

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

Crl. Misc. M 28823 of 2017 (O&M)
Date of decision: 4.9.2017

Devender

...Petitioner

Versus

State of Haryana and others

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present: Mr. Chanderhas Yadav, Advocate,
for the petitioner.

JAISHREE THAKUR, J.

Crl. Misc. No. 25252 of 2017

The application is allowed. The documents are taken on record.

The application stands disposed of.

Main case.

1. The instant petition has been filed seeking to challenge order dated 17.7.2016 passed by the Additional Sessions Judge, Jhajjar, and order dated 12.10.2015, by which the Additional Chief Judicial Magistrate, Jhajjar, has rejected the application of the petitioner for conducting a DNA test.

2. In brief, the facts are that the petitioner got married with respondent No.2 on 25.4.1999. However, on account of matrimonial discord, the parties separated. A divorce petition was filed on the ground of cruelty and adultery, which was dismissed and the appeal preferred in this

Court, being FAO No. 138-M of 2005 was also dismissed for non-prosecution by this Court on 13.1.2013. Respondent No.2 filed an application under Section 125 of the Code of Criminal Procedure (for short '**the Code**') claiming maintenance and by judgment dated 1.9.2010, the petitioner was directed to pay a sum of ₹3500/- per month to respondent No.2. Since the maintenance amount was insufficient, Babita-respondent No.2 and her son-respondent No.3 filed a petition under Section 127 of the Code for enhancement of maintenance amount. It was argued that the applicant/respondent No.2 and her son did not have means to support themselves on account of inflation and the maintenance allowance awarded should be enhanced from ₹3500/- to ₹10,000/-.

3. The petitioner filed a reply to the petition filed under Section 127 of the Code, stating that respondent No.3 was not his legitimate son, while also stating that the respondent No.2-wife was earning more than ₹10,000/- by sewing. At the same time, an application was also preferred for subjecting respondent No.2 to a DNA test to determine whether or not the son was born to the petitioner. The said application was dismissed by order dated 12.10.2015, which order was challenged in revision before the Sessions Judge, Jhajjar, who also dismissed the same holding that an application for DNA test was not maintainable in proceedings initiated under Section 127 of the Code, vide order dated 17.7.2017.

4. Learned counsel appearing on behalf of the petitioner urges that the application seeking to prove the paternity of the petitioner with respondent No.3 was wrongly dismissed and, in fact, if the same had been allowed, the truth would have come out. It is argued that the proceedings

under Section 127 of the Code are in continuation of the proceedings initiated under Section 125 of the Code and, therefore, it would have been appropriate for the Additional Sessions Judge to have allowed a DNA test conducted. Reliance in this regard has been placed upon the judgment rendered in Dipanwita Roy Versus Ronobroto Roy 2014 R.C.R. (Civil) 724, in which it was held that DNA test would be conclusive proof to prove the relationship of husband and son and to prove infidelity.

5. I have heard the learned counsel for the parties and also perused the case file and law cited.

6. There is no doubt a DNA test would prove the fact whether respondent No.3 is the son of the petitioner. However, this Court cannot lose sight of the fact that the divorce petition that was filed seeking divorce on the ground of adultery and cruelty was dismissed by the trial court and the FAO No. 138-M of 2005 filed against that was dismissed for non-prosecution by this Court on 31.1.2013. This Court is also conscious of the fact that once maintenance is awarded by the Additional Chief Judicial Magistrate, Jhajjar as far back as in 2010, the petitioner did not make any attempt to get the DNA test conducted.

5. An argument has also been raised that the petitioner has been raising the question of paternity right through and was not in a position to get the DNA test. However, this argument would be without merit since the petitioner himself accepted the maintenance awarded under Section 125 of the Code and kept quiet for several number of years and it is only when the petition was moved seeking enhancement under Section 127 of the Code that issue has been re-agitated under Section 127 of the Code. Section 127

of the Code reads as under:-

127. Alteration in allowance. *[(1) On proof of a change in the circumstances of any person, receiving, under section 125 a monthly allowance for the maintenance or interim maintenance, or ordered under the same section to pay a monthly allowance for the maintenance, or interim maintenance, to his wife, child, father or mother, as case may be, the Magistrate may make such alteration, as he thinks fit, in the allowance for the maintenance or the interim maintenance, as the case may be.]*

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that-

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,-

(i) in the case where, such sum was paid before such order, from the date on Which such order was made,

(ii) in any other case from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband by the woman;

(c) the woman has obtained a divorce from her

husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a [monthly allowance for the maintenance and interim maintenance or any of them has been ordered] to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person [as monthly allowance for the maintenance and interim maintenance or any of them, as the case may be, in pursuance of] the said order.

7. Thus, under Section 127 of the Code, the provision that has been made for alteration in allowance, is if there is proof of change in the circumstances of any person, receiving maintenance allowance under Section 125 of the Code monthly or if there is change of circumstances of any person who is ordered to pay maintenance under the same section, the Magistrate may make such alteration in the allowances, as he thinks fit. There are other grounds as specified in Section 127 for altering the allowances i.e. in case a woman after the date of divorce has remarried or has voluntarily surrendered her rights after divorce etc., which is not the issue in the present case. The petitioner had not challenged the order dated 1.9.2010 of the Additional Chief Judicial Magistrate, Jhajjar, whereby the maintenance for both the wife and the son had been accepted and now there is no change in the circumstances of the petitioner herein to warrant interference by this Court.

8. For the reasons afore-stated, the application for conducting the DNA test would not be sustainable and it was rightly rejected by the courts

below. There is no infirmity in the orders passed by the Courts below.

9. The petition is dismissed accordingly.

4.9.2017

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(JAISHREE THAKUR)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

No