



C.R.P.No.1494 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On : 06.03.2023

Delivered On : 24.03.2023

CORAM :

**THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP**

C.R.P.No.1494 of 2021

and

C.M.P.No.11768 of 2021

B.Uma Maheswari

: Petitioner/Respondent/Respondent

-VS-

G.Elangovan

: Respondent/Petitioner/Petitioner

**PRAYER**: Civil Revision Petition had been filed under Article 227 of the Constitution of India, praying to set aside the order and decretal order in I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015, dated 07.09.2020 by the learned II Additional Judge, Family Court, Chennai and thus allow the Civil Revision Petition.

For Petitioner : Mr.S.Shujath Hussain

For Respondent : Mr.R.Prabhakaran  
for Mr.P.Kannan Kumar



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## **ORDER**

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This Civil Revision Petition had been filed seeking to set aside the order and decretal order in I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015, dated 07.09.2020 by the learned II Additional Judge, Family Court, Chennai

2.The learned Counsel appearing for the Civil Revision Petitioner submitted that the Respondent/Wife in I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015 is the Petitioner in this Civil Revision Petition. The Husband/Respondent herein had filed H.M.O.P.No.4589 of 2015 seeking divorce on the ground of cruelty. The contention of the Husband/Petitioner in H.M.O.P.No.4589 of 2015 is that the child was not born to him. Pending H.M.O.P.No.4589 of 2015, the Husband/Respondent herein had filed I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015 seeking direction from the Court of the learned II Additional Judge, Family Court, Chennai, to issue direction to the Respondent in H.M.O.P.No.4589 of 2015 to subject herself and her child born to her to DNA test to decide the paternity of the child. The said I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015 seeking DNA test on the Respondent/Wife and her minor child was



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allowed by the learned II Additional Judge, Family Court, Chennai.

Aggrieved by the same, the Respondent/Wife had filed this Civil Revision Petition under Article 227 of the Constitution of India.

3.It is the contention of the learned Counsel for the Petitioner/Wife that the learned II Additional Judge, Family Court, Chennai, had ignored the presumption under Section 112 of the Indian Evidence Act and had allowed the Petition filed by the Husband/Respondent herein seeking DNA test on the Petitioner/Wife and the minor child. The learned Counsel appearing for the Revision Petitioner invited the attention of this Court to the typed set of papers filed by him wherein a copy of the card given to pregnant woman by the Health Authorities are cited wherein it is stated that the last menstrual period is mentioned as 03.03.2013 just ten days prior to the date of marriage of the Petitioner and the Respondent on 13.03.2013. It is the case of the Petitioner that she stayed in her husband's house at Tiruvannamalai after marriage. When she had come to her parent's house at Chennai to celebrate Tamil New Year's day on 14<sup>th</sup> April, 2013, she had morning sickness and that she was taken to Hospital. On examination, she was found to be pregnant. The happy news was given to her Husband/Respondent. That she



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went for regular check-up at Chennai as well as at Tiruvannamalai. That

Seemandham was held on 17.08.2013 at Tiruvannamalai in her matrimonial

home. The learned Counsel appearing for the Petitioner invited the

attention of this Court to the documents filed along with the Petition,

particularly, Sonogram report dated 06.08.2013 taken at Ashwin Scan

Centre at Tiruvannamalai. It is the contention of the learned Counsel

appearing for the Revision Petitioner that among Indians, in the traditional

form of marriage where the traditional wisdom is followed by taking into

consideration the last menstrual cycle of the bride while fixing the date of

marriage. This traditional wisdom of our ancestors is to expect that the

woman will be conceived in two or three days of her marriage.

Accordingly, the Petitioner herein was conceived immediately after

marriage. However, the Husband/Respondent herein suspected her fidelity

and filed Petition for divorce. Originally H.M.O.P.No.44 of 2015 for

divorce was filed on the file of the learned Sub Judge at Tiruvannamalai.

