

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No.10655 OF 2017

ORDER:

This Criminal Petition is filed under Section 482 of Criminal Procedure Code (for short "Cr.P.C.") to quash the order dated 12.09.2017 passed in CrI.M.P. No.641 of 2017 in M.C. No.11 of 2009 by Junior Civil Judge, Vayalpad, Chittoor District, whereby the learned Magistrate directed the petitioner herein to undergo DNA test along with the petitioners 1 to 3 therein to determine the paternity of the children, who are claiming as children of petitioner herein.

2) The 2nd respondents herein filed M.C. No.11 of 2009 on the file of the Junior Civil Judge, Vayalpad claiming maintenance from the petitioner herein and the petitioner herein filed counter denying the relationship between the petitioner and 2nd respondent, children respondents 3 and 4. By filing CrI.M.P. No.641 of 2017 in the M.C, they sought for a direction against the petitioner herein to undergo DNA test while agreeing to undergo test by the respondents 3 and 4. The petitioner denied the right of the respondents herein to compel him to undergo DNA test to determine the paternity in view of certain admissions regarding age etc., and requested to dismiss the petition.

3) The trial Court, after hearing arguments of both the counsel, allowed the petition directing the petitioner herein to

undergo DNA test along with the respondents 2 to 4 herein and appear before Centre for DNA Finger Printing and Diagnostic, Hyderabad on any convenient date, not later than 25.09.2017.

4) Aggrieved by the same, the present Criminal Petition is filed to quash the said order on the grounds urged in the counter and learned counsel for the petitioner mainly contended that the respondents cannot compel the petitioner to undergo DNA test as it amounts to testimonial compulsion and the evidence on record is sufficient to disprove the contention of the respondents 2 to 4 herein, more particularly, with regard to paternity of the respondents 3 and 4 and requested this Court to allow the criminal petition while setting aside the order dated 12.09.2017 passed in Crl.M.P. No.641 of 2017 in M.C. No.11 of 2009 by the Junior Civil Judge, Vayalpad.

5) Admittedly, the respondents 2 to 4 herein filed M.C No.11 of 2009, under Section 125 Cr.P.C, to grant maintenance, and the petitioner herein, who is respondent before the trial Court denied the marital relationship between him and 2nd respondent and paternity of the respondents 3 and 4, thereby they are not entitled to claim maintenance.

6) It is brought to the notice of this Court about the judgment in the earlier Case No.412 of 2003 passed by the Judicial Magistrate of First Class, Vayalpad, dated

10.05.2006, wherein the learned Magistrate extracted certain evidentiary admissions. On the strength of the admissions, the petitioner contended that there is no relationship between him and respondent Nos.2 to 4 as husband and wife and children, and thereby, they are not entitled to claim maintenance.

7) The respondents 3 and 4 herein are the children allegedly born during the wedlock between the petitioner and 2nd respondent but the petitioner denied the marriage between him and 2nd respondent as he already married another woman. However, Section 125 Cr.P.C permits the Magistrate to grant maintenance even to both the legitimate and illegitimate minor children. Even assuming for a moment, there was a marriage between the petitioner and the 2nd respondent, if the respondents 3 and 4 are able to establish that they were born due to sexual intercourse between the petitioner and 2nd respondent, they are entitled to claim maintenance irrespective of the marriage between the petitioner and 2nd respondent. Therefore, to establish the paternity of respondents 3 and 4, the respondents sought a direction against the petitioner to undergo DNA test along with respondents 2 to 4.

8) According to petitioner, he already married another woman as on the date of alleged marriage and the children i.e., respondents 3 and 4 were born by the date of alleged

marriage. Therefore, they are neither legitimate nor illegitimate children born to the petitioner due to sexual intercourse between the petitioner and 2nd respondent. It is difficult for anyone to prove the paternity except by scientific evidence as there is no material to establish the relationship between the petitioner and 2nd respondent. But at this stage, the Court cannot decide this controversy in view of the limited scope of the jurisdiction conferred on this Court under Section 482 Cr.P.C.

