



Crl.R.C.(MD)Nos.731 and 614 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 14.12.2023

CORAM

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

Crl.R.C(MD)Nos.731 and 614 of 2019

Crl.R.C(MD)No.731 of 2019:

A.Sahayaraj Albert

... Petitioner/Petitioner

Vs.

Sesu Reena Brijitta

... Respondent/Respondent

Prayer: Criminal Revision Petition has been filed under Section 397 r/w 401 of Cr.P.C., to call for records and set aside the impugned Order dated 19.06.2018 passed in Cr.M.P.No.779 of 2016 on the file of the learned Chief Judicial Magistrate, Tiruchirappalli, Tiruchirappalli District.

For Petitioner : Mr.K.Veilmuthu

For Respondent : Mr.B.Jameel Arasu

Crl.R.C(MD)No.614 of 2019:

A.Sahayaraj Albert

... Petitioner/Petitioner

Vs.



CrI.R.C.(MD)Nos.731 and 614 of 2019

Sesu Reena Brijitta

... Respondent/Respondent

Prayer: Criminal Revision Petition has been filed under Section 397 r/w 401 of Cr.P.C., to call for records and set aside the impugned Order dated 09.04.2019 passed in Cr.M.P.No.307 of 2016 on the file of the Learned Chief Judicial Magistrate, Tiruchirappalli, Tiruchirappalli District.

For Petitioner : Mr.K.Veilmuthu

For Respondent : Mr.B.Jameel Arasu

COMMON ORDER

Since the issue involved in these two petitions are one and the same, these two petitions are taken up together and disposed of by way of this common order.

2. The petitioner is the husband. He filed two revision cases before this Court. One is challenging the dismissal of his petition in Cr.M.P.No. 779 of 2016 seeking the relief to conduct DNA test to the minor child namely/the second respondent in M.C.No.161 of 2009. He also filed the



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another revision challenging the grant of maintenance in M.C.No.161 of 2009.

3. The petitioner married the respondent on 23.05.2005 as per the Christian rituals. Immediately after the marriage, there was some dispute regarding demand of additional dowry. Hence, a police complaint was also lodged before the jurisdictional police and in view of the strained relationship, the respondent left the matrimonial home and started living separately. In the meantime, the second respondent was born on 04.10.2006. Thereafter the respondent and her child joined with the petitioner and again some dispute arose and hence the respondent left the matrimonial home and living separately. In the said circumstances, she filed a maintenance petition, claiming maintenance of Rs.3,000/- for herself and Rs.2,000/- for the child. In the petition, she stated that the respondent is running a workshop in the name of 'Jenny Printers' and earning more than Rs.15,000/- per month and also have properties worth about more than Rs.20,00,000/-. In the said circumstances, she claimed maintenance of Rs.3,000/- to herself and Rs.2,000/- to the child per month.



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4. The petitioner filed the counter affidavit denying the allegation and specifically stated that due to the conduct of the respondent/wife in lodging the complaint, some dispute arose between the parties and the respondent herself left the matrimonial home without any reason and she was working and earning Rs.5,000/- per month. In the said circumstances, he is not liable to pay maintenance. The petitioner also disputed the paternity of the child and hence, he filed a petition for DNA test for the child. In the said circumstances, the learned trial Judge dismissed the same on the ground that the marriage was admitted and the birth of the child was also admitted and the said petition seeking DNA test was filed belatedly in the year 2016.

5. After the dismissal of the said petition, the learned trial Judge also held that he owes a duty to give maintenance. After considering the evidence of RW1 and also the income of the wife, the learned trial Judge granted maintenance of Rs.2,000/- to the second respondent/child and considering the fact that the wife received income of Rs.1,000/-, dismissed the petition as against the wife and granted maintenance of Rs. 2,000/- to the child alone.



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6. The learned counsel for the petitioner/husband submitted that the petitioner specifically pleaded that the respondent had illegal affair with some third person and hence, the learned trial Judge ought to have allowed the petition to conduct the DNA test of the child.

7. The learned counsel for the respondent/wife submitted that the DNA test is not necessary. In this case, the marriage was held in the year 2005 and the child was born on 04.10.2006 and the dispute was not raised till the year 2011. Even after that no evidence was produced by the petitioner that the respondent/wife had any chance for having relationship with some other person as required in the Evidence Act.