Since the Petitioner/Wife, who is living at Chennai, is unable to travel every

time to Tiruvannamalai, she filed Transfer Civil Miscellaneous Petition

No.608 of 2015 seeking withdrawal of H.M.O.P.No.44 of 2015 from the file



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of the learned Sub Judge, Tiruvannamalai to the file of the Family Court, Chennai. Thus the Transfer Civil Miscellaneous Petition No.608 of 2015 was ordered and H.M.O.P.No.44 of 2015 pending on the file of the learned Sub Judge, Tiruvannamalai was transferred to the file of learned II Additional Judge, Family Court, Chennai and renumbered as H.M.O.P.No.4589 of 2015. Also, the Wife/Petitioner herein had filed H.M.O.P No.2617 of 2015 seeking restitution of conjugal rights. Also, she had filed Domestic Violence Case No.176 of 2017 before the learned Metropolitan Magistrate, Additional Mahila Court, Egmore, Chennai, against the Husband/Respondent herein and in-laws. Also, the Wife/Petitioner herein had claimed maintenance. Interim maintenance was considered by the Court in C.M.P.No.2774 of 2017.

4.It is the contention of the learned Counsel for the Respondent that the marriage between the Petitioner and the Respondent was conducted on 13.03.2013 at Shri Arunachaleswarar Temple, Tiruvannamalai. The Petitioner and the Respondent lived as husband and wife only for a week in the house of the Respondent/Husband. The averments in H.M.O.P.No.4589



of 2015 are as follows:

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*“2.After marriage, the Petitioner and the Respondent herein lived together as husband and wife only for one week in the house of the Petitioner. The Respondent herein on the next day after marriage started vomiting and after she took some medicine she became alright. After one week of stay with the Petitioner in his house after marriage, the respondent herein left for Madras, and is staying with her parents all these years. After two weeks from the date of marriage, the respondent herein informed the petitioner that she is pregnant on hearing the same, the Petitioner, his parents and other members of the family were greatly shocked and disturbed. The Petitioner and his family members were put to untold hardship, and their reputation were greatly damaged, and were put to severe mental trauma.*

*3.The Petitioner and his parents after detailed enquiry discovered that the Respondent herein had access only after marriage, that too only on few occasions. The respondent herein had become pregnant by some other person, and the petitioner is not the father of the child that was in the womb of the respondent. Since the petitioner is not the father of the child, that is in the womb of the respondent, the petitioner and other members of his family demanded that the respondent should give consent for dissolution of marriage that had taken place as between the petitioner and the respondent.*

*4.The respondent herein admitted her guilt, and was prepared to give consent for dissolution of marriage that had taken place as between the petitioner and the respondent and sought for some time, in order to pacify her parents, and relatives. The petitioner herein heeded to the request of the respondent and waited for some time, so that her parents and relatives will calm down, and understand the gravity of the problem, and will give consent for dissolution of marriage. But after some time, the respondent herein retracted from her earlier stand and refused to give consent for dissolution of marriage,. Because of the adamant and hostile attitude of the respondent, the petitioner herein was constrained to convene a Panchayat, and in the said Panchayat, it was decided that the*



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*respondent will file a petition for dissolution of marriage. In the meantime, the respondent herein delivered a child, and the same was informed by the parents of the respondent to the parents of the petitioner.*

*5.Even though the respondent herein agreed to file a petition for dissolution of marriage that had taken place as between the petitioner and the respondent. As he did not take any steps to file a petition before any forum for dissolution of marriage. Since the petitioner is not the father of the child of the respondent, he is not prepared bring the respondent and her child to his house.”*

5.In the meanwhile, the Wife/Petitioner herein filed DVC No.176 of 2017 before the learned Metropolitan Magistrate, Additional Mahila Court, Egmore, Chennai against the Husband/Respondent herein and his parents. In the Domestic Violence Case, interim maintenance of Rs.2,000/- each was passed by the learned Judicial Magistrate, Additional Mahila Court in C.M.P.No.2744 of 2017 for the Petitioner/Wife and the minor child. Aggrieved by the same, the husband/Respondent herein filed Criminal Appeal No.183 of 2018 against the order passed by the learned Additional Mahila Judge. In the Criminal Appeal No.183 of 2018 preferred before the learned Principal Judge, Sessions Court, order of the learned Metropolitan Magistrate, Additional Mahila Court, in C.M.P.No.2774 of 2018 was upheld by observing as follows:

