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Crl.R.C(MD)No.752 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On	:	20.12.2023
Pronounced On	:	22.02.2024

CORAM :

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

Crl.R.C(MD)No.752 of 2023
and
Crl.M.P(MD)No.10241 of 2023

Suresh Kumar

.. Petitioner / Petitioner /
Respondent

Vs.

1.Shanmugapriya

2. Minor Karthik,

Minor represented by,
his mother/natural guardian
1st respondent Shanmugapriya

.. Respondents / Respondents/
Petitioners

PRAYER: Criminal Revision filed under Section 397 r/w 401 of the Criminal Procedure Code, to call for the records pertaining to the order dated 19.06.2023 passed in Crl.M.P.No.5009 of 2022 in M.C.No.3 of 2022 on the file of the learned District Munsif-cum-Judicial Magistrate, Thirupuvanam and set aside the same.

For Petitioner : Mr.N.Vallinayagam



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ORDER

WEB COPY This Criminal Revision Case has been filed against the order dated 19.06.2023 passed in Crl.M.P.No.5009 of 2022 in M.C.No.3 of 2022 on the file of the learned District Munsif-cum-Judicial Magistrate, Thirupuvanam.

2. The case of the prosecution is that the first respondent married the petitioner on 30.06.2017. After solemnization of marriage, due to menstruation period of the first respondent, according to the petitioner, there was no consummation of marriage. After the mensuration period, according to the petitioner, he had not had sexual intercourse with the first respondent due to injuries sustained by him on his private part. Thereafter, when the first respondent went to take treatment for fever, the doctor informed the fact that she was pregnant. Suspecting the said pregnancy, the petitioner harassed the first respondent following which a complaint was lodged by the first respondent. Finally, they parted company. In the meantime, the child/second respondent was born. So, the first respondent filed M.C.No.3 of 2022 on the file of the learned District Munsif-cum-Judicial Magistrate, Thirupuvanam. The petitioner filed the counter affidavit denying all the allegations, more particularly, the petitioner stated that he sustained injury on his private part on the date of proposed first consummation, ie., sexual intercourse is denied



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as false and there was no sexual intercourse at all, and hence, he is not liable to pay maintenance to the first respondent and the child/second respondent.

3. After filing the said counter affidavit, he filed the Crl.M.P.No.5009 of 202 under Section 45 of the Indian Evidence Act to subject the child for DNA test. The same was dismissed by the learned trial Judge holding that the petitioner has not established the circumstances to order the DNA test. Aggrieved over the same, the petitioner filed this revision raising the ground stated in the memorandum of grounds of revision.

4. The learned counsel for the petitioner reiterated the grounds and further elaborated that it is the specific case of the petitioner that he had no sexual intercourse with the first respondent and hence, the alleged birth of the second respondent is suspicious. Hence, the claim of maintenance, on behalf of the second respondent is also not maintainable. Therefore, the learned trial Judge has committed error in dismissing the petition. He placed reliance upon the following judgments:

1. In the case of ***Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik*** and another reported in ***2014 (2) SCC 576***



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2. In the case of ***Dipanwita Roy v. Ronobroto Roy*** reported in **2014**

(6) CTC 791

3. In the case of ***V.K.Bhuvaneswari v. N.Venugopal*** reported in **2007**

(1) LW 318

5. In the case of ***Palanisamy v. Vijayakumar*** and Others reported in

2021 (4) LW 771

5. This Court has considered the submission made on behalf of the petitioner and the precedents relied upon by him.

Pater est quem nuptiae demonstrant” which means, *the father is he whom the nuptials point out.*

Section 112 of the Indian Evidence Act is based on the above said principle. For better appreciation, Section 112 of the Indian Evidence Act, 1872, is extracted hereunder:

“112. 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



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marriage had no access to each other at any time when he could have been begotten.”

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It is the principle of law that “*Odiosa et inhonesta non sunt in lege prae sumenda*” (Nothing odious or dishonourable will be presumed by the law). So the law presumes against vice and immorality. One of the strongest illustrations of the principle, is the presumption in favour of legitimacy of children in a civilized society.

