

**(1994) 03 MAD CK 0068**  
**In the Madras High Court**  
**Case No : Criminal M.P. No. 9268 of 1987**

Gomathi

APPELLANT

Vs

Vijayaraghavan and others

RESPONDENT

**Date of Decision :** 11-03-1994

**Acts Referred:**

Constitution of India, 1950 — Article 20(3)  
Criminal Procedure Code, 1973 (CrPC) — Section 125  
Evidence Act, 1872 — Section 112, 4  
Penal Code, 1860 (IPC) — Section 109, 494

**Citation :** (1995) CriLJ 81

**Hon'ble Judges :** Thangamani, J

**Bench :** Single Bench

**Advocate :** V. Suresh, for the Appellant; R. Balasubramaniam, for the Respondent

## Judgement

1. The present petitioner is the complainant in C.C. No. 269 of 1983 in the Court of J.S.C.M. Chidambaram. The claims to be the legally wedded wife of first respondent Vijayaraghavan. Her complaint u/s 494 I.P.C. is that during the subsistence of their marriage the first respondent married the second respondent as his second wife. Respondents 3 to 5 are the mother, sister and brother of the first respondent. They are charged u/s 494 read with Section 109 I.P.C. for abetment of the offence. The petitioner contends that during trial respondents 1 and 2 specifically pleaded that there was no marriage at all between them, that the second respondent was a virgin and that she never gave birth to any child. The case of the petitioner before the trial Court was that on 17-5-1984, a son by name Vijayababu was born to respondents 1 and 2. And she sought to prove the same by producing Ex. 3 which purports to be the Birth Extract of the child. The

virginity of the second respondent and paternity of the child have to be established by known scientific methods. So she filed CrI.M.P. No. 2206 of 1987 before the trial court for subjecting respondents 1 and 2 to undergo medical test and blood test. The court below has dismissed the application on 16-6-1987. In the interest of justice direction has to be issued to respondents 1 and 2 and the child to undergo medical examination.

2. According to learned counsel for the petitioner, P.Ws. 2 and 3 speak about the second marriage which took place in the house of the third respondent. However, the first respondent totally denies the marriage and the paternity of the child Vijayababu. The parentage of the child is material to decide the factum of second marriage and a blood test undergone by them could convincingly establish the same. Similarly, a medical examination of the second respondent would go to show whether she could have begotten the child. In support of his contention he places reliance on *Ulaganambi v. Lagenayaki* (1986) Mad LW (Cri) 122 : 1986 Cri LJ 1522. This decision is only an authority for the position that referring the respondent to medical examination will not amount to violation of Article 20(3) of the Constitution of India. However, we have to consider whether the facts and circumstances of the present case justify such a reference.

3. The petitioner seeks direction to respondents 1 and 2 and the child to undergo medical examination to prove whether the child is born to the respondents 1 and 2 and whether the second respondent is a virgin. But as rightly urged by Sri. R. Balasubramanian, learned counsel for the respondents, u/s 494 I.P.C. the petitioner has only to prove that the marriage between herself and the first respondent is subsisting and during the subsistence of the said marriage, the second marriage with the second respondent took place. And essential ceremonies were performed with regard to the said second marriage. It is not known how the virginity of the second respondent and the paternity of the child could clinch the issue. Evidently this is an attempt to cause slur on the chastity of the second respondent and it undermines her dignity and outrages her modesty. The plea of learned counsel for the petitioner that only because of the nature of the defence taken up by the first respondent he has to resort to this course is untenable.

4. In *Goutam Kundu Vs. State of West Bengal and another*, the appellant was

married to second respondent. After living together for some time, the wife went to reside with her parents. Some four months later she conceived. On her return to her matrimonial home she was meted out cruel treatment by her husband and family members because of her pregnancy. Ultimately she came back to her paternal home and gave birth to a female child. She filed a petition u/s 125 Cr PC for maintenance. The appellant moved a revision before the High Court against the order of maintenance. During the pendency of the revision petition he came forward with an application praying for blood group test of the second respondent and the child to prove that he was not the father of the child, as according to him, if that could be established he would not be liable to pay maintenance. Rejecting the application for blood test the Apex Court held as under :-

Blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by Courts as a circumstantial evidence which ultimately excludes a certain individual as a father of the child. However, no person can be compelled to give sample of blood for analysis against his/her will and no adverse inference can be drawn against him/her for this refusal. Courts in India cannot order blood test as a matter of course. Wherever applications are made for such prayer for blood test cannot be entertained. In matters of this kind the court must have regard to Section 112 of the Evidence Act where the words "conclusive proof " must be understood by their definition in Section 4. That Section is based on the well-known maxim *pater est quom nuptice demonstrant* (he is the father whom the marriage indicated). It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities. If making out the illegitimacy, the whole burden of proving it".

It also held :

The court must carefully examine as to what would be the consequence of ordering the blood test, whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

In view of the decision referred to above, it cannot be said that the order of the Court below warrants interference.

5. In the result, the petition is dismissed.

6. Petition dismissed.