

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 12.04.2016

Coram:

THE HON'BLE Mr.JUSTICE M.VENUGOPAL

Cr1.R.C.No.222 of 2016

Prakash

...Petitioner

Vs.

1. Karpagam

2. Minor Kanimozhi

Minor 2nd respondent Rep.
by next friend and guardian
mother, the 1st respondent

...Respondents

Prayer: Petition filed under Section 397 r/w 401 Cr.P.C., to set aside the Order made in C.M.P.No.6486 of 2014 in M.C.No.10 of 2014 by the Learned Judicial Magistrate Court, Cheyyar dated 08-10-2014.

For Petitioner : Mr. P. Mani

For Respondents : M/s.V.R. Appaswamee
R. Sasi Kumar for RR1 & 2

O R D E R

The Revision Petitioner/husband has focused the instant Criminal Revision Petition as against the order dated 08-10-2014 in C.M.P.No.6486 of 2014 in M.C.No.10 of 2014 passed by the Learned Judicial Magistrate, Cheyyar.

2. The Learned Judicial Magistrate, Cheyyar while passing the impugned order in C.M.P.No.6486 of 2014 in M.C.No.10 of 2014 dated 08-10-2014 (filed by the Petitioner/Respondent husband) had observed that the marriage between the Petitioner/Respondent (husband) and first Respondent/ wife, was admitted on both sides and when the marriage relationship subsists, during the said period of relationship, if a child is born out of the said wedlock, then one has to come to the conclusion that the child was born only during the subsistence of marriage relationship as per Section 12 of the Indian Evidence Act, 1872 and hence, rejected the petition seeking for passing of an order to subject

the first Respondent/ wife to undergo the DNA test.

3. Assailing the correctness, validity and legality of the impugned order dated 08-10-2014 in C.M.P.No.6486 of 2014 in M.C.No.10 of 2014 passed by the Learned Judicial Magistrate, Cheyyar, the Revision Petitioner/ husband has filed the present Revision petition, as an aggrieved person by taking a plea that the order passed by the trial Court bristles with irregularities and illegalities in the eye of Law.

4. Advancing his argument, the Learned Counsel for the Revision Petitioner projects a plea that even prior to the marriage, the first Respondent/ wife had conceived and as such, the trial Court ought to have allowed the C.M.P.No.6486 of 2014 in M.C.No.10 of 2014 wherein the Revision Petitioner/ husband has sought for passing of an order by the Court to order DNA test in regard to the paternity of the second Respondent/minor child.

5. The main grievance of the Revision Petitioner is that the Trial Court ought not to have dismissed the C.M.P.No.6486 of 2014 in M.C.No.10 of 2014 for DNA test by drawing presumption in terms of Section 112 of the Indian Evidence Act that the second Respondent is the daughter of the Revision Petitioner, in as much as she was born during the subsistence of marriage between the Revision Petitioner and the first Respondent and in this regard, a view taken by the trial Court is an erroneous one in the eye of law.

6. Lastly, it is the stand taken on behalf of the Revision Petitioner that in regard to the paternity of the child, the specific case and counter case of the respective parties ought to have been looked into by the trial Court in a proper and real perspective, when there is a real serious dispute as regards as the paternity of the child.

7. The Learned Counsel for the Revision Petitioner/husband refers to the evidence of P.W.1 (first Respondent/ wife) in M.C.No.10 of 2014 (second Petitioner) whereby and whereunder she had deposed that she is ready to prove that the second Respondent/ minor child was born to the Revision Petitioner/husband.

8. Also, P.W.1 has stated in her evidence that she is willing for DNA test and that the second Respondent/Minor child was born at Chennai, during the month of Karthigai (22nd November 2008).

9. At this juncture, the Learned Counsel for the Petitioner/ husband cites the decision of the Honourable Supreme Court reported in 2003 (2) CTC 760 (Sharda V. Dharmpal) at

special page No.786, wherein at Paragraph No.74, it is observed as follows:

"If despite an order passed by the Court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out. Section 114 of the Indian Evidence Act also enables a Court to draw an adverse inference if the party does not produce the relevant evidences in his power and possession."