*“Admittedly the appellant/husband has filed a O.P. for*



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*divorce before the Sub-Court, Tiruvannamalai and pending and it is also the admitted case of both parties that a petition for restitution of conjugal rights has been filed and pending and in the D.V. Act case filed by the respondent/wife the CMP filed for interim maintenance has been allowed directing the appellant/husband to pay a sum of Rs.2000/- each to the petitioner and her minor child. The respondent/wife had filed the Domestic Violence Act petition through the protection officer and the petition for maintenance has been filed u/s 23 of D.V.Act. On perusal of the health card, scan report filed by the respondent/wife along with the type set of papers which was not objected by the appellant it is evident that on 06.08.2013 the respondent/wife had a sonogram which reveals that her last menstrual period was 3.3.2013 and the fetus gestation period was 22 weeks 2 days and the expected delivery was on 08.12.2013. The appellant/husband counsel had not objected to the scan center report. Admittedly, the marriage was on 13.03.2013 and the appellant/husband had not denied the sexual intercourse and going by the report regarding the expected date of delivery of the child and admittedly the child having been born on 26.11.2013 the child has been delivered within 8 months 12 days of marriage and even the discharge record of the respondent/wife reveals that the respondent/wife was approximately 9 months pregnant on the date of admission. Further the appellant/husband has not filed any proof to show that the respondent/wife is a nutritionist and is a earning person. In the said circumstances of the case this Court is of the considered view that the trial Court has rightly held that the appellant/husband has to morally and legally maintain his wife and the minor child and the trial Court has also rightly held that in order to meet the day to day expenses of both the respondent/wife and her minor daughter the appellant/husband has to pay a sum of Rs.2,000/- each as maintenance and this Court finds no irregularity or infirmity to interfere in the trial Court order.”*

6.In I.A.No.1 of 2019 filed by the Husband/Respondent before the Family Court in H.M.O.P.No.4589 of 2015 the learned II Additional Judge, Family Court, Chennai had passed orders as follows:



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*“The contention of the petitioner was his suspicion on pregnancy of the respondent. But the respondent is of the view that this suspicion amounts to suspecting her chastity. The petitioner has requested the Court, that in order to prove the paternity of the child, the petitioner is to be directed for DNA test and the respondent is to be directed to produce the female child for DNA test. The paternity of the female child can be decided only through DNA test. Apart from medical examination there is no avenue available to the petitioner to move ahead in resolving his dispute. Under these circumstances the request of the petitioner is conceded and the respondent is directed to produce the female child before The Deputy Director and Assistant Chemical Examiner to Government DNA Division, Forensic Science Department, Chennai -4 for undergoing DNA test and the petitioner is directed to appear before the above authority for undergoing DNA test. Further an Advocate Commissioner is also appointed to co-ordinate with the petitioner and respondent and above authority and to receive the FDA cards from the Forensic Science Department and proceed as instructed by the Forensic Science Department. The petitioner is directed to bear the costs of DNA test and this point is answered accordingly.”*

7.The learned II Additional Judge, Family Court, Chennai in the order passed in I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015 had failed to consider the fact that as per the traditional wisdom of our elders, the last date of menstrual cycle of the bride is taken into consideration while fixing the date of marriage. It is under the presumption and based on the prevailing experience from generations, the bride after marriage involving in sexual intercourse will absorb the semen and chances of becoming pregnant for the future progeny is recognized well in the customary and traditional marriages throughout India. This system of traditional belief had



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been given the go by and the presumption of the newly married couple cohabiting after the marriage and the wife become pregnant was suspected by the husband. Mere suspicion had been converted into filing a petition for dissolution of marriage on the ground of cruelty.

8.The date of marriage was 13.03.2013. Whereas the date of last menstrual cycle was 03.03.2013. As per the Card (PICME No.28880503000261), given to the pregnant woman through Primary Health Centres/National Rural Health Mission wherein it is stated as “கடைசி மாத விலக்கான தேதி 03.03.2013” Therefore, one month after 13.03.2013, the wife developing symptom of pregnancy is found natural whereas the husband/Respondent herein had suspected the fidelity. Also, the learned Counsel appearing for the Revision Petitioner invited the attention of this Court to the scan report obtained by the Petitioner from Ashwin Scan Centre wherein it is reiterated as “LMP: 03.03.2013 EGA: 22 w 2d. The study shows a single fetus in Breech presentation (unnatural and abnormal position)”



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9. Apart from that, he had also relied on the case summary and discharge record copy of which is enclosed in the typed set wherein it is stated that “Emergency L.S.C.S. on 26.11.2013 at 2.48 p.m. Alive female Wt: 2.4 kg passed mee”. The birth certificate issued from the Greater Chennai Corporation mentions the name of the father and mother of the child. Copy of which is also enclosed in the typed set. While so, the Husband/Respondent under the guise of dissolution of marriage had made an attempt to extract dowry from the wife for which the husband and his parents had adopted this method. Therefore, the observation by the learned Judge, Family Court, in I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015 is found unreasonable in the light of Section 112 of the Indian Evidence Act which clearly states that paternity of the child shall be presumed when the husband and wife had accessibility towards each other, that the child was born out of matrimonial wedlock and a contrary presumption shall not be drawn contrary to the said provisions of the law. However, the learned II Additional Judge, Family Court, Chennai had allowed the I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015 seeking DNA test of the child and the Petitioner.



