

**HIGH COURT OF JAMMU AND KASHMIR AND LADAKH
AT SRINAGAR**

Crl R No. 16/2019
CrlM No. 602/2019

Reserved on 31.12.2021.
Pronounced on: 27.01.2022

Raaisa (minor) through her motherPetitioner (s)
Sumaira

Through :- Mr. Abdul Manan, Advocate.

V/s

Syed Sudhanshu PandayRespondent(s)

Through :- Mr. Anil Bhan, Advocate

Coram: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1 Petitioner Raaisa (minor) through her mother has challenged order dated 30.03.2019 passed by the Judicial Magistrate First Class (2nd Additional Munsiff), Srinagar (hereinafter referred to as “the Magistrate”) in the proceedings under Section 488 of J&K Cr.P.C whereby the learned Magistrate has deferred the proceedings till the outcome of the civil suit in which question of paternity of the petitioner is in issue.

2 Before coming to the grounds urged in the instant revision petition, it would be apt to refer to the background facts leading to filing of this revision petition.

3 It appears that the minor petitioner through her mother filed a petition under Section 488 J&K Cr.P.C against the respondent herein claiming maintenance from him. In the said petition, it has been alleged that in the year 2010, when the respondent was holding the position of Finance Secretary in the Government of Jammu and Kashmir, he developed relationship with mother of the petitioner. It is further alleged that in the month of May 2010, the respondent converted to Islam, whereafter he entered into wedlock with mother of the petitioner on 08.05.2010 and out of the said wedlock, petitioner was born on 12.04.2011. It is also alleged that in the month of October, 2012, the respondent was deputed to Central Government and posted at New Delhi. The respondent shifted to the said place leaving the petitioner and her mother in lurch. It has been alleged that on 01.04.2013, the petitioner along with her mother visited the native place of the respondent at Lucknow where they came to know that the respondent was already a married man having wife and two children and it was also found that the respondent was practicing Hindu faith, as a result whereof, the marriage between the petitioner's mother and the respondent got automatically dissolved. It has been alleged that the petitioner and her mother were forced to leave Lucknow, whereafter, the respondent completely ignored the both. It is averred that the petitioner and her mother has filed a suit for declaration and injunction against the respondent, which is pending disposal before the Court of 1st Additional Munsiff, Srinagar. It is also averred that though the respondent did remit some maintenance amount in the

bank account of the petitioner, yet the same is very meager. On these grounds, the petitioner has sought monthly maintenance of Rs.30,000/- from the respondent.

4. The respondent contested the aforesaid petition by filing reply thereto. In his reply, the respondent refuted all the allegations made in the petition and denied having entered into any wedlock with mother of the petitioner. He has also denied his relationship with the petitioner. According to the respondent, the allegations made in the petition are just a figment of imagination and a device to scandalize his reputation and image. The respondent claims that the mother of the petitioner is only trying to blackmail him and to tarnish his clean image as a distinguished public servant. It is averred that in the civil suit, mother of the petitioner has admitted that she had entered into wedlock with another person on 1st August, 2010 which ended in divorce in October, 2010. It is further averred that the birth certificate of the petitioner depicts her father's name as the person with whom petitioner's mother had married. The respondent claims that he is a happily married person with two grown up children and there is no way that he could have entered into a wedlock with the petitioner's mother. The respondent further claims that the petitioner's mother has been blackmailing him and trying to extort money from him by maligning his reputation.

5. It appears that during the pendency of the petition under Section 488 J&K Cr.PC, the respondent made an application before

the learned Magistrate seeking an order for deferment of proceedings under Section 488 Cr.P.C till the disposal of civil suit filed by the petitioner and her mother against him. Another application was made by the respondent under Sections 193 and 196 of RPC seeking initiation of action against the mother of the petitioner with a direction to the petitioner to disclose the date of Nikah of petitioner's mother with Idrees Bashir Jabri and to produce a copy of Nikahnama and subsequent Talaknama as also the documents presented before Srinagar Municipal Corporation on the basis of which birth certificate of daughter of Ms. Sumaira Mirhas been issued in the year 2014. Production of certain other documents was also sought by the respondent.

