

(2009) 07 MAD CK 0073

In the Madras High Court

Case No : Criminal R.C. No. 357 of 2006 and Criminal M.P. No. 2121 of 2006

Thangavelu

APPELLANT

Vs

Sivakumar rep. by his Mother and Natural Guardian
Saraswathi

RESPONDENT

Date of Decision : 28-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125
Evidence Act, 1872 — Section 112
Hindu Marriage Act, 1955 — Section 24

Citation : (2009) 07 MAD CK 0073

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : L. Poompavai, for the Appellant; K. Shankar, for the Respondent

Final Decision : Dismissed

Judgement

G. Rajasuria, J.—Challenging and impugning the order dated 1.8.2005 passed by the Judicial Magistrate No. II, Cheyyar, Thiruvannamalai,

in CrI.M.P. No. 500/05 in M.C. No. 1 of 2004, this criminal revision case is focussed.

2. A "resume" of facts absolutely necessary and germane for the disposal of this criminal revision case would run thus:

The respondent minor, through her mother and natural guardian, filed the M.C. No. 1 of 2004 before the Judicial Magistrate No. II, Cheyyar,

seeking maintenance as against the revision petitioner herein. The revision petitioner disputed the parentage of the respondent and he disowned the

respondent as his son. Whereupon, the revision petitioner filed the CrI.M.P. No. 500 of 2005 for subjecting the respondent herein for D.N.A. test.

The Magistrate dismissed the said petition.

3. Animadverting upon such dismissal of the petition, this revision is focussed on various grounds, the pith and marrow of them would run thus:

The lower Court, due to non-application of mind, failed to allow the Crl.M.P. There are catena of decisions to the effect that D.N.A. test would

expose the truth. Unless there is proof to show that the respondent is the child of the petitioner, he cannot be compelled to pay maintenance. The

revision petitioner volunteered himself for D.N.A. test, but that was not accepted by the lower Court, unjustifiably, ignoring the fact that in

summary proceedings, such test could be resorted to. Accordingly, the revision petitioner prays for setting aside the order of the lower Court and

for directing the D.N.A. test to be underwent by the persons concerned.

4. When the matter came up for hearing, almost on four hearings I heard the learned Counsel for the revision petitioner elaborately and she could

not cite any clinching evidence that even in summary proceedings u/s 125 of Cr.P.C. D.N.A test could be ordered.

5. Today the learned Counsel for the revision petitioner is absent, but only adjournment on her behalf was sought for.

6. The learned Counsel for the respondent would highlight that the M.C. itself was filed as early as in the year 2004 and now in 2009, still the

revision petitioner is protracting the proceedings by filing the said Crl.M.P. and also this revision.

7. In these factual circumstance I would like to dispose of this revision on merits.

8. The point for consideration is as to whether there is any perversity or non-application of law in dismissing the Crl.M.P. by rejecting the request

of the revision petitioner for subjecting the child as well as himself and other persons concerned for D.N.A test.

9. The learned Counsel for the revision petitioner in the previous hearings cited the decision of this Court reported in 2009(2) CLT 460 M.

Karthika v. R. Manohar, an excerpt from it would run thus:

Held, there is no legal embargo for courts to direct medical examination by the DNA test, when circumstances warrant - Presumption u/s 112 of

Evidence Act requires to be rebutted by a strong piece of material evidence, which could be obtained from the outcome of the DNA test - Burden

of proof is on the respondent, who alleges illegal legitimacy - He has to establish fact which requires positive proof of negative plea that he has not

fathered the second child - Circumstances necessitate issuing of direction for DNA test.

10. As per the above decision, this Court issued direction for D.N.A. test during matrimonial proceedings, so to say, in a matter relating to

F.C.O.P. No. 981 of 2005. But here, the proceedings are only u/s 125 of Cr.P.C.

11. It is a common or garden principle found laid down in catena of decisions of the Apex Court as well as this Court that in the proceedings u/s

125 of Cr.P.C., the approach of the Court should be summary in nature; based on the oral and the available documentary evidence, the matter has

to be decided relegating the parties or driving the parties to the regular matrimonial forum to get decided their actual dispute. Curiously, in this case,

the revision petitioner has chosen to file such a Crl.M.P. for subjecting the child and himself for D.N.A. test, which in my opinion, is untenable and

the lower Court appositely and appropriately, correctly and convincingly stated reasons for rejecting the said request, warranting no interference

by this Court.

12. Primarily it is the responsibility of the revision petitioner herein, as petitioner before the Magistrate Court, to adduce oral evidence and

documentary evidence, if any, and convince the Magistrate and if at all the Magistrate is convinced he could order maintenance, which is always

subject to the decision of the regular forum, namely, the civil Court or the matrimonial Court. But in this case, the insistence on the part of the

revision petitioner that the child as well as the revision petitioner should be subjected to D.N.A. test is totally untenable.