9) Apart from that, it is also not known whether the marriage of the petitioner with another woman was subsisting as on the date of marriage between the petitioner and 2nd respondent. Even if the marriage of the petitioner with another woman was subsisting, the marriage of the petitioner with the 2nd respondent is not legal, as she would not attain the status of a legally wedded wife, but the children i.e., respondent Nos.3 and 4 born during the voidable marriage are illegitimate children and they are entitled to claim maintenance under Section 125 Cr.P.C., if they are able to prove their paternity and they were born due to sexual intercourse between the petitioner and 2nd respondent. Therefore, such fact has to be proved by scientific method and the respondents Nos.3 and 4 came forward to give their blood samples while insisting the petitioner to give blood samples to undergo DNA test to determine the paternity of respondents 3

and 4 when 2nd respondent adduced evidence to prove that the marriage between the petitioner and 2nd respondent, the 2nd respondent must adduce evidence to the satisfaction of the Court to prove the paternity. In such case, the only scientific method to decide the paternity is D.N.A test. The law laid down by various Courts, including the Apex Court and this Court is consistent and I would like to advert to the law laid down by various Courts hereunder.

10) In ***Dipanwita Roy vs Ronobroto Roy***¹, the Apex Court held that one of the modes of dispelling presumption under Section 112 of Indian Evidence Act is DNA Test and in view of more accuracy attached to the said DNA Test, the Court instead of banking upon presumption under Section 112 of Evidence Act, can order for DNA Test for more accurate result, the result in DNA Test will prevail over presumption under Section 112, since it is based on scientific investigation.

11) In ***Goutam Kundu v. State of West Bengal***², the Apex Court held that Section 112 of Indian Evidence Act requires the party disputing the paternity to prove non-access in order to dispel the presumption. 'Access' and 'Non-Access' mean the existence of opportunities for sexual intercourse; it does not mean actual 'cohabitation'.

¹ AIR 2015 SC 418

² (1993) 3 SCC 418

12) In the **Goutam Kundu** case, the Supreme Court relied on the judgments of **Nandlal** and **Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and another**³ cases and held that if the child is referred to DNA Test and if ultimately found to be son who is not born to the same father, then he would be bastardized. But in the later judgments, more particularly, in the judgement of **Nandlal** case, the Apex Court is of the view that reference of a child to DNA Test is no way effect the case of the petitioner.

13) In **Banarsi Dass v. Teeku Dutta (Mrs) and another**⁴, the Supreme Court highlighted the main object of a succession certificate is to facilitate collection of debts on succession and afford protection to the parties paying debts to the representatives of the deceased persons. The Apex Court also held that it is for the parties to place evidence in support of their respective claims and establish their stands. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given, as was noted in **Goutam Kundu** case. Even in the judgment of the Apex Court, the Court did not conclude that the parties can be referred to DNA test in any deserving cases as extreme step of referring the parties to DNA test is permissible, but not as a matter of routine.

³ (2010) 8 SCC 633

⁴ (2005) 4 SCC 449

14) Thus, in view of the law declared by this Court in ***Dipanwita Roy*** case directing the petitioner to undergo DNA test and his giving blood samples is not a remedy which warrants interference by this Court while exercising the power under Section 482 Cr.P.C and apart from that the result in DNA test are scientific and accurate. Therefore, the rights of the petitioner will not be affected and it would not amount to testimonial compulsion as termed under Section Article 20 (3) of Constitution of India.

15) Hence, I find no error to interfere with the order dated 12.09.2017 passed in Crl.M.P. No.641 of 2017 in M.C. No.11 of 2009 by the Junior Civil Judge, Vayalpad, in view of the limited jurisdiction of this Court. Consequently, the criminal petition is liable to be dismissed.

16) In the result, the Criminal petition is dismissed.

17) Consequently, miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

16.11.2017
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Date:16.11.2017

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