6. The learned Magistrate, after hearing the parties observed that pendency of two concurrent proceedings in which the issue as to the fact whether the petitioner's mother is legally wedded wife of the respondent, is required to be determined and in the absence of any, *prima facie*, documentary proof in the civil suit as regards the marriage between petitioner's mother and the respondent, it is appropriate to defer the decision of the proceedings till the outcome of the civil suit. It is this order which is under challenge before this Court by way of this revision petition filed by the petitioner.

7. In the revision petition, the impugned order passed by the learned Magistrate has been primarily challenged on the ground that the petitioner cannot be made to wait for award of maintenance in

her favour till the decision of issue of her paternity is rendered by the civil suit, as by doing so she would be deprived of immediate sustenance. It has been contended that there is material on record to, *prima facie*, suggest that there was relationship between the petitioner's mother and the respondent and the respondent has remitted some payments through bank transfers in favour of the petitioner.

8. I have heard learned counsel for the parties and perused the impugned order, the trial Court record as well as copies of documents placed on record by the parties during the course of arguments.

9. Before dealing with the contentions raised by the petitioner in the instant petition, certain facts which have emerged from the pleadings and documents filed by the parties before the Court of learned Magistrate, Civil Court and before this Court are required to be noticed.

10. The petitioner and her mother have filed a civil suit for declaration and injunction against the respondent before the Civil Court at Srinagar claiming the following reliefs:

“(i). It be declared that plaintiff No.1 Raaisha (minor) is the daughter of the defendant;

(ii). That the defendant during the period he professed Islam as his faith married plaintiff No.2 and out of the said wedlock plaintiff No.1 was born;

(iii). That the marriage between plaintiff No.2 and the defendant has dissolved consequent to reconversion of the defendant to his original faith (Hindu);

(iv). Plaintiff No.1 (minor) is entitled to use the name of the defendant as her father in the school records and other records;

(v). By prohibitive injunction defendant be restrained from denying legitimacy of plaintiff No.1 and be also restrained from interfering in the use of his name as the father of plaintiff No.1 and ex-husband of plaintiff No.2.”

11. In the plaint, the petitioner and her mother have claimed that the respondent converted to Islam in May 2010 and entered into a wedlock with the petitioner's mother on 08.05.2010. It is also averred in the plaint that petitioner's mother contracted another marriage with one Idrees Bashir Jabri on 01.08.2010 which got dissolved in October, 2010. The petitioner is stated to have been born on 12.04.2011. The petitioner has placed on record certified true copies of the petition for divorce filed by wife of the respondent against him before the Court of Principal Judge, Family Court, Lucknow. The said petition is stated to have been withdrawn by the respondent's wife. In the said petition, the respondent's wife has claimed that the respondent has entered into a wedlock with the petitioner's mother in furtherance of a planned conspiracy and that his consent for the marriage has been obtained by cheating and fraud. The petitioner has also placed on record a copy of bank statement of account of Ms Riza Jan daughter of Mir Sumeera and in the petition under Section 488 J&K Cr.P.C, it is claimed that this account pertains to minor petitioner into which the respondent has transferred certain amounts on account of her maintenance. The

petitioner also relies upon birth certificate dated 01.09.2014 issued by the Srinagar Municipal Corporation which indicates that the petitioner was born on 12.04.2011. The name of her mother is shown as Sumeera and name of her father is shown as Syed Sudhanshu. The said certificate appears to have been issued pursuant to the directions of the Court.

12. On the other hand, the respondent has placed on record a copy of birth certificate issued in the name of one Riza Jan wherein name of mother of the child is shown as Mrs. Sumaira and the name of father is shown as Mr. Idress Bashir Jabri. The said certificate has been issued by the office of Registrar Births and Deaths, Srinagar and it indicates that the child was born on 12.04.2011 and the date of registration of particulars is 25.05.2011. The respondent has also placed on record a copy of the medical record issued by the Modern Hospital, Srinagar, according to which, Mrs.Sumaira had given birth to a girl child on 12.04.2011 in the said Hospital and the name of father of the child is shown as Idrees Bashir Jabri.