8. In the said circumstances, the learned trial Judge correctly dismissed the petition. Further, the learned counsel for the petitioner submitted that the grant of maintenance of Rs.2,000/- p.m., to the child is excessive and also the respondent/wife is also working as a teacher and earning more than Rs.1,000/- per month. In the said circumstances, grant of maintenance to the second respondent/child is not legally correct.



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9. The learned counsel for the respondent submitted that the grant of Rs.2000/-, as monthly maintenance to the child itself is a meagre amount and is not proportionate to the cost of living.

10. This Court has considered the rival submissions made by both the counsel and perused the records and also the precedents relied upon by both side parties and the impugned judgement.

10.1. Whether the petitioner's prayer to subject the minor S.Fransico for DNA test can be entertained or not?

10.1. Whether the amount of maintenance granted in M.C.No. 161 of 2009 in favour of the said minor S.Fransico is liable to be set aside?

11.Question No. 1.

11.1. In this case, unfortunately the petitioner after 11 long years from the date of the birth of child has filed petition in Crl.M.P.(MD).No. 779 of 2016 to conduct the DNA test to the minor child in whose favour maintenance of Rs.2000/- had been awarded in M.C.No. 161 of 2009 by order dated 23.03.2011 after conclusion of a detailed enquiry as



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contemplated under section 125 of Cr.P.C. The petitioner married the respondent on 23.06.2005. The girl child namely S.Fransico was born on 04.10.2006. The respondent had filed the M.C.No. 161 of 2009 claiming maintenance for herself and her child. There is no dispute relating to the marriage and paternity of the child during the said proceedings. The Learned Trial Judge in the said proceedings awarded Rs. 2000/- towards monthly maintenance for the said child by order dated 23.03.2011. On the basis of the award, the execution petition had been filed and maintenance amount also was paid upto 08.04.2015. In the meantime the petitioner filed I.D.O.P.No. 88 of 2009 on the file of the I Additional District Judge, Trichy seeking divorce against the respondent and the same was dismissed on 30.11.2012.

11.2.Subsequently, the petitioner has filed another I.D.O.P.No. 8 of 2015 seeking divorce on the ground of adultery. In the said petition, the petitioners submitted that he has electronic evidence to prove the adultery. Simultaneously, he also filed Crl.M.P.No. 307 of 2016 before the CJM, Trichirappalli and Crl.M.P.No. 779 of 2016 with the following prayer:



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Crl.M.P.No. 307 of 2016	Subject the minor child for DNA test.
Crl.M.P.No. 779 of 2016	To set aside the maintenance order granted in favour of the minor child in M.C.No. 161 of 2009.

11.3. From the sequence of the above events, this court finds no *bonafides* on the part of the petitioner to dispute the paternity of the child without required pleadings under section 112 of the Evidence Act and that too, made the application after 10 years from the date of birth of girl child on 04.10.2006. In the said circumstances, this court at the outset dismiss the petition.

11.4.It is settled principle that when a child was born during the valid marriage, it is a conclusive proof of his legitimacy unless strong and cogent evidence is led to prove otherwise. Therefore, no person is allowed to raise a question of legitimacy by filing an application seeking the child to undergo DNA test. In this case,the petitioner has filed the said petition heartlessly raising doubt over her paternity.



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11.5.The Hon'ble supreme Court has issued following guidelines

to entertain the request for DNA test :

<i>Goutam Kundu v. State of W.B., reported in (1993) 3 SCC 418 at page 428</i>	<i>Aparna Ajinkya Firodia Vs. Ajinkya Arun Firodia reported in 2023 SCC online SC161</i>
(1) that courts in India cannot order blood test as a matter of course;	ii. DNA tests of children born during the subsistence of a valid marriage may be directed, only when there is sufficient prima-facie material to dislodge the presumption under Section 112 of the Evidence Act. Further, if no plea has been raised as to non- access, in order to rebut the presumption under Section 112 of the Evidence Act, a DNA test may not be directed.
(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.	iii. A Court would not be justified in mechanically directing a DNA test of a child, in a case where the paternity of a child is not directly in issue, but is merely collateral to the proceeding.
(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.	iv. Merely because either of the parties have disputed a factum of paternity, it does not mean that the Court should direct DNA test or such other test to resolve the controversy. The parties should be directed to lead evidence to prove or disprove the factum of paternity and only if the Court finds it impossible to draw an inference based on such evidence, or the controversy in issue cannot be resolved without DNA test, it may direct DNA test and not otherwise. In other words, only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy the Court can direct such test.



