

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.04.2019

CORAM:

THE HONOURABLE MS.JUSTICE P.T. ASHAC.R.P. (PD) No.1634 of 2018andCMP No.8809 of 2018

1.K.M.Vishnupriya

2. Minor Baby Sai Harshavardhini ..

Represented by guardian and mother

K.M.Vishnupriya ..

Petitioners

versus

E. Nithyanandh ..

Respondent

Prayer : Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 15.03.2018 made in I.A. No.2229 of 2017 in H.M.O.P No.969 of 2016 passed by the learned IV Additional Principal Judge, Family Court, Chennai.

For Petitioners : Ms. L. Poompavai

For Respondent : Mr.Chandrasudan

ORDER

The above Civil Revision Petition is filed, challenging the order passed by the Principal Judge, Family Court, Chennai in I.A. No.2229 of 2017, directing the second petitioner herein, minor aged 3 years, to undergo D.N.A. test to confirm her paternity.

2. The facts in brief, which led to filing of the above petition, which is rather unfortunate, is as follows :-

a) The respondent has filed a petition for divorce in H.M.O.P. No.969 of 2006 on the file of the Principal Family Court, Chennai. The petition for divorce was filed on the ground that the first revision petitioner had treated the respondent and his parents with utmost cruelty *inter alia* stating she did not discharge her duties either as a wife or as a daughter-in-law. The respondent / husband has also stated that on 20.06.2015, she had a major quarrel with him and left the matrimonial home. In paragraph 7 of the said petition, he has stated that the first petitioner is having some illicit contact with some other male person in the locality and her conduct is of such manner which is unworthy of a Hindu woman. However, the Original petition is not filed on the ground of adultery.

b) Thereafter, on 29.03.2016, the respondent has come forward with the petition in I.A No.1610 of 2016 to implead one Gowrishankar as the proposed respondent/adulteror. It is his contention that the proposed party was working as a Manager in "Foot reflexology", next to Vijay TV office, Nungambakkam and in the month of August 2015, the first petitioner herself had started a similar unit in the name and style of "Arora foot reflexology" in Nelson Manickam Road, Chennai - 29

and she has introduced herself to the said Gowrishankar and both of them had

developed an illegal contact. Out of such illegal contact, the first revision petitioner had got pregnant. Therefore, he sought to implead the said person as proposed party. That apart, he has taken out an application in I.A. No.2229 of 2017, which is the subject matter of the present revision petition. In this petition, the respondent would contend that he is not the father of the minor second petitioner, since, he was incapable of fathering a child inasmuch as he is suffering from the condition of less counts of sperms and that he has been under treatment from the year 2013. In this application, the respondent has categorically stated that the revision petitioner was in her matrimonial home till February 2016 and that in December 2015, he has noticed that the first petitioner was having an enlarged abdomen and to his query, she replied that it was due to Gastric problem. The entire reasons put forward to seek DNA test of the minor / 2nd revision petitioner was that he was not capable of fathering a child as he was suffering from "oligospermia" and that the first revision petitioner was having an illicit relationship with the said Gowrishankar.

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c) Incidentally, this petition for DNA test has been filed after the wife has taken out an application for maintenance under Section 24 of the Hindu Marriage Act in I.A. No.153 of 2017. The first revision petitioner has objected the said petition saying that the minor could not be compelled to undergo DNA test. Even in her petition filed for maintenance, the revision petitioner has stated that in the 3rd

week of October 2015, she had started the company and had appointed the said Gowrishankar as Manager and in the 3rd week November 2015, she had conceived out of the wedlock with the respondent. In fact, Gowrishankar had started creating problems in her matrimonial life and thereafter, he had also started blackmailing her through mobiles and edited videos and sent the same to the respondent. In fact, the first revision petitioner had filed the police complaint against the said Gowrishankar in this regard and therefore, she would state that the contentions raised by the respondent husband about her illicit relationship with the said Gowrishankar is totally unfounded. Ultimately on 28.02.2016, the respondent had abused her and she left her matrimonial and from 01.03.2016, she has been living away from the respondent's family. She has given birth to the second petitioner on 19.07.2016 and the child is living with the first petitioner.

3. Despite the counter affidavit, the learned IV Additional Principal Judge, Additional Family Court, Chennai by order dated 15.03.2018 has directed the second petitioner to undergo the DNA test. The reasons to arrive at this finding is medical records have been produced to prove the averments in the petition but the same was not denied by the first revision petitioner. Further, the respondent is disputing the birth of the second petitioner to him, the child has to undergo the DNA test. Challenging the said order, the wife / 1st petitioner is before this Court.

4. It appears that the above revision petition was listed for hearing on 13.06.2018 and since the learned counsel for the petitioner was not present, the Civil Revision Petition was dismissed, after hearing the caveator. The petitioner thereupon filed a petition in CMP No.16114 of 2018 in CRP (PD) No.1634 of 2018 on 09.07.2018 for restoring the Civil Revision Petition No.1634 of 2018, which was dismissed on 13.06.2018. When the matter was originally posted, this Court had directed the parties to settle the issue and therefore, posted the matter before the Mediation centre. The matter was being time and again adjourned and ultimately on 16.11.2018, the Tamil Nadu Mediation and Conciliation Centre, High Court, Madras had submitted the mediation report dated 14.11.2018 indicating that the parties were not willing to participate in the mediation.

