

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.**

Crl. Misc. No.M-6216 of 2016

Date of Decision: 22.03.2016

Amarjit Singh

....Petitioner

Versus

Nirmaljeet Kaur and another

....Respondents

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

- 1. Whether reporters of local newspapers may be allowed to see the judgment ? (Yes/No)**
- 2. To be referred to reporters or not ? (Yes/No)**
- 3. Whether the judgment should be reported in the Digest ? (Yes/No)**

Present:- Mr. Vinay Pandey, Advocate
for the petitioner.

DAYA CHAUDHARY, J.

The present petition has been filed under Section 482 Cr.P.C for quashing of order dated 23.12.2015 (Annexure P-5), whereby, the application moved by the petitioner for conducting DNA test of respondent No.2 has been dismissed.

Brief facts of the case are that respondent No.1-wife filed a petition under Section 125 Cr.P.C for grant of maintenance to herself and respondent No.2 (minor son). Said petition was allowed and the petitioner was directed to pay a sum of ₹ 4,000/- per month as maintenance to respondent No.1 and ₹ 2500/- per month to respondent No.2 (son).

Aggrieved by the said order of grant of maintenance, the petitioner preferred a revision petition before the Sessions Court, Jalandhar, which is still pending. However, during pendency of the said

revision petition, the petitioner moved an application for issuance of direction to respondent No.1 to bring respondent No.2 to concerned Forensic Science Laboratory for conducting DNA test.

As per grounds in the application, respondent No.2 was not born from the loins of petitioner and respondent No.1 as respondent No.1-wife was living in adultery. The said application was contested by respondent No.1 and even the reply was also filed but ultimately, it was dismissed on 23.12.2015 on the ground that similar application moved by the petitioner had already been dismissed by the trial Court on 18.12.2013 and the said order of dismissal of application was never challenged before any Court of law. The impugned order of dismissal of application has been challenged by the petitioner by raising various grounds.

Learned counsel for the petitioner submits that the Revisional Court, while passing the impugned order, has not taken into consideration the cross-examination of respondent No.1-wife as she has categorically admitted that she wanted to get conducted the DNA test and was ready for the same but still the application was dismissed. It is also the argument of learned counsel for the petitioner that as per provisions of Section 112 of the Indian Evidence Act, 1872, the conclusive proof of legitimacy of a child born during a valid marriage is not absolute in nature. In case, the parties to the marriage had no access to each other at any time then legitimacy of the child cannot be considered as conclusive proof that the child was born out from the husband.

Heard the arguments of learned counsel for the petitioner and have also perused the impugned order as well as other documents available on the file.

The filing of petition by respondent No.1-wife under Section 125 Cr.P.C for grant of maintenance for herself and her son respondent

No.2 is not disputed. The marriage between the petitioner and respondent No.1 took place on 13.02.2005. Both the parties remained together as husband and wife. Respondent no.1-wife moved an application under Section 125 Cr.P.C., which was allowed. The respondents filed a petition before the Judicial Magistrate 1st Class, Phillaur, wherein, the petitioner made a statement before the Court that he will provide all the facilities to the respondents. The said petition was withdrawn on 30.10.2011. Both the parties remained together for a period of two months but the behaviour of petitioner was not good towards respondents and she moved an application before the Police Station, Goraya. The petitioner admitted his guilt but still, respondent-wife was maltreated. Thereafter, both the respondents left the house of the petitioner. A petition under Section 125 Cr.P.C was filed, which was contested by the petitioner. During pendency of the proceedings, the petitioner-husband filed an application before the trial Court for conducting DNA test, which was dismissed on 18.12.2013 and the same was not challenged before any competent Court of law.

Aggrieved by the order of maintenance, the revision petition was filed by the petitioner. During pendency of the said petition, an application was moved with the same prayer for conducting DNA test of respondent No.2. Same grounds were raised in the subsequent application moved before the Revisional Court, which was dismissed on the ground that the similar application had already been dismissed and the order passed in the said application was never challenged. There was no fresh cause of action to move application before the Revisional Court as the order passed in the earlier application was never challenged before any competent Court of law. The argument of learned counsel for the petitioner is that the Revisional Court has not taken into consideration the cross examination of respondent No.1, wherein, respondent No.1-wife was ready

for conducting DNA test of her son.

Section 112 of the Indian Evidence Act, 1872 is relevant, which is reproduced 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.”

As per provisions of Section 112 of the Indian Evidence Act, 1872, in case, any person is born during the continuance of a valid marriage between his mother or 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 is shown that parties to the marriage had no access to each other at any time when he could have been begotten.

The marriage between the parties is not the dispute and moreover, both the parties have resided together in their matrimonial home for a considerable long time and it cannot be doubted in any manner that respondent No.2 was not born out of the matrimonial relationship of both the parties as they were not having access to each other.

Section 125 Cr.P.C is also reproduced as under :-

“125. Order for maintenance of wives, children and parents.-(1)If any person having sufficient means neglects or refuses to maintain-

(a)his wife, unable to maintain herself, or

(b)his legitimate or illegitimate minor child, whether married or

not, unable to maintain itself, or

(c)his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d)his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

[Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct :

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be

disposed of within sixty days from the date of the service of notice of the application to such person.]

Explanation.- For the purposes of this Chapter,-

(a)" minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b)" wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

[(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.]

(3)If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,] remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife

on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

(4)No Wife shall be entitled to receive an [allowance for the maintenance or the interim maintenance and expneses of proceeding, as the case may be,] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5)On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.”

As per provisions of Section 125 Cr.P.C, even the illegitimate child is also entitled for maintenance. It is also relevant to mention here that the earlier application moved by the petitioner before the trial Court with the same prayer was dismissed and the said order was not challenged by the petitioner. How the second application, for the same cause of action with the same prayer is maintainable, has not been explained. Proceedings under Section 125 Cr.P.C are summary in nature and any suggestion could have been put to respondent No.1-wife during cross-examination.

By considering the submissions made by learned counsel for

the petitioner, I am of the view that no interference is required with the impugned order and as such, the present petition, being devoid of any merit, is hereby dismissed.

22.03.2016
gurpreet

(DAYA CHAUDHARY)
JUDGE