10.The learned Counsel appearing for the Petitioner invited the attention of this Court to the Counter filed by the Petitioner herein as Respondent in the I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015. The relevant portion is extracted as under:

*“6.This Respondent/Respondent submits that in the meantime, the Petitioner/Petitioner's sister Mrs.Ilavarasi was entangled in matrimonial problem and to solve her dispute with her husband, the Petitioner/Petitioner's parents requested the father of this Respondent to intervene and settle the matter amicably. After several rounds of talks and persuasions, a solution for re-union was arrived at. It was resolved that the said Ilavarasi should live with her husband at his house. But the Petitioner/Petitioner's mother did not agree. She wanted to take full control of her daughter and son-in-law. Since her daughter was facing problems, the Petitioner/Petitioner's mother did not relish this Respondent to live peacefully in their house. She used to ill-treated her in the absence of the Petitioner/Petitioner. This Respondent was made to starve without proper food on several occasions and she was confined a dark room. She was not even allowed to talk to the members of the Petitioner/Petitioner's family members. On the whole, this Respondent was treated as unpaid servant and slave.*

*7.This Respondent submits that the Petitioner/Petitioner's mother with sinister design disregard of elementary decency started hurling wild and despicable allegations against her by imputing her very character since her daughter did not become pregnant even after three years of marriage. She deliberately proclaimed and preached that it was impossible for a girl to become pregnant within one month of the marriage and doubted that the pregnancy was not of the wedlock with her son. With this poisonous aspiration, she started instigating the Petitioner/Petitioner against her.*

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*15.This Respondent further submits that the allegations of the Petitioner/Petitioner that she admitted her adulterous life and promised to give consent for dissolution of marriage by filing a Petition for dissolution of marriage are absolutely false and that there is iota of truth in it. The Petitioner/Petitioner makes this grave allegation against his good conscious just to get additional dowry by threat or to marry another girl with substantial dowry. Making allegations against the modesty and character of a woman is a great unpardonable sin. Just by taking undue advantage of premature delivery of the child, the Petitioner/Petitioner is making such deplorable and despicable derogatory remarks against the Respondent, despite the fact that Doctors and experts have expressed their opinion that premature delivery is nothing unusual. In this connection, the Respondent herein has sent a reply notice dated 13.03.2015 to the Petitioner/Petitioner's notice dated 03.02.2015 whereby she clearly explained her stand and she never on any occasion admitted her guilt and gave consent for dissolution of marriage as alleged by the Petitioner/Petitioner. It is an unbearable cruelty beyond any stretch of imagination and beyond human endurance to cast aspirations about the character of an innocent woman. The Petitioner/Petitioner cannot simply escape by making bald and boisterous allegations casually. The Petitioner/Petitioner is duty bound to prove his accusations against the character of this Respondent."*

11.In the admission stage, this Civil Revision Petition was admitted and interim stay was granted which is also continuing. Therefore, H.M.O.P. No.4589 of 2015 could not be proceeded. Now, the photo of the minor child along with the photo of the Husband/Respondent had been enclosed in the typed set which shows the similarity in the facial features between the Respondent/Father and the child. In support of his contention, the learned



Counsel appearing for the Petitioner relied on the ruling of the Hon'ble Supreme Court in ***Inayath Ali and another -vs- State of Telangana and another [SLP (Crl.) No.4946 of 2017]*** wherein it was observed as follows:

*“7.The first factor, which, in our opinion, is of significance, is that in the judgment under appeal, blood sampling of the children was directed, who were not parties to the proceeding nor were their status required to be examined in the complaint of the respondent No.2. This raised doubt on their legitimacy of being borne to legally wedded parents and such directions, if carried out, have the potential of exposing them to inheritance related complication. Section 112 of the Evidence Act, also gives a protective cover from allegations of this nature. The said provision stipulates:—*

*“Birth during marriage, conclusive proof of legitimacy.— The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be 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.”*

*8.In our opinion, the Trial Court as also the Revisional Court had completely ignored the said factor and proceeded as if the children were material objects who could be sent for forensic analysis. The other factor, in our opinion, which was ignored by the said two Courts is that the paternity of the children was not in question in the subject-proceeding.*