5.1. Now, the question arose in this case is that whether the petitioner's prayer to subject the second respondent for DNA test can be entertained or not?

6. 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 to seek the child to undergo DNA test.

7. In this regard, the Hon'ble Supreme Court issued the detailed following guidelines to be followed before ordering DNA test:

7.1. *Goutam Kundu v. State of W.B., (1993) 3 SCC 418 at page 428*



26. From the above discussion it emerges—

- (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 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.*
- (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.*
- (5) *No one can be compelled to give sample of blood for analysis.*

7.2. In *Aparna Ajinkya Firodia Vs. Ajinkya Arun Firodia* reported in 2023 SCC online SC161

60. *Having regard to the aforesaid discussion, the following principles could be culled out as to the circumstances under which a DNA test of a minor child may be directed to be conducted:*

- i. That a DNA test of a minor child is not to be ordered routinely, in matrimonial disputes. Proof by way of DNA profiling is to be directed in matrimonial disputes involving allegations of infidelity, only in matters where there is no other mode of proving such assertions.*



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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.*

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.*

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.*

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.

7.3. In *Kamti Devi v. Poshni Ram*, (2001) 5 SCC 311 at page 316

10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.

11. Whether the burden on the husband is as hard as the prosecution to prove the guilt of the accused in a trial deserves consideration in the above background. The



standard of proof of prosecution to prove the guilt beyond any reasonable doubt belongs to criminal jurisprudence whereas the test of preponderance of probabilities belongs to civil cases. The reason for insisting on proof beyond reasonable doubt in criminal cases is to guard against the innocent being convicted and sent to jail if not to extreme penalty of death. It would be too hard if that standard is imported in a civil case for a husband to prove non-access as the very concept of non-access is negative in nature. But at the same time the test of preponderance of probability is too light as that might expose many children to the peril of being illegitimatized. If a court declares that the husband is not the father of his wife's child, without tracing out its real father the fallout on the child is ruinous apart from all the ignominy visiting his mother. The bastardised child, when grows up would be socially ostracised and can easily fall into wayward life. Hence, by way of abundant caution and as a matter of public policy, law cannot afford to allow such consequence befalling an innocent child on the strength of a mere tilting of probability. Its corollary is that the burden of the plaintiff husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff husband.



12. In Goutam Kundu v. State of W.B. [(1993) 3 SCC 418 : 1993 SCC (Cri) 928] the Hon'ble Supreme Court after considering the above decision in Dukhtar Jahan v. Mohd. Farooq [(1987) 1 SCC 624 : 1987 SCC (Cri) 237] held (at SCC p. 427, para 22) that “this presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities”.

In a Dukhtar Jahan v. Mohd. Farooq, (1987) 1 SCC 624 at page 629

12. Another serious infirmity noticed in the judgment is that the learned Judge has completely lost sight of Section 112 of the Indian Evidence Act. Section 112 lays down that if a 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 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. This rule of law based on the dictates of justice has always made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimization of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering



a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman.

8.The Hon'ble Supreme Court in **1987 1 SCC 624**, rejected the similar contention raised by the petitioner herein in the “maintenance proceedings” categorically in the following terms:-

In *Dukhtar Jahan v. Mohd. Farooq*, (1987) 1 SCC 624 at page 628

11. Examining the matter, we feel the learned Judge has failed to view the case in its entire conspectus and this has led to miscarriage of justice. On the sole ground that the child had been born in about 7 months' time after the marriage it cannot be concluded that the child should have been conceived even before the respondent had consummated the marriage. Giving birth to a viable child after 28 weeks' duration of pregnancy is not biologically an improbable or impossible event. In Combined Textbook of Obstetrics and Gynaecology by Sir Gugald Baird, 7th Edn., at p. 162 it is reported as under:

“In the case of Clark v. Clark(1939) P 228 an extremely small baby, born alive 174 days after last possible date when intercourse with the husband could have taken place, and which survived, was



held to be legitimate. While it is most unusual for babies of this weight or gestation period to survive it does occasionally happen.”

