

Court No. - 79

Case :- CRIMINAL REVISION No. - 6308 of 2023

Revisionist :- Sagedu

Opposite Party :- State Of U.P. And 2 Others

Counsel for Revisionist :- Surendra Nath Chauhan

Counsel for Opposite Party :- G.A., Pavan Kumar Srivastava

Hon'ble Ram Manohar Narayan Mishra, J.

1. Learned counsel for the revisionist is present.
2. None appeared on behalf of the respondent No.2, even in the revised call.
3. Instant Criminal Revision has been preferred against the judgment and order dated 01.11.2022 passed by learned Additional Principal Judge, Family Court No.1, Mau in Criminal Case No. 2157 of 2014, under Section 125 Cr.P.C., Police Station Saraylakhansi, District Mau.
4. Learned counsel for the revisionist submits that scanned copy of lower court record has been received, wherein said application dated 01.09.2022 under which prayer has been made by opposite party who is revisionist before this Court to carry out DNA/biological test of respondent No.3 Anshu and himself, as he has denied her paternity and this application remained undecided, even after judgment in maintenance case in which the same has been filed. The revisionist has disowned said female child, as he is not her biological father.
5. Learned court below has wrongly observed at Page 3 of impugned judgment and order that opposite party has pleaded in paragraph No.3 of his written statement that applicant No.1 was living at her parental place many years prior to birth of the child Anshu and no cohabitation could take place between spouse during this period, this daughter is not born out of wedlock of applicant and opposite party No.2 Geeta. In this context applicant No.1 has accepted in cross-examination that daughter was born out of wedlock of her husband Sagedu.
6. Thus, it is obvious that applicant No.2 Anshu is minor daughter of opposite party, and applicants are entitled to file the application for maintenance under Section 125 Cr.P.C. This finding of learned court below is based on unilateral statement of applicant, which is denied by revisionist from very

beginning.

7. Learned counsel for the revisionist submitted that respondent No.2 has shifted to some other place alongwith her minor daughter and she is not presently residing at her parental place. Therefore, it is in the interest of justice that this Court may refer the matter to learned court below to get the paternity of respondent No.3 who ascertained through DNA test. He also requested for verification of present address and whereabouts of private respondents by learned court below.

8. Learned counsel for respondent No.2 submitted that in written statement the revisionist has not taken any plea that applicant was living in adultery, he has only stated in his written statement that the applicant deserted him and started living separately without any sufficient cause. Thus, he assailed the claim for maintenance made by the applicant under first component of Section 125(4) Cr.P.C.

9. He next submitted that even if an application for DNA test has been made before the court below, the Family Court is not empowered to direct DNA examination of a child to ascertain his/her paternity.

10. Learned trial court has given a categorical finding that applicant No.1 Geeta is having sufficient cause to live separately from her husband/opposite party. The revisionist has neglected to maintain his wife and minor daughter. Revisionist is under obligation to maintain his wife and minor child, even if he is unemployed.

11. In the present case, by the impugned judgment and order dated 01.11.2022 learned Family Court has awarded Rs.1,000/- per month as maintenance to the applicant No.1 Smt. Geeta at the rate of Rs.5,00 per month to his minor daughter Anshu from the date of filing of application dated 24.05.2013 to date of judgment dated 01.11.2022, and thereafter a sum of Rs.3,000/- to applicant No.1 and Rs.1,000/- per month to applicant No.2 till attaining the age of majority.

12. The revisionist has taken a stand before learned court below as well as before this Court that applicant No.2 Km. Anshu has not born out of his wedlock with respondent No.2 Geeta and he is not her biological father. Therefore, he is not entitled to provide maintenance to the child. He had filed an application before the court below with prayer to direct DNA examination of the revisionist and respondent No.2 Km. Anshu to determine her paternity which remained undecided till passing of impugned judgment and order.

13. Applicant has stated in his sworn testimony before the court below that the child Anshu born out her wedlock with her husband Sagedu. She is not earning anything on her own. At the time of her marriage she was 15 years of age, her husband expelled her from home on giving her beating, she is not ready to live with her husband, as he has contracted second marriage and is having children from IInd Marriage also. She came from her matrimonial home in the year 2013 last time, her daughter Anshu is also residing with her, her stridhan is grabbed by her husband. He is possessed of sufficient means. Revisionist has stated in his affidavit evidence that his wife used to visit her parental place, after marriage for two years. She gave birth to a girl child at her parental place and he had no access to his wife for years together at that time, therefore, the child was not born out of wedlock of his wife. In cross-examination he has stated that he has not contracted second marriage with any other woman. He is ready to keep his wife Geeta with him. He works as a labourer in building construction work.

14. Learned counsel for the revisionist has filed an application for DNA examination of his daughter and himself and his wife placed on record of trial court with a view to ascertain paternity of respondent No.2 Km. Anshu.

15. Section 112 of Evidence Act is relevant in this regard which provides as under:-

"112. Birth during marriage, conclusive proof of legitimacy.