10. The Learned Counsel for the Revision Petitioner/husband takes an emphatic plea that in terms of Article 21 of the Constitution of India, the right of the Revision Petitioner to defend the matrimonial proceedings in M.C.No.10 of 2014 on the file of the trial Court are adequately protected and indeed the Court has got an inherent power to order for DNA test in the subject matter in issue. Added further, it is for a Court of Law to reconcile the competing interest of respective parties by placing the same.

11. The Learned Counsel for the Petitioner emphatically comes out with a plea that by ordering DNA test and allowing the C.M.P.No. 6486 of 2014 filed by the Petitioner/ husband, no prejudice would be caused to the first Respondent/ wife and ultimately, by allowing the petition for DNA test, the same would enable the trial Court to find out the real truth in the subject matter, in issue.

12. Apart from that, the Learned Counsel for the Petitioner seeks in aid of the decision of this Court in M. Karthika Vs. R. Manohar (2009 (3) CTC 672) wherein it is held that, 'the presumption under Section 112 of the Indian Evidence Act requires to be rebutted by strong evidence which could be obtained from the outcome of DNA test'.

13. The Learned Counsel for the Petitioner cites the decision Muniappan Vs. Ponni (2011 (2) CTC 635) wherein it is held that there would be no impediment in ordering DNA test and resultantly, allowed the civil revision petition filed by the husband.

14. The Learned Counsel for the Petitioner draws the attention of this Court to the decision of the Honourable Supreme Court reported in 2014 (2) SCC 576 (Nandlal Wasudeo Badwaik Vs. Lata Nandlal Bandwaik and another) wherein it is held that the scientific proof provided by DNA test is an acceptable one and the presumption of legitimacy of the child can be rebutted.

15. Continuing further, the Learned Counsel for the Petitioner in the aforesaid decision of the Honourable Supreme

Court places reliance on Page No.586 of Paragraph No.17 whereby and whereunder, it is observed as follows:

"We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former."

16. At this stage in C.M.P.No.6486 of 2014 in M.C.No.10 of 2014 the Revision Petitioner/husband at Paragraph No.2 had stated that he had made an averment in the main petition and in interlocutory application that second respondent/Minor was not born to him. Further in the counter to M.C.No.10 of 2014, the Revision petitioner/husband had stated that the first Respondent/ wife's family threatened his family members and registered the marriage on 16-05-2008. Moreover, he had stated that at any point of time, viz., before or after marriage, he had no sexual intercourse with the second Respondent/wife. He had also stated that even for a day he had not lived with the first Respondent/wife as family.

17. Conversely, it is the submission of the Learned Counsel for the first Respondent/wife that the Revision Petitioner/ husband in his petition in C.M.P.No. 6486 of 2014 and also in his own statement had not mentioned anywhere that the marriage between himself and the first Respondent/ wife had not taken place and the allegation that the second Respondent/ child was not born to him as projected by the Petitioner for the purpose of the present case only.

18. Also, the Learned Counsel for the first Respondent/ wife by referring to the Maintenance Petition in M.C.No.10 of 2014 filed before the trial Court (by the first Respondent/ wife and the second Respondent/ minor child) wherein they have sought for monthly maintenance of Rs.7500/- from the Revision

Petitioner/ husband, would draw the attention of this Court to Paragraph No.3 wherein it is stated in a crystalline fashion that her parents, relatives and the Revision Petitioner's/ husband's parents and relatives were present at the Anakkavoor Police Station and also outside the Police Station and in the presence of parents and relatives, a decision was taken to perform the marriage of the Revision Petitioner and the first Respondent on 16-05-2008, and on that basis, the marriage between the first Respondent/wife and the Revision Petitioner/ husband took place at the Temple of Arulmighu Paavadai Moorthy Vinayagar Subramania Swami Thirukoil, Eswarapuram, Cheyyar Town, on the said fixed date. The Learned Counsel for the first Respondent/wife also brings to the notice of this Court that the said marriage between the Revision Petitioner and the first Respondent was registered at Cheyyar Sub-Registrar's Office, bearing Registration No.57 of 2008 and the Marriage Registration Certificate was also enclosed as proof by the first Respondent along with M.C.No.10 of 2014 before the trial Court.