*9. The substance of the complaint was not related to paternity of the children of the respondent no. 2 but the question was whether the offences under the aforesaid provisions of the 1860 Code was committed against her or not. The paternity of the two daughters of the respondent no. 2 is a collateral factor to the allegations on which the criminal case is otherwise founded. On the basis of the available materials, in our opinion, the case out of which this*



*proceeding arises could be decided without considering the DNA test report. This was the reasoning which was considered by the Coordinate Bench in Ashok Kumar<sup>2</sup>, though that was a civil suit. Merely because something is permissible under the law cannot be directed as a matter of course to be performed particularly when a direction to that effect would be invasive to the physical autonomy of a person. The consequence thereof would not be confined to the question as to whether such an order would result in testimonial compulsion, but encompasses right to privacy as well. Such direction would violate the privacy right of the persons subjected to such tests and could be prejudicial to the future of the two children who were also sought to be brought within the ambit of the Trial Court's direction.*

12.The learned Counsel appearing for the Respondent/Husband vehemently objected to the line of arguments made by the learned Counsel appearing for the Petitioner/Wife stating that the Respondent/Husband had remained silent while marking documents before the learned II Additional Judge, Family Court, Chennai viz., Ex.R-1 - Copy of Sonogram Report of the Respondent/Wife before the family Court, R-2- Copy of Medical Records of the Respondent/Wife, R-3-Copy of the Scan Report of the Respondent/Wife and R-4-Order dated 26.06.2019 passed in CrI.A.No.183 of 2018 in C.M.P.No.2774 of 2017. It is the contention of the learned Counsel for the Respondent/Husband that the child was not born premature. The child was born after full term of pregnancy from the date of marriage i.e., 13.03.2013 and the delivery of the child viz., 26.11.2013, it was not as



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claimed by the Petitioner. Further, in the typed set, there had been two PICMY Cards have been enclosed – one issued by Primary Health Centre at Chennai and another by Primary Health Centre at Tiruvannamalai. Normally, only one card will be issued for a pregnant woman. Here two cards have been produced by the Petitioner. Also the discharge summary of the Petitioner is enclosed in the typed set wherein the name of the Doctor, who performed the surgery who had signed that discharge summary, does not contain. Therefore, the same was objected to by the learned Counsel for the Respondent/Husband in I.A.No.1 of 2019. Also, the learned Counsel for the Respondent submitted that after the suspicion was raised by the Husband/Respondent herein before the parents of the Wife, the Wife admitted to undergo DNA test. At the moment the I.A.No.1 of 2019 was filed, she had withdrawn such undertaking. Therefore, the Court can draw adverse inference against the Wife for her conduct in apprehending that the DNA report will be against her. Therefore, she has objected. The learned Counsel appearing for the Respondent/Husband invited the attention of this Court to the Respondent's typed set furnished by him wherein he had relied on the counter statement of the Wife/Respondent in H.M.O.P. No.4589 of



2015 which is extracted as under:

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*“Since they were adamant and firm to their conviction, the father of this Respondent preferred complaint with All Women Police Station, Thiruvannamalai. Before the Police Enquiry, the Petitioner for the first time alleged that he was not responsible for the birth of the child. This Respondent was ready and willing to undergo DNA test to prove her innocence and to establish that the Petitioner alone was the father of her child. But the Petitioner did not agree to such proposal and he was very particular for dissolution of marriage without sufficient cause or reason to please his mother.”*

13.The learned Counsel appearing for the Respondent/Husband also relied on the cross-examination of the Respondent/Husband which reads as under:

