

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.12.2020

Pronounced on : 30.12.2020

CORAM

THE HON'BLE JUSTICE MR.G.CHANDRASEKHARAN

CRL.R.C.No.1345 of 2017
and
Crl.M.P.No.13072 of 2017

Vijayavelu ..Petitioner/Respondent

.Vs.

V. Sujatha ..Respondent/Petitioner

Prayer: This Criminal Revision is filed Under Section 397 and 401 of Cr.P.C to call for the records and set aside the order dated 17.08.2017 made in M.P.No.2069 of 2015 in C.C.No.592 of 2012 passed by the 18th Metropolitan Magistrate, Saidapet Chennai - 600 018.

For petitioner : Mr.S.Senthilnathan

For Respondents: Mr.R.Natarajan

ORDER

This Criminal Revision petition is filed against the order passed in M.P.No.2069 of 2015 in C.C.No.592 of 2012 on the file of VII Metropolitan Magistrate Court, Saidapet.

2.This petition has been filed by the respondent who is the complainant in the main case for conducting DNA test to the respondents 1 and 2 in M.P.No.2069 of 2015 and their girl child Magathi. It is seen from the affidavit filed in support of the petition that the first respondent (petitioner in this case) is having illicit relationship with the second respondent and out of this illicit relationship one girl child Magathi was born on 18.03.2011. Birth certificate dated 21.03.2011 issued by Avadi Municipality shows that Magathi was born to them on 18.03.2011 at Sir Ivan Stedeford Hospital, Thirumullaivoyal, Chennai. The respondent/complainant filed C.C.No.592 of 2012 against the petitioner and Nithya Kalyani for the offences under Section

494, 495 and 166 of I.P.C. The petitioner is a Government Servant and governed by (CCS) conduct rules. The birth certificate bears the name of the child as Mahathi, name of the father as Vijayavel and mother as Nithyakalyani. However, the petitioner is disputing this birth certificate. Petition filed for divorce by the petitioner is pending before the III Additional Family Court at Chennai in O.P.No.2634 of 2006.

3.The respondent herein lodged a complaint with the concerned authorities against the petitioner, that the petitioner married one Nithya Kalyani when the marriage with the respondent is subsisting. However, the authorities did not investigate the issue and tried to cover up the matter. The respondent had also participated in the enquiry conducted by the state Government Authorities. Nithya Kalyani did not attend the enquiry. Petitioner is denying the illicit relationship with Nithya Kalyani and the birth of girl child Magathi. In the said circumstances, the petitioner, Nithyakalyani and girl child Magathi have to be subjected to medical examination for DNA test to establish the biological relationship among them. Therefore, this petition.

4.The petitioner herein has filed counter objecting to the DNA test. It is stated in the counter that the petition for DNA test is filed only to harass the petitioner and cause delay in disposal of the divorce case. Self incrimination is prohibited under Article 23 of the Constitution of India. The out come of DNA test will not be an evidence for proving the alleged bigamous marriage. The ingredients of bigamous marriage under section 494 of Cr.P.C have to be proved by independent and reliable evidence. Therefore, he prayed for the dismissal of this petition.

5.Nithyakalyani also objected for DNA test and alleged that subjecting her and her child to DNA test would cause untold mental agony. The respondent filed a another criminal case against the petitioner and that was dismissed. The dismissal of that Criminal case is not brought to the notice of this Court. This petition has been filed only to wreak vengeance against petitioner and malign the Character of Nithyakalyani and birth of her girl child Magathi. The respondent cannot seek DNA test for her and her daughter in a case filed Under Section 494 of I.P.C. This is a frivolous petition and liable to be dismissed.

6.On considering the submissions made by the parties, the learned Judicial Magistrate allowed the petition for DNA test for the reason that the result of DNA test would be an additional evidence in favour of the respondent. Against the said order, this Criminal Revision is filed.

7.The point for consideration is whether the order of the Learned Judicial Magistrate suffers from any incorrectness, illegality or impropriety?

8.The learned Counsel for the petitioner submits that DNA test cannot be ordered for the collection of evidence and to bastardize a child. Perusal of the complaint in C.C.No.592 of 2012 shows that nothing had been said about performing the ceremonies in the conduct of second marriage. Assuming that there had been a second marriage between the petitioner and Nithyakalyani, unless the marriage is established in terms of Section 494 of I.P.C, there is no chance for succeeding in the case. DNA test for the petitioner, Nithyakalyani and Magathi would no way establish the conduct of second marriage between the petitioner and Nithyakalyani. The offence of Bigamy will have to be independently proved by evidence. This petition has been filed only to harass the petitioner Nithyakalyani and Magathi. The order passed by the Judicial Magistrate is not a reasoned order but a cryptic order without giving any reason for allowing the petition. Therefore, the learned counsel for the petitioner prayed for the dismissal of this petition.

9.The learned counsel for the petitioner relied on the rulings reported in CDJ 1993 SC 074, AIR 1993 SC 2295 [Goutam Kundu vs State of Bengal and another] , CDJ 1994 MHC 206 [Gomathi vs Vijayaraghavan and others], CDJ 2008 MHC 3971[K. Neelaveni Vs S.K. Sivakumar and others] wherein it was held that DNA test cannot be ordered as a matter of course and in a routine manner. Only when there is paternity of a child is disputed by one of the parents, there is a possibility of ordering DNA test. At the instance of 3rd party DNA test cannot be ordered to any man or woman or a child.