19. It is represented on behalf of the first Respondent/ wife that as a result of the wedlock, the first Respondent/ wife gave birth to the second Respondent on 22-11-2008 at the Egmore Government Women and Children Hospital. Furthermore, it is the stand of the first Respondent/ wife that her marriage with the Revision Petitioner/ husband was an inter-caste marriage and that the Revision petitioner's/husband's family had not accepted her as her Daughter-in-Law and also they had not accepted the second Respondent/ Minor child as their family Heir. It is to be noted that Section 53 of Code of Criminal Procedure speaks of 'examination of an accused by medical practitioner, acting at the request of the Police Officer'. In this connection, this court pertinently points out that law leans in favour of validity of marriages and in favour of legitimacy and not bastardy, as per decision in Parvathi Ammal Vs. S.M.Ammal (AIR 2002 Madras 462 : 2002 (2) Mad LJ 175). It cannot be forgotten that a child born during the wedlock of the parties is presumed to be a legitimate child and in fact, the burden in this regard lies on the shoulders of the husband to prove otherwise.

20. It is to be noted that 'legitimacy' is question of fact and can be decided only with reference to four aspects:

1. Who was the child's mother?
2. Who was the child's father?
3. Whether the father and mother were validly married at the time of conception or at the time of birth?
4. Whether the father and mother had reasonable opportunity to co-habit at the time when the child could have been conceived.

The term 'legitimacy' as a concept postulates two things, (1) that the natural parents were married to each other; (2) that they were lawfully married to each other. In this connection, it

cannot be gainsaid that as per Section 112 of the Indian Evidence Act, the conclusive presumption is that a child born during the continuance of a valid marriage between his parents is their legitimate child, irrespective of the question whether the child was born six, seven or eight months after such marriage as per decisions, Kahan Singh Vs. Natha Singh (AIR 1925 Lahore 414) and Thandi Ram Vs. Jagan Nath (AIR 1937 Lahore 784). Moreover, unless the husband is able to establish non-access satisfactorily and conclusively, the presumption under Section 112 of the Indian Evidence Act shall prevail as per decision Bhagwan Vs. Mahesh (AIR 1935 Privy Council 199).

21. Besides the above, the word 'access' under Section 112 of the Indian Evidence Act means no more than opportunity of intercourse as per decision Karapaya Vs. Mayandi (AIR 1934 Privy Council 49).

22. This Court also points out a decision of the Honourable Supreme Court Perumal Nadar Vs. Ponnusamy (AIR 1971 SC 2352) wherein it is observed and held that, 'unless the husband is able to prove the absence of access, the presumption of legitimacy of the child shall not be displaced as per decision of Honourable Supreme Court.'

23. In another decision of Honourable Supreme Court in C. Venkateswarlu Vs. C. Venkatanarayana (AIR 1954 SC 176) wherein it was observed that the presumption under Section 112 of the Indian Evidence Act is conclusive and it can be displaced only by proof of 'non-access' at the time when the child could have been begotten. Section 112 of the Indian Evidence Act proceeds upon adopting the period of birth as distinguished from 'conception' as the turning point of legitimacy. In the decision reported in 1978 CrL.L.J (NOC) 176 (Samila Devi V. Shankar Dass), it is observed that if the parties had access to each other for a number of days and child was born after six months of marriage and the child was held to be a legitimate one. Besides this, a positive proof of 'non-access' has got to be proved. Of course, it can be proved like any other physical fact by direct and circumstantial evidence of unambiguous character but unless such evidence is forthcoming, it will not be possible for any Court to believe it to be probable that there was no access as per Full Bench decision in T.P.Moni Vs. Amma Kannu (AIR 1942 Madras 129).

