

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05-01-2016
(Orders reserved on 14.12.2015)

CORAM:

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

C.R.P.No.627 of 2013
& M.P.No.1 of 2013

Devaki ... Petitioner/Respondent/
Petitioner
Vs.

C.L.Subramanian ... Respondent/Petitioner/
Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decretal order dated 09.01.2013 in I.A.No.128 of 2012 in G.W.O.P.No.75 of 2012 on the file of the Principal District Court, Namakkal.

For petitioner : Mr.T.Dhanyakumar

For respondent : Mr.D.Shivakumaran

ORDER

This Civil Revision Petition is filed against the order dated 09.01.2013 in I.A.No.128 of 2012 in G.W.O.P.No.75 of 2012 passed by the learned Principal District Judge, Namakkal, in and by which, the application filed by the respondent herein, for sending the children Minor Srinivasan, Minor Kalaivani and the petitioner and the respondent, for subjecting themselves to DNA test to Dean, Salem Mohan Kumaramangalam Government Hospital, was allowed.

2. Learned counsel for the revision petitioner contended that the trial Court failed to appreciate the special facts of the case. He submitted that the G.W.O.P. itself is not maintainable and the petition for declaring the respondent herein as guardian alone is maintainable. He further submitted

that the guardian alone is entitled for the custody of the minors. He further contended that the trial Court failed to note the presumption under Section 112 of the Indian Evidence Act and the said presumption squarely applies to the facts of the case. The trial Court failed to appreciate the authorities cited before Court and erroneously allowed the application. He further submitted that the application filed for DNA test is not maintainable and prayed that the Civil Revision Petition may be allowed and the impugned order of the trial Court may be set aside. In support of his submissions, learned counsel for the petitioner relied on the following decisions:

(a) 2011 (1) CTC 111 (SC) (Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women):

"13. In a matter where paternity of a child is in issue before the Court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the Court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the Court to reach the truth, the Court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the Court as a matter of course or in a routine manner, whenever such a request is made. The Court has to consider diverse aspects including presumption under Section 112 of the Evidence Act, pros and cons of such order and the test of 'eminent need' whether it is not possible for the Court to reach the truth without use of such test."

(b) AIR 1979 Bombay 156 (Mohammad Shafi Vs. Shamin Banoo):

"19. Turning to the provisions of S.25 and S.4 it would be seen that S.25 permits a guardian to make an application to the Court where the minor is removed from the custody of such guardian, and order the return of the minor provided it is, in the opinion of the Court, in the interest and welfare of the minor to do so. Four things, therefore, clearly are necessary before an application under S.25 can be entertained. Firstly, the application must be by a guardian of the person of the minor. Secondly, the guardian must have had the custody of the minor. Thirdly, the minor must have been removed from such custody of the guardian and lastly, it must, in the opinion of the Court, be for the welfare of the minor to return the custody to the guardian."

3. Learned counsel for the respondent contended that the lower Court, after appreciating the facts and circumstances of the case, correctly came to the conclusion and allowed the application and he prayed that the Civil Revision Petition may be dismissed.

4. Heard the learned counsel appearing for the parties and perused the materials available on record.

5. It is seen that the respondent herein (C.L.Subramanian) filed G.W.O.P.No.75 of 2012 under Section 25 of the Guardian and Wards Act, before the Court below against the revision petitioner-Devaki. Even according to the respondent, one Selvaraj had earlier married the revision petitioner. Subsequently, the respondent herein married the revision petitioner. According to the respondent herein, the marriage between the said Selvaraj and the revision petitioner-Devaki was customarily divorced and subsequently, she married the respondent-C.L.Subramanian on 03.06.1999 in Trichy Samayapuram Mariamman Temple and no document is available in proof of the second marriage. It is stated by the respondent herein that two minor children were born to them, namely Srinivasan on 13.04.2005 and Kalaivani on 03.10.2007. The said Selvaraj filed divorce petition before the Sub-Court, Namakkal in H.M.O.P.No.147 of 2012 seeking divorce of his wife Devaki. Learned counsel for the revision petitioner contended that subsequently, the said Selvaraj has not pressed the said divorce petition and this fact is not denied by the respondent herein.

In H.M.O.P.No.147 of 2012, the said Selvaraj has filed a memo on 07.11.2012, not pressing the said H.M.O.P. The learned Subordinate Judge, Namakkal has passed the following order on 17.11.2012 in the said H.M.O.P.No.147 of 2012:

"I.A.148/12 is allowed today. Hg. advanced today. Not press Memo filed by the petitioner Objection memo filed by the 2nd respondent and recorded.

2nd respondent opposed the not press memo and prays compensatory cost in the objection memo.

On perusal of records it reveals that 2nd respondent stated in the counter that he married 1st respondent with the consent of 1st wife. Since R1 got divorce already.

But the above facts are proved only after the trial.

Now, the petitioner filed the memo for not pressing this petition. Hence, at this stage, the marriage held between R1 and R2 is valid or not was not decided and hence compensatory cost cannot be granted at this stage. Hence, this petition is dismissed....."

6. From the above order dated 17.11.2012, it is clear that H.M.O.P. filed by the said Selvaraj against Devaki and Subramanian, was pending till 17.11.2012 and subsequently, the said Selvaraj has not pressed the divorce petition in H.M.O.P.No.147 of 2012 and it was dismissed on that day. Hence, the argument of the learned counsel for the respondent that there was customary divorce between the said Devaki and the said Selvaraj and there was subsequent second marriage between the respondent-C.L.Subramanian and the revision petitioner-Devaki in Trichy Samayapuram Mariamman Temple, is not prima-facie acceptable.

