
(2015) 10 MAD CK 0031

In the Madras High Court

Case No : Criminal R.C.(MD)No. 85 of 2011 and M.P.(MD) No. 1 of 2011

Xaviour Muthuraj

APPELLANT

Vs

Mary Asha

RESPONDENT

Date of Decision : 14-10-2015

Acts Referred:

Citation : (2016) 2 MadWNCri 295

Hon'ble Judges : Mrs. S. Vimala, J.

Bench : Single Bench

Advocate : Mr. J. John Jayakumar, Advocate, for the Appellant; Mr. K.P. Narayanakumar, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Mrs. S. Vimala, J.——"What"s in a name? That which we call a rose

By any other name would smell as sweet."

Shakespeare in Romeo and Juliet (II, ii, 1-2)

This is the popular Shakespearean quote expressing the meaning that name is a meaningless and artificial convention. But this is a case where the name has been a tool in the hands of the revision petitioner to drag this case up to High Court.

2. Mary Asha @ Ajitha Asha, the daughter of the revision petitioner was a minor at the time of filing of the petition and hence represented by the grandmother, though the mother was alive and available. Now she has attained majority. As against the major daughter, against the award of maintenance at the rate of Rs. 2,000/- per month, passed in M.C. No.26 of 2004, this revision petition has been filed.

3. Brief facts leading to the filing of this petition:

Mallika is the wife, Natchathram is the grandmother and the respondent herein is

the daughter born between Mallika and the revision petitioner. Mallika and the revision petitioner got married on 03.07.1987 in a Church according to Christian customs. Out of the wedlock, the child, viz. Mary Asha @ Ajitha Asha was born. Mallika got separated from the revision petitioner and got married to someone else and also having children through him. Alleging that the child is not able to be maintained, the application for maintenance was filed by the grandmother.

4. The marriage and the paternity of the child was disputed by the revision petitioner. But, the Court below, on a perusal of the oral and documentary evidence, came to the conclusion that the marriage between Mallika and the revision petitioner is true and the child is the one born between them and therefore, the child is entitled to be maintained by the revision petitioner.

5. In so far as the quantum of maintenance is concerned, even though Rs. 3,000/- was claimed, the Court has chosen to order only Rs. 2,000/- per month as maintenance. This order is under challenge in this revision petition.

6. The main contention of the learned counsel for the petitioner is that there is no relationship of husband and wife between the revision petitioner and the mother of the respondent, and therefore, no maintenance should have been ordered by the Court below. The supporting contention is that Xaviour Muthuraj is a person different from Muthukutty and they are not one and the same person and therefore, the document filed on the side of the child showing the relationship between the parties should not have been acted upon by the Court below. Whether they are one and the same person or different persons, has been considered by the Court below and the finding is that in respect of the documents filed on both the sides, in all documents bearing the name Muthukutty as well as Xaviour Muthuraj, the father's name being one and the same, it must refer one and the same person. The Court has also given a finding that when the father's name and the mother's name is not disputed in both the documents filed, the contention that the persons named therein could be different persons, cannot be accepted and therefore, the person by name Xaviour @ Muthuraj and Muthukutty are one and the same person.

7. The next contention is that when the marriage itself is disputed, the presumption under Section 112 of the Indian Evidence Act would not be applicable in this case, and therefore, unless the birth of the child is established as a child born between the revision petitioner and Mallika, the Court should not have ordered maintenance. So far as this case is concerned, the Court has relied upon the documents, viz. Ex.A1 and Ex.R4, both with reference to two different marriages. One is the marriage invitation pertaining to the revision petitioner and Mallika, and the other one Ex.R4 is the marriage invitation of the revision petitioner along with one Chandrakala. In both these invitations, the parents' name of the revision petitioner herein is stated to be one and the same.

7.1. Apart from this fact, the Court has also relied upon the Birth Certificate of the child, which is marked as Ex.A5. Finding that at the time when the birth was

registered, the fact that in future there could be a case for maintenance in which the Birth Certificate can be relied upon, could not have been in the mind of the parties and therefore, the Birth Register long prior to the maintenance application, should be given credence. Relying upon the Birth Certificate, the legitimacy of the child has been upheld by the Court below.

8. During the hearing of this matter, there was a suggestion that parties could be sent for DNA test and this Court also thought it fit to do so. But it was represented that the mother, having married somebody else and living with him after begetting two children, cannot be disturbed at this distant point of time, and that after being consulted, she seems to have expressed her inability to cooperate for the DNA test. Therefore the contention is that unless the paternity of the child is proved, the respondent is not entitled to claim maintenance.

9. The fact remains that the petition before the Court below has not been filed by the mother, but it was filed by the grandmother of the child, in whose custody the respondent is living. The mother has not even chosen to appear before the Court and give evidence stating that the child is the one born between the revision petitioner and herself. Perhaps with an intention to save her marriage with her second husband, she might have chosen not to support the case of the daughter. Having regard to the peculiar nature of this case, this Court thought it fit that instead of relegating the parties to the Civil Suit, this Court can give a finality to the litigation, (a) having regard to the age of the grandma; (b) having regard to the educational need of the child, having attained majority. But, the process of DNA test could not be carried out because of the circumstances stated above.

10. But the fact remains that the birth of the child herein has been registered long back. When the marriage has been proved, then the non-examination of the mother, to speak about the paternity, will not be fatal as the presumption under Section 112 of the Indian Evidence Act would come into operation and save the respondent.

11. So far as the contention regarding the DNA test is concerned, the Court below has relied upon the decision in 1957 L.W. (CrL.) 499, wherein it has been held that the Court need not embark upon an elaborate enquiry with regard to status of parties and the parties must be given liberty to move the Civil Court if they are so advised in order to have the parentage of the child determined finally. Based on this decision, this Court is of the view that the parties must be given liberty to work out their remedies before the Civil Court in order to determine the parentage of the child (even at this point of time, if the revision petitioner wants to challenge the parentage of the child).

12. In such circumstances, as the remedy open to the parties under Section 125 Cr.PC being summary in nature, the order passed by the Court below does not suffer from any infirmity or illegality. There is no scope for interference in the findings arrived at by the Court below. Therefore, the findings regarding the

marital status of the parties, paternity of the child and the quantum of maintenance, as given by the Court below, cannot be interfered with. In the result, the Criminal Revision Case is dismissed. Consequently, the connected miscellaneous petition is closed. It is always open to the parties, as stated by the Court below, to work out their final rights before the Civil forum, if they are so advised.