

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

(1) CRM-M-29719 of 2017 (O&M)
Decided on:- August 13, 2019.

Dr. Sanjeev Malhotra.

.....Petitioner.

Versus

Kushargra Malhotra (minor) through his mother Dr. Aaradhna Malhotra.

.....Respondent.

(2) CRM-M-29732 of 2017 (O&M)

Dr. Sanjeev Malhotra.

.....Petitioner.

Versus

Kushargra Malhotra (minor) through his mother Dr. Aaradhna Malhotra.

.....Respondent.

CORAM: HON'BLE MR. JUSTICE HARI PAL VERMA.

Argued by:- Ms. Sheenu Sura, Advocate, legal aid counsel
for the petitioner.

Mr. Sanjeev Manrai, Senior Advocate with
Mr. Ajay Singh Parmar, Advocate
for the respondent.

HARI PAL VERMA, J.

This order shall dispose of the aforementioned two petitions as
the same have been filed under Section 482 Cr.P.C. by petitioner Dr. Sanjeev
Malhotra against his minor son Kushargra Malhotra.

In *CRM-M-29719 of 2017*, the petitioner has prayed to call for the records of the petition filed by the respondent under Section 125 Cr.P.C. bearing No.Mnt-125/13/2014 dated 10.09.2009 titled as ***Kushargra Malhotra Versus Dr. Sanjeev Malhotra*** pending before the Court of learned Judicial Magistrate 1st Class, Kalka, District Panchkula as well as for quashing of the order dated 15.07.2017 passed by learned Magistrate, whereby the application dated 26.04.2016 filed by the petitioner under Section 311 Cr.P.C. for recalling of AW1 Dr. Aaradhna Malhotra for further cross-examination has been dismissed.

Similarly, in another petition i.e. *CRM-M-29732 of 2017*, the petitioner has prayed to call for the records of the aforesaid petition under Section 125 Cr.PC filed by the respondent as well as for quashing of the order dated 31.05.2017 passed by learned Magistrate, whereby the application dated 26.04.2016 filed by the petitioner seeking permission to amend the application dated 26.04.2016 under Section 311 Cr.P.C. and the application dated 20.08.2016 seeking addition/amendment in the application dated 26.04.2016, were dismissed by learned Magistrate.

However, for convenience and clarity, detailed order is being passed in *CRM-M-29719 of 2017*.

Briefly stated, respondent Kushargra Malhotra, claiming himself as minor son of the petitioner, has filed a petition under Section 125 Cr.PC for grant of maintenance through his mother Dr. Aaradhna Malohotra, who is wife of the petitioner.

During the pendency of the aforesaid petition seeking maintenance, the petitioner had filed an application under Section 311 Cr.P.C.

for recalling of AW1 Dr. Aaradhna Malhotra for further cross-examination and to produce the details of her income, assets and liabilities on affidavits. In the main petition for maintenance filed by the minor, the petitioner has also raised the issue of biological parentage and that request for determination of biological parentage of the minor son by DNA test already stands rejected. The petitioner sought to elicit new evidence in order to discover true income and financial status of AW1 Dr. Aaradhna Malhotra and the minor son by cross-examining her again.

Learned counsel for the petitioner has submitted that AW1 Dr. Aaradhna Malhotra, being in special knowledge of her and minor's income and financial status was required to disclose the same in this matter truthfully, but instead thereof, she has concealed the same by giving false evidence. The petitioner wants to cross-examine AW1 again to falsify medical record produced by her and the new evidence sought to be elicited on medical aspect is essential for just decision of the case, because the biological parentage of minor is in dispute. There is complete contradiction, inconsistencies, obscurities, evasive replies and ambiguities in the statement of AW1 and she has concealed the vital facts which needs to be clarified. She needs to be cross-examined for her statement of having and maintaining two different residences. The record submitted by AW1 on 12.11.2010 is forged. Alterations in the said record are visible to the naked eyes. While month and year of last menstrual period (LMP) are clear, day has been made illegible to conceal date of conception. Similarly, expected date of delivery is blank which is very unusual. It could not be blank, once LMP has been recorded on the card. In this manner, she has concealed the date of conception. Similarly,

menstrual history has been tampered to make it look like 7/1½ - 2½, done to justify tempering of medical records.

Learned counsel for the petitioner has further argued that the AW1 Dr. Aaradhna Malhotra, who filed the petition under Section 125 Cr.P.C. on behalf of minor Kushargra Malhotra, is a Haryana Government Medical Officer with substantial income and assets and, therefore, she is required to maintain her minor son in proportion to her income. The financial resources of the petitioner are very meagre, but learned Magistrate has overlooked the desirability/essentiality of determination of true income of the respondent, which is essential for a just and fair decision on quantum of maintenance of the minor son. The statement of AW1 dated 05.02.2014 in her cross-examination on the one hand and her income tax returns showing assets for the years 2012-13 and 2013-14 are different. In this manner, she has concealed the income received from interest amounting to more than Rs.2 lakh in the year 2013-14. Similarly, capital gain of more than Rs.20 lakh in the year 2012-13 and even her salary income has not been rightly projected. Since the petitioner has left his practice on 21.01.2019 due to hearing impairment, he is surviving on meagre interest income of his PPF account. The non-disclosure of true income by AW1 Dr. Aaradhna Malhotra would lead to miscarriage of justice to the petitioner. Accordingly, discovery of true income in the case of AW1 is very essential for just decision of the case as she has not disclosed her true income.