“நான் தாக்கல் செய்துள்ள எதிருரை பத்தி 6ல் மனுதாரருக்கும் எனக்கும் ஒரு வாரம் தாம்பத்திய உறவு உள்ளது என்று குறிப்பிட்டுள்ளேன் என்றால் எனக்கும் மனுதாரருக்கும் தாம்பத்திய உறவு கிடையாது. நீதிமன்றத்தில் இடைக்கால ஜீவனாம்ச உத்தரவு பிறப்பிக்கப்பட்டது எனக்கு தெரியும். அந்த உத்தரவு அடிப்படையில் நான் ஜீவனாம்சம் தொகையை மனுதாரருக்கும் குழந்தைக்கும் கொடுத்துள்ளேனா என்றால் மேல்முறையீட்டு நீதிமன்றம் ரூ.2 ஆயிரம், ரூ.2 ஆயிரம் கொடுத்துள்ளேன். எத்தனை மாதம் ரூ.2 ஆயிரம், ரூ.2 ஆயிரம் கொடுத்துள்ளேன் என்றால் எனக்கு தெரிந்து 15 மாதம் கொடுத்திருப்பேன். மேல்முறையீட்டு நீதிமன்றத்தில் C.A.No.183/2018 என்ற எண்ணில் 26.06.2019 அன்று ஒரு உத்தரவு பிறப்பிக்கப்பட்டது என்றால் சரிதான். மேல் முறையீட்டு நீதிமன்றத்தில் பொய்யான ஆதாரங்கள் தாக்கல் செய்து உத்தரவு பெறப்பட்டது. மேல் முறையீட்டு நீதிமன்றமானது நான் சந்தேகப்படுவதுபோல் குழந்தை எனக்கு பிறக்கவில்லை என்ற கூற்று தவறானது என்று உத்தரவு பிறப்பிக்கப்பட்டுள்ளது என்றால் மேல் முறையீட்டு நீதிமன்றமானது மனுதாரர் தரப்பில் தாக்கல் செய்த கேஸ் சம்மரியின் அடிப்படையில் உத்தரவு பிறப்பிக்கப்பட்டுள்ளது.”



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14.Also the learned Counsel appearing for the Respondent/Husband submitted that the learned Metropolitan Magistrate, Additional Mahila Court, Chennai had dismissed D.V.C.No.176 of 2017 as per order dated 28.09.2022. That shows that the Petitioner herein/wife was not interested in prosecuting the DVC as she was clear that no case is made out against the Respondent/Husband throughout during the period of dispute before filing of H.M.O.P. before the Sub Judge, Tiruvannamalai. The wife undertook to subject herself to DNA test to prove that the child was born through the Respondent/Husband but when a petition was filed, she refused to subject herself for DNA test. Also the learned Counsel for the Respondent relied on the affidavit filed as Examination-in-Chief of Petitioner/Wife in OP No.2617 of 2015. Therefore, the wife had filed DVC only as a counter blast to harass the husband from making allegations. Also, the learned Counsel appearing for the Respondent relied on the ruling of the Hon'ble Supreme Court reported in **(2015) 1 SCC 365 [Dipanwita Roy -vs- Ronobroto Roy]** wherein it has been held as follows:

*“A. Evidence Act, 1872 – Section 112 – Birth during subsistence of marriage, as proof of legitimacy - Presumption as to, under Section 112 of Evidence Act – Conclusive rebuttal of, by DNA test – Holding of DNA test of son born to wife, allegedly from adulterous relationship, to establish paternity/adultery – Husband's*



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*prayer as to – Grant of – When permissible – Wife if bound to comply with such direction – Effect of non-compliance with such direction – Right to privacy – Preservation of.”*

15.Also, the learned Counsel appearing for the Respondent relied on the decision of the Hon'ble Supreme Court in ***SLP (C) No.5554 of 2020 dated 04.04.2022 [Piryanka Janardhan Patil -vs- Janardhan Raghunath Patil]***. Here the fact of the case is different.

16. Point for consideration:

*Whether the order passed by the learned II Additional Judge, Family Court, Chennai in I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015, dated 07.09.2020 is to be set aside as not permissible in law?*

17.On consideration of the rival submissions, the petition for dissolution of marriage filed by the Husband/Respondent herein is merely on suspicion that the wife/Petitioner herein has become pregnant within first week of the marriage. In the counter filed by the Wife in H.M.O.P. No.4589 of 2015 as well as in I.A.No.1 of 2019, she had clearly stated that there was misunderstanding in the family due to the dispute between the husband's sister and her husband for which the Respondent's mother requested the



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Revision Petitioner's father to intervene on their behalf and in the course of the mediation, the mother-in-law of the Revision Petitioner wanted her Daughter and son-in-law to be with them. For which, the Revision Petitioner's father as mediator did not approve and so there was misunderstanding. Therefore, only at the instigation of the mother-in-law of the Revision Petitioner, the Husband of the Revision Petitioner had filed H.M.O.P. No.4589 of 2015 disputing the paternity in spite of the fact that the Doctors who attended to the pregnancy and delivery of the child had convinced the husband. However, he was not willing to accept the fact that he is the father of the child and he had filed the Petition which is bereft of merit.

