to comply with an order for the payment of alimony.

For these reasons I would set aside the judgment and decree entered by the District Judge and remit the case for trial. It will be open to the plaintiff to make any such application as she may be advised to make for the purpose of enforcing the order for alimony, but the District Court will not again strike out the defence as a means of enforcement. There will be no order as to the costs of this appeal or of the past proceedings in the lower Court.

T. S. FERNANDO, J.—I agree.

Case remitted for trial.