The learned Judge ought not, therefore, to have rushed to the conclusion that a child born in about 7 months' time after the marriage of the parents should have necessarily been conceived even before the marriage took place. Insofar as the second aspect is concerned viz. about the appellant's statement that the child was not born prematurely, the High Court has failed to bear in mind that the appellant is a rustic and illiterate woman and as such her opinion could suffer from error of judgment.

15.The relevant features which have escaped the attention of the High Court can be catalogued as under :

15-A.If the appellant was pregnant even at the time of the marriage she could not have concealed that fact for long and in any event the respondent would have come to know of it within two or three months of the marriage and thereupon he would have immediately protested and either discarded the appellant or reported the matter to the village elders and relatives and sought for a divorce. On the contrary the respondent had continued to lead life



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with the appellant in a normal manner till the birth of the child. Even the confinement appears to have taken place in his house as otherwise the child's birth would not have been registered in his village. The respondent had not disowned the child immediately after its birth or sent away the appellant to her parents' house. Such would not have been his conduct if he had any doubt about the paternity of the child. Moreover, there is an entry in the birth register (Ex. Kha-1) setting out the respondent as the father of the child. Though the respondent has attempted to neutralise the entry in Ex. Kha-1 by examining DW 2 and making it appear that the entry had been made on the basis of information given by a third party, the lower courts have refused to give credence to the vague and uncorroborated testimony of DW 2. It is also significant to note that the respondent had allowed eleven months to pass before effecting a divorce. By his inaction for such a long period the respondent has given room for inference that the divorce may have been effected for other reasons and not on account of the appellant giving birth to a child conceived through someone else. Lastly, even if the child had been born after a full-term pregnancy it has to be borne in mind that the possibility of the



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respondent having had access to the appellant before marriage cannot be ruled out because they were closely related and would therefore have been moving in close terms. All these factors negate the plea of the respondent that the minor child was not fathered by him.

***16.** The proper course for the High Court, even if entitled to interfere with the concurrent findings of the courts below in exercise of its powers under Section 482 CrPC, should have been to sustain the order of maintenance and direct the respondent to seek an appropriate declaration in the **civil court**, after a full-fledged trial, that the child was not born to him and as such he is not legally liable to maintain it. Proceedings under Section 125 CrPC, it must be remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner. The High Court was, therefore, clearly in error in quashing the order of maintenance, in favour of the child.*



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8.1. Goutam Kundu v. State of W.B., (1993) 3 SCC 418 at page 428

27. Examined in the light of the above, we find no difficulty in upholding the impugned order of the High Court, confirming the order of the Additional Chief Judicial Magistrate, Alipore in rejecting the application for blood test. We find the purpose of the application is nothing more than to avoid payment of maintenance, without making any ground whatever to have recourse to the test. Accordingly, criminal appeal will stand allowed. Crl. M.P. No. 2224 of 1993 in SLP (Crl.) No. 2648 of 1992 filed by respondent 2 will stand allowed. She is permitted to withdraw the amount without furnishing any security.

By applying the above principles, the petitioner prayer to subject the child to DNA Test in order to avoid the payment of maintenance under Section 125 of Cr.P.C., under the summary proceedings cannot legally be entertained.

9. According to the first respondent, the petitioner married the first respondent on 13.06.2017. After the marriage, the first respondent and the petitioner were living in the matrimonial home along with her father-in-law, mother-in-law and sister-in-law, and all caused cruelty to the first respondent.



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Even the petitioner assaulted the first respondent. When she was pregnant, she suffered from fever. She was taken to the hospital. In the hospital, the doctors informed that she was pregnant. Therefore, the petitioner forcibly drove her out from the matrimonial home and she is living in her parental house and the petitioner never made any contact and the second respondent was born on 22.03.2018 in the Government Hospital. Even after that the petitioner never visited the respondents.