18.Further, the submission of the learned Counsel for the Respondent cannot at all be accepted in the light of the photograph furnished by the Revision Petitioner regarding the similarity in the facial features of her husband and the child. Even to the naked eye, one could find the similarities between the father and child. When that be the case, the presumption available under the Indian Evidence Act as had been held by



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the Hon'ble Supreme Court in various decisions cited by the learned Counsel for the Revision Petitioner in the recent decisions in ***Inayath Ali and another -vs- State of Telangana and another [SLP (Crl.) No.4946 of 2017]*** is found acceptable. The decisions relied on by the learned Counsel for the Respondent in ***(2015) 1 SCC 365 [Dipanwita Roy -vs- Ronobroto Roy]*** is unacceptable in the facts of the case before us. When adultery is claimed, there shall be clear mentioning of the person with whom the spouse had adulterous life. Also, there shall be pleading in the Petition that there was no amenability to the other spouse against whom adultery is claimed. Here, the learned Counsel for the Respondent had furnished deposition before the learned Metropolitan Magistrate, Additional Mahila Court, Chennai, wherein the suggestion of the learned Counsel for the wife was rejected by him. In the petition for divorce, he had clearly stated that both spouses were living as husband and wife. Therefore, there was presumed amenability and accessibility between the spouses leading to the Revision Petitioner becoming pregnant. When there is no specific averments in the Petition regarding adulterous life of the other spouse and when he had admitted in his pleadings that he had access to the Revision



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Petitioner on few occasions coupled with the Revision Petitioner's contentions that her last menstrual date was on 03.03.2013 and that she showed symptoms of morning sickness after one month of date of marriage, with the child being born on 28.11.2013 on the strength of the medical records is found to be normal and natural occurrence and is acceptable and true. Also as rightly pointed out by the learned Counsel for the Revision Petitioner her right to privacy had to be protected. When the wife is reluctant to subject herself to DNA test and Court cannot forcibly enter into the domain of the privacy guaranteed under the Constitution of India to its citizens. Therefore, in all probabilities, there was misunderstanding between spouses due to the interference of the elders of the family of the Husband which had resulted in filing of the petition for dissolution of marriage. The learned II Additional Judge, Family Court, Chennai, in the absence of the party/the so-called adulterer cannot have ordered conducting DNA test ignoring the settled position of the Hon'ble Supreme Court in various decisions. In the light of the above, the submission of the learned Counsel for the Respondent/Husband cannot at all be accepted.



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19. On perusal of the Sonogram Report dated 06.08.2013 wherein it is stated as “gestational age 20 to 21 weeks”. The date of marriage was 13.03.2013, the date of Sonogram Report was 06.08.2013. Therefore, 20 weeks is found natural. The allegations in the Divorce Petition that the Revision Petitioner/Wife was three month pregnant on the date of marriage is found to be false as the Respondent/Husband made wanton allegation as stated by the Revision Petitioner in her counter in I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015.

20. The contention of the learned Counsel for the Respondent/Husband that the Revision Petitioner/Wife had two PICME Cards – one registered at Tiruvannamalai and another registered at Chennai. Therefore, the test report filed cannot at all be accepted, also is rejected considering the contents of the counter that she came to her parents house and her father took her to Central Government Health Centre where the test was done and she had informed the news of pregnancy to her husband. Due to the dispute created by the mother-in-law of the Revision Petitioner, the Revision Petitioner had been staying at Chennai. Therefore, she has to take



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care of herself and the child in the womb. Therefore, the contention of the Respondent/Husband that the Petitioner had two PICME cards cannot be considered as doubtful. It is natural.

21. Also there is a strong presumption in favour of the institution of marriage under Section 112 of the Indian Evidence Act. Therefore, against that presumption it is for the Respondent/Husband to let in evidence during the trial that he had no access to the wife or he was impotent. Only in these two factual situations, the Court can arrive at a conclusion. Till such time when there are circumstances that the Petitioner/Wife had the company of the Respondent/Husband and the Respondent/Husband had the company of the Petitioner/Wife in the course of matrimonial relationship, the child born to the Petitioner/Wife was born during the matrimonial life. It is useful to extract Section 112 of Indian Evidence Act which reads as under:

*“S. 112 enacts a strong presumption favouring legitimacy against bastardy; the rule is founded in the notion that it is undesirable to enquire into a child's paternity whose parents had a subsisting marital status with access to each other; the continuance of the marriage and availability of access is conclusive proof of legitimacy; no evidence in such a case is permissible that the child could have been begotten of another man; such conclusive presumption is, however, rebuttable by proof of non-access at any time when the child could have been begotten; on facts found, the*



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*presumption of legitimacy stood rebutted: [AIR. 1977 Karn. 115: (1977) 1 Karn.L.J. 206 (DB); 1982 M.P.L.J. 487]”*

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Apart from that, Article 20 of the Constitution of India guarantees its citizens the right to protect oneself from giving evidence incriminating him or her.