7. On the side of the revision petitioner, learned counsel has filed additional typed set of papers enclosing the copies of the Birth Certificates of the minor children Srinivasan and Kalaivani, showing their Dates of Birth as 13.04.2005 and 03.10.2007 respectively. It is seen that the said Birth Certificates were registered on 15.04.2005 and 10.10.2007. In both the said Birth Certificates, the father's name is clearly mentioned as Selvaraj and the mother's name is mentioned as Devaki. Hence, even during the year 2005 itself, the name of the minor children's father had been specifically mentioned in the Birth Certificates as Selvaraj. Thus, it is clear that the

marriage between the said Selvaraj and the revision petitioner-Devaki is subsisting. It is to be noted that the said Selvaraj filed divorce petition in 2012 and subsequently, he has not pressed the same, which is clearly proved from the above order dated 17.11.2012 passed in H.M.O.P.No.147 of 2012. Hence, prima-facie, the revision petitioner-Devaki and the said Selvaraj are husband and wife and their marriage is still subsisting and the minor children Srinivasan and Kalaivani are born to the above said couple Devaki and Selvaraj, which is evident from the copies of the Birth Certificates enclosed in the additional typed set of papers filed by the learned counsel for the revision petitioner.

8. In the case on hand, the father and the mother of the minor children are very much available. It is alleged by the respondent-C.L.Subramanian that the revision petitioner-Devaki is his second wife and the minor children are born to him through the revision petitioner. Admittedly, as per the above documents, i.e. the Birth Certificates, the minor children are born to the said Selvaraj and the revision petitioner-Devaki. Therefore, the petition in G.W.O.P.No.75 of 2012 filed under Section 25 of the Guardian and Wards Act itself is not maintainable, which is nothing but seeking custody of the minor children from their own father and mother. The children are the minor children of the said Selvaraj and the revision petitioner-Devaki. Since the Birth Certificates are available for the minor children, the alleged DNA test as required by the respondent-C.L.Subramanian, before the Court below, will spoil the image, future, mind set-up, etc., of the minor children.

9. In view of the above peculiar facts and circumstances of the case and following the above decisions relied on by the learned counsel for the revision petitioner, it has to be held that the respondent-C.L.Subramanian has no right to seek for the custody of the minor children. If at all the respondent-C.L.Subramanian has any right over the minor children, he has to work out his remedy according to law and not by filing G.W.O.P. seeking for custody of the minor children, for whom, the father and the mother are available and the minor children are very much in the custody of their father and mother. Hence, DNA test is not at all necessary in this case and the G.W.O.P. itself is not maintainable in law. The impugned order of the trial Court ordering DNA test, is liable to be set aside.

10. Accordingly, the impugned order of the trial Court is set aside. The Civil Revision Petition is allowed. No costs. The Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

CS

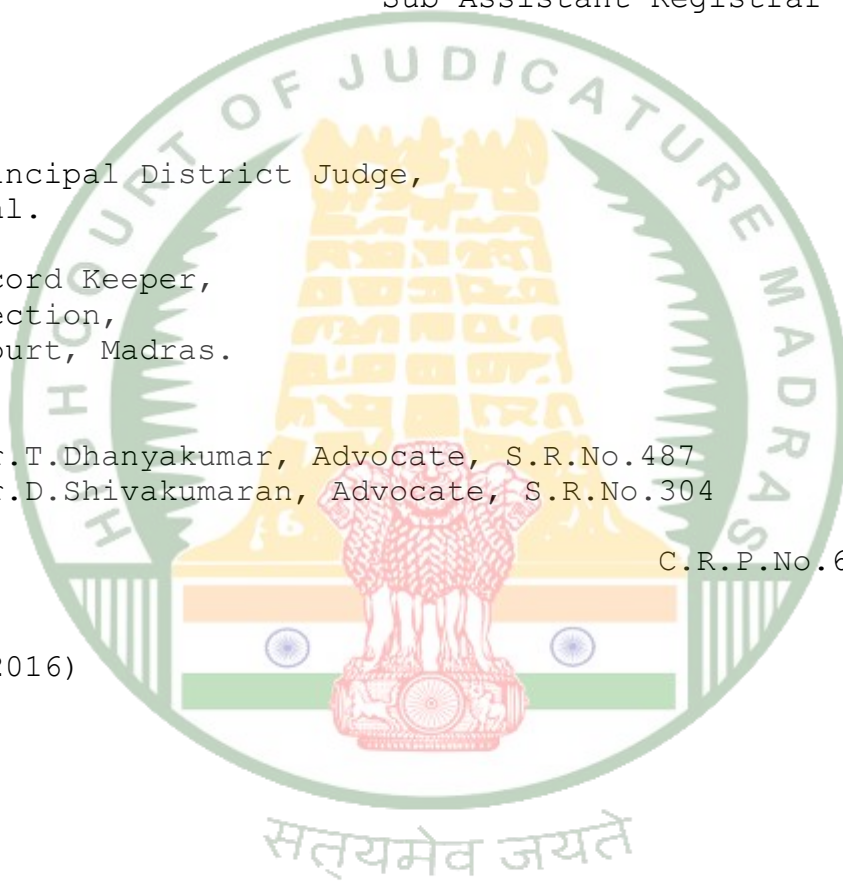
To

1. The Principal District Judge,
Namakkal.
2. The Record Keeper,
V.R. Section,
High Court, Madras.

+1cc to Mr.T.Dhanyakumar, Advocate, S.R.No.487
+1cc to Mr.D.Shivakumaran, Advocate, S.R.No.304

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BVR(CO)
CA(19/01/2016)



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