10. According to the petitioner, on the date of the marriage, the first respondent informed that she was under the mensuration period and hence, the petitioner had no sexual intercourse with her. After one week, he sustained injury on his private part at the time of the sexual intercourse and hence there was no sexual intercourse between them. Thereafter, there was some dispute relating to the pregnancy and hence, she was forced to have left the matrimonial home within a period of 25 days from the date of marriage and hence, he disputed the paternity of child. Therefore, he filed the petition in Crl.M.P.No.5009 of 2022 to subject the second respondent for the DNA test and the same was dismissed by the learned trial Judge.



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11. From the pleadings it is clear that the petitioner married the first respondent on 13.06.2017 and she left the matrimonial home hardly one month from the date of marriage. Even in the present petition, it is stated that he had sexual intercourse and sustained injuries on his private part, for which, he is said to have taken treatment. In the said circumstances, it cannot be denied that he had the access and the relationship with the first respondent.

12. 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 could have begotten, the question of legitimacy comes. In this case, no such situation arise.

13. 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 can readily be in company with his wife is said to have access to 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*



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intercourse took place and the same has been emphasized by the Hon'ble

Supreme Court in the following judgement:

Chilukuri Venkateswarlu Vs. Chilukuri Venkatanarayana reported in
A.I.R. 1954 S.C. 176

(4) 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 v.Mayandi', AIR 1934 PC 49 (A) existence and non-existence of opportunities for material intercourse.

14. 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 could have been begotten.

In Sham Lal v. Sanjeev Kumar, (2009) 12 SCC 454 at page 465 the Hon'ble Supreme Court has held as follows:



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33 [Ed.: Para 33 corrected vide Official Corrigendum No. F.3/Ed.B.J./79/2009 dated 10-7-2009.] . 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.

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



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Therefore, he disputed the paternity of the child and hence, a complaint was given on 23.01.2018 before the Thirumangalam Taluk Police Station. The police advised both of them to live together. Thereafter, there was no communication from the petitioner. Hence, the first respondent filed the maintenance proceedings before the trial Court.

14. From the above sequence of events, it is clear that except the petitioner, nobody had any access to the first respondent. In the said circumstances, as per Section 112 of the Indian Evidence Act, legitimacy of the child can be legally presumed.

15. As per the provisions contained in Section 112 of the Indian Evidence Act, the husband should establish that he had no access with the respondent to have sexual intercourse. Here, it is not the case of the petitioner that the first respondent had access with some other persons. Hence, in the said circumstances, the learned trial Judge has correctly dismissed the petition. The paternity of the child cannot be easily raised by the husband. It is the child's right to have a good legitimate name as well as unquestioned patronage. Hence, all over the world, the Courts consistently held that the



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DNA test by disputing the innocent child's right of privacy, cannot be ordered.

16. DNA Test is intrusive test and the said lis is between the parties to a marriage and not between one of the party to the marriage and the child whose paternity is questioned. It would leave a far-reaching stigma on the infant and the future of infant would be devastated and would force the child to a position of fatherless child and would cause stress and potential heartache to the child and turn his world upside down. Therefore, the Court below rightly dismissed the petition, without sacrificing the right and best interest of the child and hence, this Court has no reason to differ with the conclusion of the learned trial Judge.

17. It is seen from the finding of the learned trial Judge, in paragraph No.7 of the judgment that the petitioner has not been regularly appearing before the Court below to co-operate the completion of the proceedings. He filed the H.M.O.P.No.25 of 2018 to seek divorce but he has not taken any steps to continue the same. After five years, the petitioner filed the petition raising the paternity issue without dispelling the conclusive presumption



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under Section 112 of the Indian Evidence Act. Therefore, this Court accepts the dismissal of the impugned order with costs.

18. Accordingly, this Criminal Revision Petition is dismissed. Consequently, connected miscellaneous petition is closed.

22.02.2024

NCC : Yes/No
Index :Yes/No
Internet :Yes/No
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To

1. The District Munsif-cum-Judicial Magistrate,
Thirupuvanam.
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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Predelivery order made in
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