13. From the foregoing material on record, it appears that a girl child was born to the petitioner's mother on 12.04.2011. One birth certificate shows the name of child as Riza Jan with Mr. Idress Bashir Jabari as her father, whereas the other one shows the name of girl child as Raaisha with name of father as respondent herein. The petitioner's own document, the bank statement shows that her bank account has been opened in the name of Riza Jan. It means that

Raaisa and Riza Jan is one and the same person. As per the certificate of birth dated 27.05.2011 issued by the Registrar of Births and Deaths, Srinagar, the name of father of the petitioner is Mr. Idress Bashir Jabari with whom petitioner's mother has admittedly entered into a wedlock on 01.08. 2011. The date of birth of the girl child is 12.04.2011. The birth certificate dated 27.05.2011 has been issued within one and a half month of birth of the child. The particulars contained therein have been recorded in regular course of events based upon spontaneous information furnished within one year, as contemplated in the provisions contained in Section 13(1)(2) of the Registration of Births and Deaths Act, 1969. Therefore, in view of provisions contained in S.114(e) of the Evidence Act, there is a presumption of correctness attached to the particulars entered in the said certificate. On the other hand, the birth certificate dated 01.09.2014, on which reliance is being placed by the petitioner, appears to have been issued pursuant to the directions of the Court after more than three years of the event of birth, by taking recourse to the provisions contained in Section 13 (3) of the Registration of Births and Deaths Act, 1969. Therefore, presumption cannot be raised as regards the correctness of contents of the said certificate, unless oral and documentary evidence is led to support the same.

14. I am supported in my aforesaid view by the judgment of High Court of Madras in the case of **K. Muthulakshmi v. K. Lakshmiammal**, 2011 (3) MWN (Civil) 679. In the said case the

Court, while considering the probative value of a birth certificate issued in terms of S.13(3) of aforesaid Act, observed as under: -

“10. The primary question involved in this case is as to what is the evidentiary value of an order made by a competent Judicial Magistrate under [Section 13 \(3\)](#) of the Registration of Births and [Deaths Act 1969](#).(hereinafter referred to as "Act") In the case on hand, except the oral evidence of P.W.1 there is no other evidence let in to prove the date of birth of the appellant as 31.03.1941 as claimed by her. It is needless to point out that her oral evidence, in the absence of any other materials, either in the form of oral evidence or in the form of documentary evidence, will be of no use. The learned counsel would contend that there shall be a legal presumption of the correctness of the date of birth as found in [Ex.A.3](#), the order passed by the learned Magistrate under [Section 13 \(3\)](#) of the Act.

11. I find it very difficult to accept the said contention. If the birth of a child had been registered in the regular course in the appropriate register based on spontaneous information furnished within a reasonable time, then surely, there can be a presumption on the correctness of the entry of the date of birth in the said register in view of [Section 114\(e\)](#) of the evidence Act. But, in this case, such presumption cannot be raised because the birth of the appellant was not registered in the regular course. As I have already stated, it was registered on the orders of the learned Judicial Magistrate after many years. Thus, the said presumption under [Section 114 \(e\)](#) of the Act is not at all available to the appellant”.

15. The aforesaid principles have been reiterated and reaffirmed by Madras High Court in the case of **T. Lakshmi vs. The State, 2014 (2) CTC 31** as also by Karnataka High Court in the case of **State of Karnataka vs. Smt. Annaka, ILR 2000, KAR 4770**

16. Apart from the above, presumption contained in S.112 of the Evidence Act is also attracted to the facts of the instant case. As per the aforesaid provision, 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, is conclusive proof that he is the legitimate son of that man, unless it is shown that the parties to the marriage had no access to each other. The girl child (petitioner herein) to whom the petitioner's mother has given birth, was born on 12.04.2011, which is within two hundred and eighty days of October 2010 i.e, the date of dissolution of her marriage with Idrees Bashir Jabri. Thus, there is a presumption that the petitioner was born out of wedlock of her mother with Mr. Idrees Bashir Jabari, unless it is shown that Mr. Idrees Bashir Jabari had no access to the mother of petitioner during this period. The fact that the petitioner has not placed on record any Nikahnama or any other material to show that her mother had entered into a wedlock with the respondent strengthens the aforesaid presumption. Merely because wife of the respondent had alleged in her divorce petition that respondent was forced to marry mother of the petitioner does not prove the said fact particularly when respondent's wife has admittedly withdrawn the petition itself. Thus, there was hardly any material before the learned Magistrate to even *prima facie* record a finding that the respondent is the father of the minor petitioner.