10.On the other hand the learned counsel for the respondent submitted that though there is birth certificate which shows the father's name as Vijayavelu and mother's name as Nithyakalyani for the girl child Magathi, petitioner denies the birth of the child to him. In fact the petitioner had even disputed the birth of his child to the respondent. The respondent had to file a petition to conduct DNA test for establishing the birth of a child to the petitioner. DNA test will help the Court in drawing inference regarding the bigamous marriage and arriving at conclusive decision. Therefore, the learned counsel for the respondent prayed for confirming the order of learned Judicial Magistrate and for the dismissal of this petition. He produced a typed set consisting of 20 documents. Perusal of the copies of the documents filed in the form of typed set consists of birth certificate, complaint given by the respondent to Inspector General, departmental enquiry related papers, communications between the respondent and officials of Directorate of Medical

and Rural Services, complaint in Criminal case and Chief Examination of witnesses, orders passed by the High Court in C.R.P. No.3358 of 2019 etc., Except some documents relating to C.C.No. 592 of 2012, C.R.P.(pd) No. 3358 of 2019, the documents relating to various complaints and departmental proceedings have to be produced only in the manner known to law. These documents have not been produced before the Trial Court for consideration. Therefore, the documents which have not been produced before the trial court cannot be taken into consideration now.

11.Before taking up claim and counter claim of the parties, it is better to find out the legal position with regard to ordering DNA test. It is observed in CDJ 1993 SC 074 AIR 1993 SC 2295 [Goutam Kundu vs State of Bengal and another] in Criminal Appeal No.443 of 1993 that:

1.that courts in India cannot order blood test as a matter of course;

2. Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

3. There must be strong prima facie in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.

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 bastard and the mother as an unchaste woman

5. No one can be compelled to give sample of blood for analysis.

12.In CDJ 1994 MHC 206 [Gomathi vs Vijayaraghavan and others], it was held with regard to the conduct of DNA test as follows:

"Blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by Courts as a circumstantial evidence which ultimately excludes a certain individual as a father of the child. However, no person can be compelled to give sample of blood for analysis against his/her will and no adverse inference can be drawn against him/her for this refusal. Courts in India cannot order blood test as a matter of course. Whenever applications are made for such prayer for blood test cannot be entertained. In matter of this kind the Court must have regard to Section 112 of the Evidence Act where the words "conclusive proof" must be understood by

their definition in Section 4. That Section is based on the well-known maxim pater est quom nuptice demonstrant (he is the father whom the marriage indicated). It is rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities. If making out the illegitimacy, the whole burden of proving it: It also held "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 as an unchaste woman."

13.It is seen from the Judgment reported CDJ 2008 MHC 3971 [K. Neelaveni Vs S.K. Sivakumar and others] in CrI.Rc.No.117 of 2008 and M.P.No.1 of 2008 that 'to maintain the charge Under Section 494 of I.P.C, there should be evidence to show that essential ceremonies were performed at the time of alleged 2nd marriage and such ceremonies and other requirements for a valid marriage have to be established by adducing evidence in the course of trial and a valid marriage between a man and woman cannot be presumed from the fact that the child was born out of their relationship. Unmarried man and women have serious relationship and out of that a child may be born and from that it cannot be presumed that there was a valid marriage between them. Therefore, as rightly pointed out by the learned Judicial Magistrate if there was a valid second marriage between the first and second accused that have to be proved only by way of evidence and not by subjecting them and the child for DNA test.The aforesaid reasoning of the learned Judicial Magistrate is in accordance with the settled principles of law and no exception can be taken to that"

14.The Judgment reported in CDJ 2008 MHC 3971 squarely applies to the facts of this case. As rightly pointed by the learned counsel for the petitioner, the offence of bigamy has to be proved by independent evidence and not by the alleged birth of a child between the alleged bigamous relationship. Therefore, in view of the direct ruling on the issue involved in this petition, negating the prayer for DNA for proving the bigamy and also the fact the bigamous marriage has to be independently proved, this Court is of the considered view that the order passed by the learned Judicial Magistrate in allowing the petition for conducting DNA test to the petitioner, Nithyakalyani and Magathi is not correct and not in accordance

with law. Moreover it is seen from the order passed by the learned Judicial Magistrate, no valid reasons have been given to allow the petition. It was just said that the DNA report will be an additional evidence to the case of the respondent. That could not be the reason for allowing the petition. In this view of the order, the order of the Learned Judicial Magistrate is liable to be set aside and set aside accordingly.

16. In fine, the order of the Judicial Magistrate in ordering DNA test to the petitioner, Nithyakalyani and girl child Magathi is set aside as incorrect and not in accordance with law and this Criminal Revision Petition is allowed. The learned Magistrate is directed to dispose the case as early as possible, preferably within a period of 3 months from the date of receipt of a copy of this order. Consequently, the connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS IX)

/true copy/

Sub Asst. Registrar

To

The 18th Metropolitan Magistrate,
Saidapet Chennai - 600 018.

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