24. Generally, 'admission' in a given pleadings can be taken into account when there is no conclusion between contesting parties. At this juncture, this Court worth recalls and recollects the decision of the Honourable Supreme Court in Mahendra Vs. Susheela (AIR 1965 SC 364) wherein it is observed that when a Court is satisfied that there is no room for collusion, there is no reason why admission of parties should

not be treated as civil proceedings under Section 58 and Order 8, Rule 5 of the Code of Civil Procedure. Ordinarily, if the husband is able to establish that the husband had sexual intercourse with his wife or even had reasonable opportunity of sexual intercourse with the wife during the relevant period, the Court should not allow the husband to take resort to blood group evidence.

25. Further, whenever a child is born out of a wedlock, there is a conclusive presumption of legitimacy, unless it is rebutted by reliable evidence (vide *Saraswathi Vs. Chinna Rengay Gounder* (2008 (7) MLJ 336 (Mad))). It is an axiomatic principle of law that the presumption of legitimacy is a rebuttable presumption of law and the only way of displacing it, is to be shown by a party to the marriage that he had no access to his wife at the relevant point of time, viz., during the period when the child or a person whose legitimacy in dispute could have been conceived or could have been begotten. The term 'may presume' and 'shall presume' parties to the marriage had no access to each other at the time when the child was begotten and that 'conclusive proof' have been defined in terms of Section 4 of the Indian Evidence Act, 1872 as per *Ningamma Vs. Chikkaiah* (2000 (1) Kar LJ 281 (Kant)).

26. One cannot ignore a very vital fact that Section 112 of the Indian Evidence Act would apply only when the father is able to prove that he has no access to have sexual intercourse with the woman and only then the man cannot be said to be the father. But as far as the present case is concerned, it is the categoric evidence of P.W.1 (first Respondent/ wife) that it was the Revision Petitioner/husband, who had fathered the second Respondent/ minor child.

27. It cannot be gainsaid that Section 112 of the Indian Evidence Act refers to the 'point of time of birth' as a deciding factor and not to the time of conception. Whenever a child is born in a lawful wedlock, there is a question of presumption of legitimacy unless it is proved by very reliable evidence (example, by means of divorce, long and continued separation, illness etc.) that the parties had not or could not have any access. Be that as it may.

28. In the instant case, it is the categoric evidence of the first respondent/wife (as P.W.1 before the trial Court in M.C.No.10 of 2014) that it is the Revision Petitioner/ husband, who is the father of the first Respondent/ minor child and also that the evidence of P.W.1, which unerringly points out that the marriage had taken place at a Temple Arulmighu Paavadai Moorthy Vinayagar Subramania Swami Thirukoil, Eswarapuram, Cheyyar Town and therefore, there is a strong presumption about the legitimacy of the child born from that wedlock. Of course, the

presumption could only be rebutted by a strong, clear, satisfying and conclusive evidence. To put it precisely, the presumption cannot be displaced by mere probabilities or any circumstance creating doubt, as per decision Sham Lal Vs. Sanjeev Kumar (2009 (12) SCC 454) .

29. In a civilised society, it is quiet imperative to presume the legitimacy of a child born during the wedlock between the parties and the continuation of a valid marriage and whose parents had 'access' to each other. It is not palatable to enquire into the paternity of the child whose parents have 'access' to each other. In reality, Section 112 of the Indian Evidence Act is based on presumption of public morality and public policy, as per decision Sham Lal Vs. Sanjeev Kumar (2009 (12) SCC 454) .