Learned counsel for the petitioner has further argued that the provisions of Section 311 Cr.PC is too liberal and the Court is empowered to

summon material witness or examine person present in the Court. As per Section 311 Cr.P.C. any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined. The Court is empowered to summon any person as a witness at any stage of enquiry, trial or other proceedings, if his/her evidence appears to the Court to be essential for the just decision of the case. In the instant case, the wife has filed a petition under Section 125 Cr.PC for grant of maintenance for her minor son and, therefore, her evidence and at this stage, her cross-examination is essential for the just decision of the case. If on account of mistake on the part of the counsel for the petitioner, AW1 was not properly cross-examined, the request of the petitioner to recall her for further cross-examination should not have been declined. In support of her contention, learned counsel for the petitioner has relied upon ***Rahul Labroo Versus Dr. Priya 2015(4) RCR(Criminal) 69.***

On the other hand, learned counsel for the respondent has argued that the petitioner is in the habit of moving such like applications repeatedly and in this manner, he is harassing the respondent-wife and minor son in order to avoid his responsibility to pay maintenance. Moreover, the trial Court has allowed only a symbolic maintenance to the minor giving right to the petitioner to challenge it by way of present petition.

I have heard learned counsel for the parties.

During the course of arguments, learned counsel for the petitioner has re-agitated the argument questioning the legitimacy of

Kushargra Malhotra. So far as entitlement of maintenance even of an illegitimate child is concerned, the Apex Court in ***Dukhtar Jahan Versus Mohammed Farooq 1987(1) RCR (Criminal) 375*** has held that as per Section 112 of the Indian Evidence Act, if a person was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution and the mother remains unmarried, it shall be taken as 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.

Similarly, in ***Sunita Kachwaha and others Versus Anil Kachwaha 2014(4) RCR (Criminal) 831***, Hon'ble Supreme Court has held that the proceeding under Section 125 Cr.PC is summary in nature and in that proceeding, it is not necessary for the Court to ascertain as to who was in wrong and the minute details of the matrimonial dispute between the husband and wife need not be gone into. The High Court cannot go into the intricacies of dispute between the parties.

Moreover, in ***Bhabani Prasad Jena Versus Convenor Secretary, Orissa State Commission for Women and another 2010(4) RCR (Civil) 53***, Hon'ble Supreme Court while relying upon its earlier judgment in ***Ramkanya Bai Versus Bharatram 2009(4) RCR (Civil) 854***, has observed that the High Court was not justified in allowing the application for grant of DNA of the child on the ground that there will be possibility of reunion of the parties if such DNA was conducted and if it was found from the outcome of the DNA that the son was born out of the wedlock of the parties. Further, the relevant

observations made in paragraph Nos.13 and 14 of **Bhabani Prasad Jena's case (supra)** read as under:

“13. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. In our view, 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 is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of 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 and 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.

14. There is no conflict in the two decisions of this Court, namely, Goutam Kundu and Sharda. In Goutam Kundu , it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and court

must carefully examine as to what would be the consequence of ordering the blood test. In the case of Sharda while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA can be given by the court only if a strong prima facie case is made out for such a course. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court over-looked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that Court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court.”

Enough emphasis was made by learned counsel for the petitioner questioning the legitimacy of the child, however, in the light of the judgments referred above, this Court does not want to give any comments and the petitioner has remedy to avail under law.

So far as the argument of learned counsel for the petitioner that there are contradictions in the statement of AW1 Dr. Aaradhna Malhotra and it has become necessary to further cross-examine her, is concerned, merely

because some documents have come in the knowledge and possession of the petitioner at a later stage is no ground to allow the petitioner to recall the said witness, who has already been cross-examined in detail. In fact, what the petitioner intends to recall the said witness for further cross-examination is that he wants to ascertain the true income of the respondent-wife and discrepancies in the medical records determining the biological parentage of the child.

Interestingly, the respondent had filed the petition under Section 125 Cr.PC seeking maintenance in the year 2009, whereas the application seeking recall of AW1 Dr. Aaradhna Malhotra for her further cross-examination was filed by the petitioner on 26.04.2016 and that too without any substantial grounds. AW1 Dr. Aaradhna Malhotra had tendered her affidavit in her examination-in-chief on 27.07.2011 and thereafter, the case was fixed for her cross-examination on different dates. For the first time, it was listed for her cross-examination on 04.11.2011 and she remained in the witness box for her cross-examination till 05.02.2014 when her cross-examination was finally concluded.

Paragraph No.14 of the impugned order dated 15.07.2017 passed by learned Magistrate makes it clear that it is after a gap of one year i.e. on 15.04.2015, the application for recalling of the witness under Section 311 Cr.PC was moved by the petitioner. Perusal of the application further shows that the petitioner intends to shift his burden of proof on the respondent. Similarly, the medical record which was in possession of AW1 was already supplied to the petitioner at the stage of AW1's evidence for providing effective opportunity to him to cross-examine her. Mere plea that there are

contradictions and inconsistencies in the statement of AW1, is no ground to allow the petitioner to recall AW1 for further cross-examination unless it is substantiated by some cogent material. In order to succeed in the case, it is incumbent upon the petitioner to prove his case beyond all probabilities. The contradictions, if any, in the statement of AW1 would rather put the petitioner to an advantageous condition at the time of final adjudication. At the time of final adjudication of the petition under Section 125 Cr.P.C., the Court shall consider the contradictions in the evidence. Repeated applications filed by the petitioner throughout the proceedings does reflect that he is adamant to harass the respondent on one pretext or the other.

Therefore, this Court finds that there is no merit in the present petitions and the same are, accordingly, dismissed.

Photocopy of this order be placed on the file of other connected case.

August 13, 2019
Yag Dutt

(HARI PAL VERMA)
JUDGE

Whether speaking/reasoned: Yes

Whether Reportable: No