22.Merely admitting that she will subject herself to DNA test during the talks to convince him that she will be taken back by the husband but the husband filing a petition making frivolous allegations had made her to resist such attempt, particularly, after the Doctors had convinced the husband of the scientific development and the complications of the pregnancy resulting in delivery by cesarean section, premature and the adamant attitude of the husband from the date of marriage till delivery of the child. The scientific explanation by the Doctors was not accepted by the husband and the necessity had made an attempt to file a petition for divorce as though she was living in adultery. The photograph of the husband and the child is clear even to the naked eye regarding similarities in facial features between the father and the child. Therefore, the presumption is strong in favour of the Petitioner/Wife. Ignoring those well established norms of morality and ignoring the right to privacy guaranteed under the Constitution of India and



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the settled position of law regarding subjecting the child to paternity test for proof of paternity cannot be accepted in the light of the reported ruling cited by the learned Counsel for the Respondent i.e., **(2015) 1 SCC 365 [Dipanwita Roy -vs- Ronobroto Roy]**. In the same ruling, the consequences of a paternity test had been discussed based on earlier rulings of the Hon'ble Supreme Court.

23. In the reported decision cited by the learned Counsel appearing for the Respondent/Husband, a case has been clearly stated and pleaded adultery of the wife and the persons involved with adulterous life with the wife. Therefore, the Court had allowed DNA test. Here, the case is different. The Husband/Respondent herein had only raised doubt regarding paternity of the child and he did not accept the scientific explanation offered by the Doctors who treated the wife. Only for the purpose of extracting more dowry and only to cause harassment to the wife, since the Sister of the husband is facing matrimonial dispute due to the interference of the mother of the husband in the relationship between the daughter and son-in-law resulting in sour relationship between the spouses. Here in this case, the facts had been clearly set out in the counter filed in H.M.O.P.No.4589 of



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2015 as well as in the counter filed by the Revision Petitioner as Respondent in I.A.No.1 of 2019. The same had been stated by the Revision Petitioner in the H.M.O.P.No.2617 of 2015 filed by her and also in the Domestic Violence Case No.176 of 21917 filed by her.

24.In the light of the specific averments by the Wife in all these proceedings that H.M.O.P. No.4589 of 2015 had been instituted based on the instigation of the mother of the husband and in the absence of specific averments regarding non-consummation of marriage in H.M.O.P. No.4589 of 2015, the order of the learned II Additional Judge, Family Court, Chennai, directing the Petitioner herein/Wife/Respondent in I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015 to undergo DNA test is not sustainable. The point for consideration is answered in favour of the Petitioner and against the Respondent.

25.In the light of the above discussions from paragraphs 17 to 24, in the light of Section 112 of the Indian Evidence Act and in the light of Article 20 of the Constitution of India when there is specific pleading by the



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Respondent/Husband that the Respondent/Husband and Petitioner/Wife lived in matrimonial home immediately after marriage and they had amenability with each other, the order passed by the learned II Additional Judge, Family Court, Chennai in I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015, dated 07.09.2020 is not permissible in law. Therefore, the said order is not sustainable. Hence, the same is to be set aside.

In the result, **the Civil Revision Petition is allowed.** The order passed by the learned II Additional Judge, Family Court, Chennai in I.A.No.1 of 2019 in H.M.O.P.No.4589 of 2015, dated 07.09.2020 is set aside.

The learned II Additional Judge, Family Court, Chennai, is directed to dispose of both H.M.O.P.Nos.4589 of 2015 and 2617 of 2015 as early as possible on priority basis. Consequently, the connected miscellaneous petition is closed.

**24.03.2023**

SRM

Index : Yes / No

Internet : Yes / No

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To

- 1.The II Additional Judge,  
Family Court, Chennai
- 2.The Section Officer,  
V.R. Section,  
High Court, Madras.



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**SATHI KUMAR SUKUMARA KURUP., J.**

**SRM**

**Order made in  
C.R.P.No.1494 of 2021**

**24.03.2023**