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

16. Learned counsel for the respondent Nos. 2 and 3 place reliance on a judgment of Hon'ble Supreme Court in **Aparna Ajinkya Firodia Vs. Ajinkya Arun Firodia 2024 (7) SCC 773**, wherein it is held as under:-

(1) Order directing that a minor child be subjected to DNA test should not be passed mechanically in each and every case.

(2) Questions as to illegitimacy of a child, are only incidental to the claim of dissolution of marriage on the ground of adultery

or infidelity.

(3) Question as to whether a DNA test should be permitted on the child, is to be analysed through the prism of the child and not through the prism of the parents.

17. In another judgment **Ivan Rathinam Vs. Milan Joseph (2025) Supreme (SC) 231** the Hon'ble Supreme Court considered the question of paternity test of a child in maintenance proceedings at length and framed following issues:-

i. Whether the presumption of legitimacy, if not displaced, determines paternity in law?

ii. Whether the Civil Court had the jurisdiction to entertain the Original Suit; and accordingly, whether the Family Court was entitled to reopen the Maintenance Petition?

iii. Whether the second round of litigation, initiated by the Respondent, was barred by the principle of res judicata?

18. The Hon'ble Supreme Court further held in paragraph Nos.55, 56, 57, 69 and 70 as under:-

55. In this regard, the Appellant asserted that the Munsiff Court had jurisdiction to entertain the Original Suit because it was filed for a declaration of paternity and for a mandatory injunction. In support of this, the Appellant cited **Renubala Moharana v. Mina Mohanty 2004 (4) SCC 215**. Per contra, the Respondent claimed that the Family Court, alone, could adjudicate on paternity through the Maintenance Petition, as it is distinct from legitimacy. Further, the Respondent contended that the Family Court had exclusive jurisdiction to make a declaration regarding legitimacy. In support of this, the Respondent cited **Bharat Kumar v. Selma Mini 2007 (1) KLT 945** and **Alexander C. C v. Jacob Anthony Palakkandathi @ Amith and Anr, 2012 (2) KLT 36**.

56. **It is well-settled law that the Family Court has exclusive jurisdiction over a suit or proceeding for a declaration as to the legitimacy of a person. However, the Family Court cannot entertain any proceedings for a declaration of legitimacy without a claim on the marital relationship.**

57. In **Renubala Moharana v. Mina Mohanty** (supra), this Court was confronted with a set of facts similar to the present dispute. In the captioned matter, the child therein was contended not to have been the mother's husband's offspring,

despite being conceived during the subsistence of the marriage. The appellants therein filed a petition before the Family Court "to declare that their son was the father of the minor child, and not the mother's husband." This Court held that the Family Court could not entertain any proceedings for a declaration as to the legitimacy of any person without any claim on the marital relationship.

69. This convoluted case, spanning over two decades, has no doubt taken its toll on the parties involved and other relevant stakeholders. Given these extenuating circumstances, at this stage, it must be closed for all intents and purposes.

70. Accordingly, we deem it appropriate to allow this appeal and set aside the Impugned Judgment of the High Court dated 21.05.2018 and of the Family Court dated 09.11.2015, with the following directions and conclusions:

i. Legitimacy determines paternity under Section 112 of the Indian Evidence Act, 1872, until the presumption is successfully rebutted by proving 'non-access';

ii. The Munsiff Court and the Sub-Judge Court possessed jurisdiction to entertain the Original Suit, which dealt with the question of the legitimacy of the Respondent;

iii. The Family Court, Alappuzha erred in reopening the Maintenance Petition when the self-imposed condition was not satisfied;

iv. The impugned proceedings, initiated by the Respondent, are barred by the principle of res judicata.

v. The proceedings in MC No. No. 224/2007 before the Family Court, Alappuzha stand quashed.

vi. Any claim by the Respondent based upon the perceived relationship of paternity qua the Appellant, stands negated.

vii. The Respondent is presumed to be the legitimate son of Mr. Raju Kurian.

19. In the present case there is no plausible evidence on record that access between the revisionist and respondent No.2 was not possible when respondent No.2 got conceived. Therefore, the presumption under Section 112 of Evidence Act will be applicable, keeping in view the dictum of Hon'ble Supreme Court as stated above, there is not need of subjecting respondent No.3 to DNA examination to ascertain her paternity.

The golden rule in this context is that paternity test can only be resorted to when the interest and welfare of child is involved and not to his abrogate his/her legal rights.

20. The learned court below has itself awarded maintenance on lower side which is just and fair, even if it is assumed that revisionist is not in regular employment, as he being an able bodied person is under obligation to maintain his wife and child.

21. Consequently I, find no illegality, irregularity or perversity in the impugned order passed by the learned court below. The revision is devoid of merit and deserves to be dismissed.

22. The revision is **dismissed** accordingly.

Order Date :- 21.3.2025

Ashish/-