



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 10.10.2017
Delivered on : 06.02.2018

WEB COPY

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P. (PD) (MD) No.1317 of 2017
and
C.M.P. (MD) No.6458 of 2017

1.Vellaiammal
2.Radhika @ Malaivalanthai : Petitioners/Respondents 1 & 2/
Plaintiffs

Vs.

1.Annamalai : 1st Respondent/Petitioner/1st Defendant
2.Sirumbayee
3.Malar
4.Dhanapakkiam
5.Devakuchari @ Malaivalanthai
6.Ramesh
7.Thandava Prasath : Respondents 2 to 7/ Respondents 3 to 8
/Defendants 2 to 7

PRAYER : Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order in I.A.No.439 of 2015 in O.S.No.103 of 2013, dated 06.01.2017, on the file of the Subordinate Court, Kulithalai.

For Petitioners : Mr.B.Saravanan
For Respondents : Mr.K.Prabhakar - for R.1
: No Appearance for R.2, R.3, R.5 to R.7
: R.4-died

ORDER

The petitioners, who are plaintiffs in O.S.No.103 of 2013, on the file of the Subordinate Court, Kulithalai, have filed the above Civil Revision Petition, challenging the fair and decreetal order made in I.A.No.439 of 2015 in O.S.No.103 of 2013, dated 06.01.2017.

2. The plaintiffs have filed the suit in O.S.No.103 of 2013, seeking maintenance, partition and future measne profits.

<https://hcservices.ecourts.gov.in/hcservices/>

3. During the pendency of the suit, the first defendant in the suit filed an application in I.A.No.439 of 2015 seeking an order



for collection of blood samples of the first defendant and the second plaintiff for the scientific study of D.N.A., to find out the paternity of the second plaintiff and send such samples to the appropriate authority by way of appointing an Advocate Commissioner by the trial Court.

WEB COPY

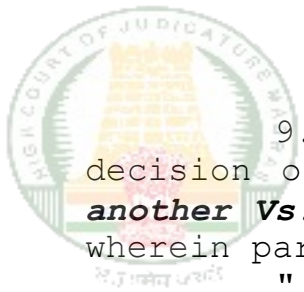
4. In the affidavit filed in support of the application in I.A.No.439 of 2015, the first defendant would submit that the first plaintiff is his wife, but she did not come and live with him even for a single day and from the date of marriage, she remained in her mother's house. It is further submitted that there is no conjugal relationship between the first plaintiff and himself. Hence, the second plaintiff was not born to him at all, since there is no conjugal relationship or cohabitation between the first plaintiff and himself. Hence, he filed the application in I.A.No.439 of 2015 seeking above stated relief.

5. In the counter affidavit filed by the second plaintiff/second respondent would state that after the marriage between the first plaintiff and the first defendant, they lived together as husband and wife and the second plaintiff was born. In the ration card stood in the name of the first defendant, the names of the plaintiffs were mentioned. In the School Transfer Certificate, the name of the first defendant was shown as father of the second plaintiff and they had no hesitation to undergo the medical test.

6. After hearing both sides, the trial Court allowed the application in I.A.No.439 of 2015. Against which, the present Civil Revision Petition has been filed.

7. The learned Counsel for the petitioners would submit that the impugned order has been passed by the trial Court on the assumption that the petitioners had no objection to allow the prayer in the interlocutory application, whereas the petitioner had stated in the counter affidavit in I.A., that they had no hesitation to undergo the medical test. He would further state that the trial Court had failed to appreciate the provisions of Section 112 of the Indian Evidence Act which provides that birth during marriage is a conclusive proof of its legitimacy, unless, it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten.

8. The learned Counsel for the petitioners would further submit that in the written statement filed by the defendants in the main suit, it is clear that the first defendant/first respondent herein has not taken the plea that he had no access with the first plaintiff at any time, when the second defendant could have been conceived. Therefore, the filing of petition for DNA test itself is not supported by any averment which is mandatory under Section 112 of Indian Evidence Act.



9. In support of his contentions, he would rely upon a decision of the Honourable Supreme Court in **Kamti Devi (SMT) and another Vs. Poshi Ram** reported in **(2001) 5 Supreme Court Cases 311**, wherein paragraph Nos.8 and 9 reads as follows :

" 8. When the legislature chose to employ the expression that a certain fact shall be conclusive proof of another fact, normally the parties are disabled from disrupting such proof. This can be discerned from the definition of the expression conclusive presumption in Section 4 of the Act. Conclusive proof. -When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

9. But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative. The *raison d'etre* is the legislative concern against illegitimatizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents."

10. Perusal of records shows that the parties to the marriage had got access to each other and unless and until there is an evidence to show that the parties had no access to each other then the birth during marriage is conclusive proof of marriage of legitimacy. Perusal of the affidavit filed in I.A.No.439 of 2015 and the written statement filed in the main suit, makes it clear that the first respondent/petitioner has not taken the plea that he had no access with the first petitioner/ first respondent at any time and therefore the respondent could not have been conceived. Therefore, the present test for DNA cannot be sustained under Section 112 of the Indian Evidence Act.

11. The learned Judge has relied on the averment made by the petitioner that she had no hesitation to undergo the medical test. But on the reading of the whole petition, the intention of the petitioner in making the statement is that she was not in shy of undergoing the test by other mode. The statement made by the petitioner should be read with the over all context of the case.



The question of paternity has to be decided only during the trial.

12. The learned Counsel for the petitioners would rely upon a decision of the Honourable Supreme Court in **Sham Lal Alais Kuldip Vs. Sanjeev Kumar and others** reported in **(2009) 12 Supreme Court Cases 454**, wherein, it has been held that once a validity of marriage is proved that there is strong presumption about the legitimacy of children by born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt. Even the evidence of adultery by wife which though amounts to very strong evidence, it, by itself, is not quite sufficient to repel this presumption and will not justify finding of illegitimacy if husband has had access.

13. The learned Counsel for the respondents relied on the judgment reported in **(2015) 1 Supreme Court Cases 365**. On perusal of this judgment, this Court is of the view that the same is not applicable to the facts and circumstances of the present case on hand. In the instant case, admittedly the second petitioner was born to the first petitioner, when the marriage was in subsistence with the first respondent.

14. Therefore, in my considered opinion, the order passed by the learned Trial Judge by relying the statement that no hesitation to go for DNA test and the order for DNA test is erroneous and the same warrants interference.

15. In the result, this Civil Revision Petition is allowed and the order dated 06.01.2017, passed in I.A.No.439 of 2015 in O.S.No.103 of 2013 on the file of the Sub Judge, Kulithalai is set aside. No costs. Consequently, the connected Miscellaneous Petition is also dismissed.

Sd/-

Assistant Registrar (CS-I)

/True Copy/

Sub Assistant Registrar

To

The Subordinate Judge,
Sub Court, Kulithalai.

+ 1 CC TO Mr.B.SARAVANAN, ADVOCATE IN SR No. 46351
+ 1 CC TO Mr.K.PRABHAKAR, ADVOCATE IN SR No. 46763

RM

TE/KKR/SAR-2 : 15/02/2018 : 4P/4C