5. Post the return of papers from the Mediation Centre, the matter had come up for hearing on 20.11.2018, 11.12.2018, 8.01.2019 and 24.01.2019. Further, on 13.02.2019, this Court has directed the matter to be listed under the caption "for dismissal" on 04.03.2019. Thereafter, the matter came up for hearing on 20.03.2019 under the caption "for reporting settlement". The parties once again sought time for settling the issue, and therefore, the matter was adjourned to 27.03.2019. Thereafter, the matter got listed on 03.04.2019 and after hearing both sides, this Court was pleased to restore the Civil Revision Petition to file. The

learned counsel for the respondent was also not averse to have the revision petition argued once again. Thereupon, this Court on the very same day has proceeded to hear the parties at length.

6. Heard Ms.Poompavai, learned counsel for the revision petitioners and perused the records. She would contend that the main Original Petition itself was filed only on the ground of cruelty. If the first revision petitioner was a woman of loose mores, the respondent /husband could have filed the petition for divorce on the ground of adultery. At the first instance, he has not taken the said petition on the ground of adultery. On the contrary, his entire allegations is that the first revision petitioner treated him and his parents with cruelty. The present petition is only a counterblast to the petition filed by the first petitioner seeking maintenance.

7. Per contra Mr. Chandrasudan, learned counsel appearing for the sole respondent would contend that the documents/medical reports would clearly show that the respondent is incapable of fathering a child and the photographs would show that the first revision petitioner is of loose mores and the child has not been born to him. In the reported Judgment of **Nandhlal Wasudeo Badwaik Vs. Lata Nandalal Badwaik and another Vasudev Updhoy [2014 (2) SCC 576]**, wherein, it has been held that the husband had no access with his wife and the child could not have been born to him. Therefore, in order to disprove the same, the DNA test has been ordered. Infact the Hon'ble Apex Court has held that Section 112 of the

Evidence Act can be invoked when there was no proof to show that there was access between the husband and the wife, the Honourable Apex Court has held as follows:

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 test is eminently needed.

8. Ultimately in that case the DNA test had been conducted by coming to the conclusion that the child could not have been born to the petitioner therein. This order has been subsequently followed in the case of the ***Dipanwita Roy versus Ronobroto Roy [2015 (1) SCC 365]***, where, there was a specific allegation that the wife is leading a wayward life and proceeded to have an extramarital relationship and on account of that, the child was born to him.

9. Heard the learned counsels on either side.

10. Juxtapose, these judgments were not applicable to the facts of this case, it is found that the respondent husband filed a petition for divorce on the ground of cruelty on 03.03.2016. In the said application, though he had said that the wife had contact with some third persons, there was no allegations whatsoever made in the petition that there was no cohabitation between the husband and the wife or that the husband is suffering from any kind of ailment. On the contrary, the

husband has proceed to contend that the wife had treated him and his parents with cruelty. It was only after the first revision petitioner has filed the petition for interim maintenance that the respondent / husband has come out with the instant application, seeking directions for subjecting the minor child to undergo DNA test. The entire fulcrum on which the instant petition has been filed is that the respondent / husband is incapable of fathering a child, on medical grounds and the respondent himself has submitted the reports of medical examination.

11. In the light of such overwhelming evidence, he can very well prove that the second petitioner was not born to him by submitting his medical records. There is no necessity to subject a minor child to undergo DNA test. The allegations of not having access with his wife etc. has been made for the first time, only in the petition seeking DNA test.

In the judgment of the Hon'ble Supreme Court referred in **Gautam Kundu versus State of West Bengal [(1993) 3 SCC 418]** had after discussing the evaluation of ascertaining the paternity by blood group test and relying on the law as available in England and discussing the earlier judgments both of the Supreme Court as well as the High Courts ultimately held as follows :-

"(1) That Courts in India cannot order blood test as a matter of course;

(2) Whatever applications are made for such prayers in order to take a roving inquiry the prayer for blood test cannot be entertained;

(3) there must be a strong prima facie case in that the husband must establish non access inorder to dispel the presumption arising under Section 112 of the Evidence Act and

(4) the Court must carefully examine as to what would be the consequence of ordering the blood test. Whether it will have the effect of branding a child as a bastard and the mother an unchaste woman."

12. This view underwent a change in the judgment reported in **AIR 2003 SC 3450 Sharda Vs. Dharmapal**, where the Hon'ble Supreme Court took the view that a medical test would be ordered, if the applicant has a strong prima facie case & sufficient material before it.

Thereafter in **Bhahani Prasad Jena Vs. Convenor, Secretary, Orissa State Commission for Women** and the Hon'ble Supreme Court has held as follows :-

"DNA is a matter relating to paternity of a child should not be directed by the Court as a matter of a 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 ad 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."

In the instant case, there is no overwhelming compulsion particularly

when the wife was living in her matrimonial home till February 2016 and the child

was born in the 2nd week of July 2016. That apart the husband is questioning the paternity only on account of his incapacity, which as discussed supra, can be proved by him otherwise.

13. I am therefore of the opinion that the learned Principal District Judge has not considered the interest of the minor, especially when the husband has filed the main case for divorce only on the ground of cruelty. The medical incapability of procuring a child can very well be established by examining the Doctor, who has treated him. Hence, there is no necessity to submit the Minor to undergo DNA test. Therefore, the order insofar as relates to subjecting the minor child for DNA test is set aside. This Civil Revision Petition is allowed accordingly. No costs. Consequently, connected miscellaneous petition is closed.

सत्यमेव जयते

03.04.2019

Internet: Yes/No

Index: Yes/No

Speaking order/Non-speaking order

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P.T. Asha, J.

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To
The IV Additional Principal Judge, Family Court, Chennai.



C.R.P. (PD) No.1634 of 2018

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