30. In view of the detailed qualitative and quantitative discussions, this Court taking note of the fact that the first Respondent/wife as P.W.1 before the trial Court had categorically stated in lucid terms that her marriage took place with the Revision Petitioner on 16-05-2008. Further, in M.C.No.10 of 2014, she had stated at Page No.2 that the Revision Petitioner/husband before marriage in the year 2008 had bodily connections with her. As such, the contra-plea taken on behalf of the Revision Petitioner / husband that at no point of time either before or after marriage, he had not indulged in any sexual intercourse, is not accepted by this Court. Viewed in that perspective, the conclusive presumption under Section 112 of the Indian Evidence Act about the paternity of the second Respondent/ child born during the subsistence of a valid marriage is rightly resorted to by the trial Court in the considered opinion of this Court. Consequently, the view taken by the Learned Judicial Magistrate Court, Cheyyar in dismissing the C.M.P.No.6486 of 2014 in M.C.No.10 of 2014 dated 08-10-2014 is flawless. Resultantly, the revision petition fails.

31. In fine, the Criminal Revision Petition is dismissed. It is made clear that the dismissal of the Revision Petition by this Court will not preclude the respective parties to raise all factual and legal pleas in M.C.No.10 of 2014 at the time of final hearing, in the manner known to Law and in accordance with Law. The connected CrI.M.P.No.1541 of 2016 is also dismissed.

-s/d-
Assistant Registrar

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Sub-Assistant Registrar

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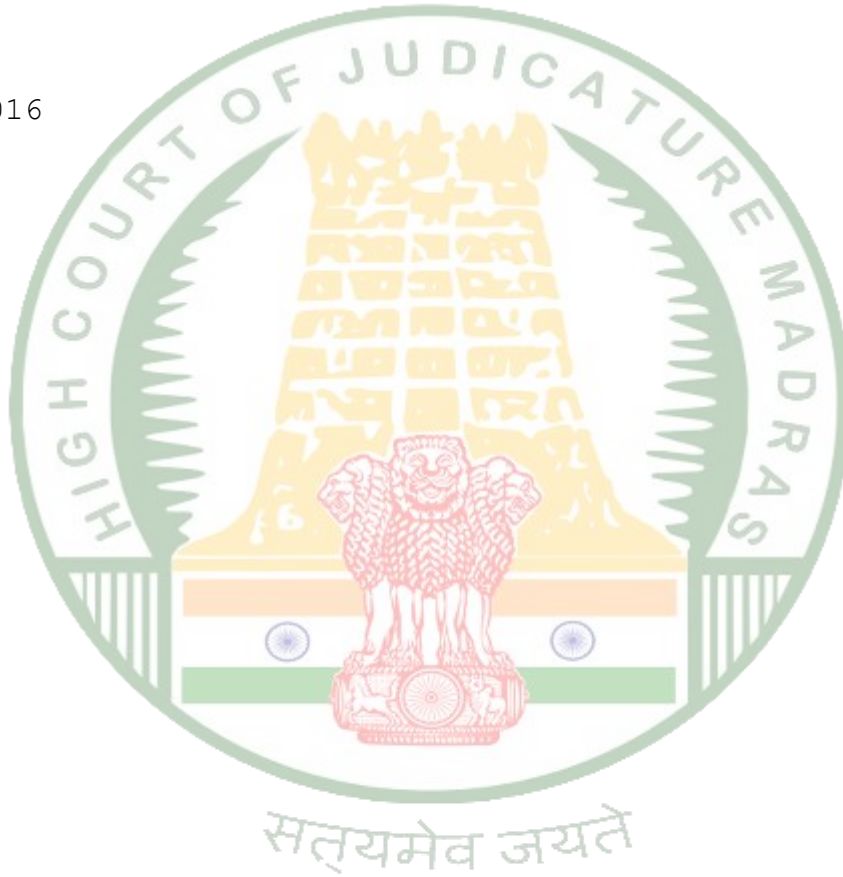
1.The Learned Judicial Magistrate Court, Cheyyar

2.The Chief Judicial Magistrate
Cheyyar (for Information)

+1 cc to M/s.V.R.Appaswamee Advocate sr.22873

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