13. At this juncture, my mind is reminiscent and redolent of the following decision of the Honourable Supreme Court reported in (2003) 10 SCC

228 Amarjit Kaur v. Harbhajan Singh, certain excerpt from it would run thus:

8. Section 24 of the Hindu Marriage Act, 1955 empowers the court in any proceeding under the Act, if it appears to the court that either the wife

or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it

may, on the application of any one of them order the other party to pay to the petitioner the expenses of the proceeding and monthly maintenance

as may seem to be reasonable during the proceeding, having regard to also the income of both the petitioner and the respondent. Once the High

Court, in this case, has come to the conclusion that the appellant wife herein has to be provided with the litigation expenses and monthly

maintenance, it is beyond comprehension as to how, de hors the criteria laid down in the statutory provision itself, the Court could have thought of

imposing an extraneous condition, with a default clause which is likely to defeat the very claim which has been sustained by the Court itself.

Considerations as to the ultimate outcome of the main proceeding after regular trial would be wholly alien to assess the need or necessity for

awarding interim maintenance, as long as the marriage, the dissolution of which has been sought, cannot be disputed, and the marital relationship of

husband and wife subsisted. As noticed earlier, the relevant statutory consideration being only that either of the parties, who was the petitioner in

the application u/s 24 of the Act, has no independent income sufficient for her or his support, for the grant of interim maintenance, the same has to

be granted and the discretion thereafter left with the court, in our view, is only with reference to reasonableness of the amount that could be

awarded and not to impose any condition, which has self-defeating consequence. Therefore, we are unable to approve of the course adopted by

the learned Single Judge, in this case.

9. Coming now to the nature of the condition imposed, though, it has been seriously contended for the appellant that no such condition could have

been imposed to compel the undergoing of a DNA test of the male child, we do not propose to express any opinion on the legality or propriety of

the court undertaking consideration at the appropriate stage, by the court competent, in the main petition of any application moved in an

appropriate manner according to law, but we would confine our consideration to the limited aspect as to whether the High Court could have

imposed such a condition at the stage of awarding interim maintenance pendente lite and that too without an application for the purpose from the

other party, at the instance of the court by way of a suggestion put to the appellant in the course of consideration of the application for interim

maintenance. The law in the matter governing the consideration and passing any order in respect of a claim for a DNA test has sufficiently been laid

down by this Court and if a party to a proceeding cannot be compelled against his/her wish to undergo any such test, we fail to see how the Court

on its own could have imposed a condition without any consideration whatsoever of any of the criteria laid down by this Court, by adopting a novel device of imposing it as a condition for the grant of the interim maintenance, with a default clause, which as rightly contended for the appellant, will have the inevitable consequence of predetermining the claim about the parentage with serious consequences even at the preliminary stage. The procedure, thus, adopted by the High Court does not appear to be either just or reasonable or in conformity with the principles of law laid down by this Court and consequently the order is liable to be set aside. The decision in *Dwarika Prasad Satpathy v. Bidyut Prava Dixit* relied on for the respondent, in our view, has no relevance or application to the case on hand. That was a case wherein, in dealing with a claim for maintenance invoking the summary proceedings u/s 125 CrPC, the husband attempted to defeat the claim made by the wife by asserting non-performance of essential rites at the time of marriage, the factum of which as well as the parentage of the child could not be questioned. In the process of ascertaining the genuineness of the said stand, when the suggestion made to the husband to undergo a DNA test was refused by him, and the court dealing with the application by summary proceedings chose to observe that the husband was disentitled to challenge the paternity of the child in the proceedings u/s 125 CrPC, this Court declined to interfere with the order of the trial court on the question of prima facie satisfaction recorded as to the proof of marriage. We see absolutely no general principle of law laid down in this case which could be said to lend any support to the plea on behalf of the respondent. We are unable to persuade ourselves to agree with the plea urged for the respondent that the case does not warrant our interference in these appeals, since we find that a serious and flagrant violation of law has been committed by the High Court in the matter disposing of the revision and review petition, and the same ought not to be allowed to get sanctified, with our approval, too.

14. A plain reading of the above judgement would indicate and cannot that in summary proceedings, when child is in need of maintenance, the Court would not be justified in driving the seeker of the maintenance from pillar to post for getting such minimum succor.

15. The facts involved in this case would speak by itself that ever since 2004, the M.C. case is pending because of the attitude of the revision

petitioner herein. Hence, I am of the view that absolutely there is no ground for interfering with the order of the lower Court. Accordingly, the criminal revision case is dismissed with the direction that the Magistrate, on receipt of a copy of this order, shall see that within a period of six weeks, the M.C. itself is disposed of as per law, after hearing both sides and entertaining the evidence. Consequently, connected miscellaneous petition is dismissed.