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(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 a bastard and the mother as an unchaste woman.	v. While directing DNA tests as a means to prove adultery, the Court is to be mindful of the consequences thereof on the children born out of adultery, including inheritance-related consequences, social stigma, etc.
(5) No one can be compelled to give sample of blood for analysis.	

11.6.As per the provision of Section 112 of the Indian Evidence Act, only when parties to the marriage establish that they had no access to each other at any time when the child was begotten, the question of legitimacy comes. In this case, no such situation has arisen.

11.7. The petitioner should establish that he had no access with the first respondent to have sexual intercourse. Further, it is not the case of the petitioner that the first respondent had access with some other person. In the said situation, A man who in company with his wife is said to have had access with her; and in that case her child is presumed to be his child. But this presumption may be rebutted by positive evidence that no sexual intercourse took place and the same has been emphasized by the Hon-ble Supreme Court in the following judgement:



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11.7.1.In the case of ***Chilukuri Venkateswarlu Vs. Chilukuri Venkatanarayana*** reported in ***A.I.R. 1954 S.C. 176.***

11.8.It may be stated at the outset that the presumption which section 112 of the Indian Evidence Act contemplates, is a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the section, namely, non-access between the parties to the marriage at a time when according to the ordinary course of nature the husband could have been the father of the child. Access and non-access again connote, as has been held by the Privy Council: Vide -Karapaya vs Mayandi-, AIR 1934 PC 49 (A) existence and non-existence of opportunities for marital intercourse.

11.9.In *Ammathayee v. Kumaresain* [(1967) 1 SCR 353] the Hon'ble Supreme Court held that the conclusive presumption under Section 112 of the Indian Evidence Act can only be displaced if it is shown that the parties to the marriage had no access at any time when the child was begotten.



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11.10.The Hon'ble Supreme Court in the case of ***Sham Lal v.***

Sanjeev Kumar, (2009) 12 SCC 454 at page 465, has held as follows:

The findings of the High Court on the interpretation of Section 112 of the Evidence Act are based on correct analysis of Indian and English cases for the last more than a century. According to the legislative intention and spirit behind Section 112 of the Evidence Act it is abundantly clear that once the validity of marriage is proved then there is strong presumption about the legitimacy of children 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.

11.11.It is well-settled principle of law that odiosa et inhonesta non-sunt in lege praesumenda (nothing odious or dishonourable will be presumed by the law). The law presumes against vice and immorality. In a civilised society it is imperative to presume the legitimacy of a child born during continuation of a valid marriage and whose parents had



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access to each other. It is undesirable to enquire into the paternity of a child whose parents have had access to each other. Section 112 of the Evidence Act is based on presumption of public morality and public policy.

11.12. In this case having admitted that the marriage took place on 23.06.2005 and birth of child on 04.10.2006, the petitioner has raised a question of paternity without any cogent and trustworthy evidence to prove that the respondent had access with any other person. But, after 11 years from the date of birth of child and five years from the decision of the M.C.No. 161 of 2009, the petitioner filed the petition raising the paternity issue without dispelling the conclusive presumption under Section 112 of the Indian Evidence Act. Therefore, this court inclines to dismiss his petition to seek the DNA test by confirming the order of the Learned Trial Judge.

12.Question No. 2:

12.1. The Learned Trial Judge in the M.C.No. 161 of 2009 granted only Rs.2000/- considering the cost of living and education expenses of



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the present scenario this is not too excessive. Therefore, the prayer of the petitioner to set aside the maintenance award passed in M.C.No. 161 of 2009 disputing the paternity and quantum is also liable to be declined.

13. Accordingly, these Criminal revision Cases are dismissed by confirming the impugned Order dated 19.06.2018 passed in Cr.M.P.No. 779 of 2016 and Cr.M.P.No.307 of 2016 by the learned Chief Judicial Magistrate, Tiruchirappalli, Tiruchirappalli District.

14.12.2023

NCC : Yes/No
Index : Yes/No
Internet: Yes/No
PJL/vsg

To

1. The Chief Judicial Magistrate,
Tiruchirappalli,
Tiruchirappalli District.
2. The Section Officer,
Criminal Section(Records),
Madurai Bench of Madras High Court,
Madurai.



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K.K.RAMAKRISHNAN, J.

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