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CrI.R.C.No.187 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.10.2022

CORAM:

THE HON'BLE MR.JUSTICE P.VELMURUGAN

CrI.R.C.No.187 of 2021

and

CrI.M.P.No.4500 of 2021

Sabu George

... Petitioner

..VS..

M.S.Lavanya Maria @

Moozhayil Sabu Lavanya

... Respondent

Criminal Revision Case filed under Sections 397 r/w 401 Cr.P.C to call for the records relating to the impugned orders made in M.P.No.604 of 2017 in M.C.No.552 of 2008 dated 20.09.2018 on the file of the IV Additional Principal Judge, Family Court, Chennai and set aside the same and allow the application of the petitioner in M.P.No.604 of 2017 as prayed for.

For Petitioner : Mr.K.Premkumar

For Respondent : Mr.V.Jayakumar

ORDER

This revision has been preferred challenging the order dated 20.09.2018 passed in M.P.No.604 of 2017 in M.C.No.552 of 2008 by the learned IV Additional Principal Judge, Family Court, Chennai.

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2. The respondent filed a maintenance case under Section 125 Cr.P.C. before the Family Court, Chennai in M.C.No.552 of 2008 against the petitioner. Pending maintenance case, the petitioner, who is the father of the respondent filed a petition under Section 45 of the Indian Evidence Act, 1872 in M.P.No.604 of 2017 in M.C.No.552 of 2008 on the file of the IV Additional Family Court, Chennai seeking to direct the respondent to undergo DNA test to decide her paternity. The said petition was dismissed. Challenging the same, the petitioner has filed the present revision case.

3. The learned counsel for the petitioner submitted that the petitioner is seriously disputing the paternity of the respondent. The petitioner herein filed a divorce petition in O.P.No.9629 of 1997 before the High Court of Kerala against one Rosalind Joseph, who is the mother of the respondent herein. Pending divorce petition, the petitioner filed C.M.P.No.30681 of 1997 disputing the paternity of the respondent and to direct the respondent to undergo DNA test to decide her paternity. The said petition was ordered and the petitioner and the respondent herein



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appeared before the Centre for DNA Finger Printing and Diagnostics, Hyderabad and their samples were collected to ascertain the paternity of the child/respondent herein. Subsequently, the petitioner withdrawn the above O.P. The DNA report though said to have been received by the Registry of the High Court of Kerala, it was neither opened in the Open Court nor informed to the parties. He further submitted that the respondent's mother also filed divorce petition against the petitioner herein in O.P.No.14445 of 1998 and the same is pending for consideration. Though the said Rosalind Joseph did not initiate any steps either for dissolution of marriage or claiming maintenance for the respondent, after expiry of 16 years from the date of birth of the respondent she filed M.C.No.552 of 2008 claiming maintenance of Rs.20,000/- per month to the respondent.

4. The learned counsel for the petitioner further submitted that since the DNA test report was neither opened nor perused by the High Court of Kerala during the pendency of the said divorce petition, however, during the chief examination in M.C.No.552 of 2008, the



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respondent filed DNA test report which is said to have been obtained from the High Court of Kerala and hence, the report filed by the respondent is not genuine and it cannot be relied upon to decide the paternity of the respondent. He further submitted that the respondent has produced different Birth Certificates and the particulars therein are different which creates doubt. Therefore, the respondent has not proved that the petitioner is her biological father. The learned Family Court without considering the averments made in the affidavit filed in support of the petition filed under Section 45 of the Indian Evidence Act, 1872 and the grounds taken therein, dismissed the petition.

5. The learned counsel for the respondent submitted that the matrimonial original petition in O.P.No.9629 of 1997 filed by the petitioner was dismissed with costs, since the counsel for the petitioner reported no instructions from the clients and the petitioner also called absent. He further submitted that pending matrimonial proceedings, the petitioner filed miscellaneous petition before the High Court of Kerala for taking DNA test to ascertain the paternity of the respondent and the same



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was allowed. The petitioner and the respondent also participated in the procedure for DNA test and also given their blood samples for testing and the report was also received by the Registry of the High Court of Kerala. Thereafter, the respondent obtained a certified copy of the report and the same has been marked as Ex.P2 in M.C.No.552 of 2008. The Family Court after considering the entire facts dismissed the petition.

6. In support of his contention the learned counsel for the respondent placed reliance on the decision of the Hon'ble Supreme Court in ***Goutam Kundu Vs State of West Bengal and Another*** reported in ***1993 AIR 2295*** wherein it is stated that a child born during the lawful wedlock is legitimate. Further, as per Section 112 of the Indian Evidence Act, there is a presumption that the child born to the wife during the wedlock is legitimate. Since the respondent and the petitioner had participated in the DNA test at the age of four years of the respondent, now the petitioner cannot be permitted to re-agitate the same issue and hence, the Court below has rightly dismissed the petition.

7. Heard the learned counsel for the petitioner and the learned



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counsel for the respondent and also perused the materials available on record.

8. Admittedly, the marriage between the petitioner and mother of the respondent herein is not in dispute and they have separately filed divorce petitions on various grounds. Further, the divorce petition filed by the petitioner/husband before the High Court of Kerala has been dismissed for default and the petition filed by the mother of the respondent seeking divorce is pending for consideration. Hence, as on date, the marriage between the petitioner and mother of the respondent is not dissolved. Now, the respondent filed a petition seeking monthly maintenance through her mother since she is a minor.

9. According to the mother, the respondent/daughter was born out of their wedlock. Though DNA test was taken and report also received from the High Court of Kerala, which was marked as Ex.P2 before the Family Court in M.C.No.552 of 2008, the main contention raised by the learned counsel for the petitioner is that the report was not opened before the High Court of Kerala and even in the exhibits there is no continuity of



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pages. The respondent obtained certified copy of the DNA test from the Court and marked the same as Ex.P2 in maintenance case. The petitioner has not proceed with the divorce petition and without getting certified copy of the DNA report cannot dispute the paternity. Therefore, once the petitioner admitted that he had undergone DNA test, the respondent also obtained certified copy and marked the same, which clearly shows that the petitioner is the biological father of the respondent.

10. In the light of the above facts and circumstances, this Court does not find any perversity or irregularity in the order passed by the Court below. Accordingly, this Criminal Revision Case is dismissed. Consequently, connected miscellaneous petition is closed.

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P.VELMURUGAN, J.

ms

To

The IV Additional Principal Judge,
Family Court, Chennai.

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