

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Criminal Misc. No. M-6105 of 2016
Date of decision : April 22, 2016

Surender

....Petitioner

versus

Rajbala @ Rajkumari and others

....Respondents

Coram: Hon'ble Mr. Justice Fateh Deep Singh

Present : Mr. Vivek Khatri, Advocate, for the petitioner

Fateh Deep Singh, J. (Oral)

The brief factual background that emerges from the submissions of Mr. Vivek Khatri, counsel for the petitioner are to the effect that the petitioner claims that a marriage between him and respondent no. 1 Rajbala @ Rajkumari was solemnized on 4.5.2002 at village Chapla Mori, Tehsil and District Fatehabad and at the same time simultaneously marriage of real sister of the petitioner namely Darshna was solemnized with Vinod real brother of respondent no. 1. It is the claim of the petitioner that matrimonial dispute has ensued between the parties and out of this wedlock a female child namely Pariyanka was born to the couple who is minor as on

date. It is the claim of the petitioner-husband that Rajbala vanished along with his minor daughter and subsequently it was revealed that she has undergone another marriage without taking divorce from him with respondent no. 2-Ugarsain Godara with the help of respondent no. 3 and 5. The claim of the petitioner is that during the course of illegitimate relations with respondent no. 2, respondent no. 1 had given birth to a boy namely Kapil, also a minor. It is on account of this illegitimate relations, the petitioner claims that he moved the Senior Superintendent of Police, Hisar for registration of criminal case and when all his efforts failed to materialize, he filed a private complaint under sections 497, 494, 420, 468, 471, 109 IPC Annexure P/1. It is during the proceedings in that complaint at pre-summoning stage, the petitioner has moved an application under section 311 Cr.P.C. seeking direction for examination of Pariyanka and Kapil, both children to determine their parentage as well as to summon their school records. It is the case of the petitioner that the learned trial court through the impugned findings Annexure P/4 vide orders dated 18.11.2015 allowed the prayer of the petitioner to the extent of allowing examination of the school records but declined the prayer for conducting test on the two children to determine their parentage. It is against these findings, the present petitioner has knocked at the doors of this Court seeking quashment of the orders passed by learned Magistrate Annexure P/4 whereby his application for additional evidence stood partly dismissed.

Heard Mr. Vivek Khatri, Advocate, for the petitioner and

perused the record.

Since the inception of the complaint it was the univocal stand of the complainant as has been averred in the complaint Annexure P/1 that out of his wedlock with accused Raj Bala alias Raj Kumar, she has given birth to a girl namely Priyanka who is minor and is school going. It has been categorically asserted by the complainant that the wife on account of matrimonial dispute had relinquished these relations and deserted him to live with his parents and thereafter without seeking divorce undergone another marriage with accused Ugarsain Godara-respondent no. 2, out of which a male child namely Kapil had been begotten by the wife. Thus, from it all ensues that it was the own stand of the petitioner to this effect and had sought to rely upon the birth record of the child born out of subsequent relations of the wife as well as holding of DNA test to determine the very parentage. Section 112 of the Evidence Act deals with legitimacy of a child and lays down that a birth during marriage is a conclusive proof of legitimacy. However, certain exceptions have been carved out. Detailing that unless it is shown that the parties to the marriage had no access to each other at any time when the child could have been begotten or it is conclusively established by tests conducted at the expense of that man namely, which could determine that the man is not the father of the child or such like test like DNA genetic printing tests and in case of a child with the permission of the Court, that that man is not the father of the child. Though much controversy has raised over the rights of the parties to such a resort

and in the case of **Sharda vs Dharampal, 2003(2) RCR (Civil) 795** (which was also relied upon by the Hon'ble Delhi High Court in **Shri Rohit Shekhar vs Shri Narayan Dutt Tiwari and another, 2011(1) RCR (Criminal) 289** wherein 3 Judges Bench of Hon'ble Apex Court has taken the view keeping in view the provisions of Article 21 of the Constitution of India that a direction after taking into consideration of relevant facts to the person to undergo such a test is not an invasion of his right to life and thus had affirmed the power of the Court to direct a DNA test by one of the parties but has cautioned the courts below that it must be exercised with care and caution after weighing all pros and cons by laying down the test of "eminent need". In the instant case, if the petitioner had been fully aware of the evidence he is likely to lead and by his gross and negligent conduct had failed to either detail such witnesses in the list of witnesses accompanying the complaint nor appears to have been vigilant enough to examine the same while completing his evidence. Therefore, the petitioner cannot be allowed to take un-due advantage of his own negligent stand. Though it was within the powers of the courts below to have exercised its powers to examine a witness by exercising of powers under section 311 Cr.P.C. but which it did not feel appropriate and therefore, cannot revert to undo the effects of his own negligence. The witnesses thus so sought to be examined cannot even loosely termed to be by means of additional evidence when they were part and parcel of averments right since the inception of complaint.

Looking from another angle, since the impugned order is intermediary in nature, as has been held by this Court in **Uppal Credit & Investment Pvt. Ltd. Vs Ashwani Kumar, CRM-M No. 15173 of 2012, decided on 22.3.2016.** So in view of the same, none of the ratios i.e. **Baba Kashmira Singh vs Mahindra & Mahindra Financial Services Ltd., 2014 (15) RCR (Criminal) 150; Baljit and other vs State of Haryana and another, 2009(2) RCR (Criminal) 178 and Dalveer Singh vs State of Rajasthan, 2014(9) RCR (Criminal) 483,** cited by counsel for the petitioner comes to the aid of the petitioner and to the mind of this Court, petition under section 482 Cr.P.C. does not lie against such an order which is amenable to Revision and exercise of inherent powers under section 482 Cr.P.C., in view of law laid down in **State Of Haryana And Ors vs Ch. Bhajan Lal And Ors, 1992 AIR 604,** are be exercised only sparingly to meet the ends of justice. Moreover, since statutory remedy is provided under Code of Criminal Procedure, so there is no occasion to resort to provisions of section 482 Cr.P.C. Thus, the present petition is hopelessly meritless and stands dismissed in limine.

April 22, 2016

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(Fateh Deep Singh)
Judge*Whether referred to Reporter ? Yes/No*