17 Learned counsel for the petitioner has vehemently contended that the petitioner cannot await the decision in the civil suit for grant of maintenance and if she is made to await the decision of the civil suit, she would be driven to vagrancy. In this regard, he has placed reliance upon the judgment of this Court in **Ahmad Ullah Kundji vs. Humaria, 1986 KLJ 485** as also the judgments of Supreme Court in **Sharda vs. Dharmपाल(2003) 2 Supreme 962** and **Goutam Kundu v State of West Bengal and another, (1993) 3 SCC 418.**

18. There can be no dispute to the proposition that grant of maintenance to a minor child should be the paramount consideration for a Magistrate dealing with a petition under Section 125 of Cr.P.C, but when the paternity of a child is seriously disputed and there is no *prima facie* material to suggest that the respondent happens to be the father of the child, it would not be prudent for a Magistrate to fasten the respondent with the liability of maintaining the child without first ascertaining the veracity of claim of the petitioner. In the case of **Ahmad Ullah's case** (supra), this Court did emphasize the need to provide immediate succor to the minor child till the question of his paternity is finally decided, but the Court, before doing so, had *prima facie* come to a conclusion that there was probability that petitioner and respondent's mother in that case may have, during the course of their employment in one Hospital, cohabited with each other, even if their marriage was not proved. It is in those circumstances that this

Court directed that the question of payment of maintenance in favour of minor child needs to be decided first subject to the outcome of issue regarding paternity of the minor child. The judgments of the Supreme Court relied upon by the petitioner are also distinguishable on facts as in both these cases there was material on record to *prima facie* support the claim of the petitioners, which is not the case over here.

19. In the instant case as already noticed, there is a serious dispute as regards the paternity of the petitioner. The documents on record *prima facie* suggest that the mother of the petitioner had entered into a wedlock with one

Mr. Idrees Bashir and the birth of the petitioner has taken place within two hundred and eighty days of dissolution of marriage between the petitioner's mother and the said person. Thus, presumption of Section 112 of the Evidence Act gets attracted to the present case. Then there are two birth certificates on record, in one, name of father of the petitioner is shown as Mr. Idrees Bashir Jabari and in the other one, which has been issued after more than three years of her birth, the name of father of the petitioner is shown as respondent herein. The first birth certificate being based upon contemporaneous record, *prima facie*, would get precedence over the second one, which has been issued after a considerable delay of more than three years. In the face of this overwhelming record, unless the petitioner, by leading cogent and convincing evidence and placing on

record unimpeachable material in the proceedings going on before the Civil Court, it may not be possible for the Magistrate to pass an order of maintenance in her favour. The learned Magistrate has, therefore, rightly deferred further consideration of the petition till the decision of the issue in the civil suit.

20. Even otherwise, the impugned order passed by the learned Magistrate is interlocutory in nature, inasmuch as, it does not decide the dispute between the parties either finally or at interim stage. Section 397 (2) of the Cr.P.C which corresponds to S.435(2) of J&K Cr.P.C, clearly creates a bar to exercise of revisional powers against orders of aforesaid nature. The revision petition is, therefore, not maintainable.

21. In view of what has been discussed hereinbefore, I do not find any illegality or impropriety in the impugned order passed by the learned Magistrate. The revision petition is otherwise found to be not maintainable. The same, therefore, deserves to be dismissed and is dismissed as such.

22. The record along with a copy of this judgment be sent back.

(SANJAY DHAR)
JUDGE

27 .01.2022.
Sanjeev PS

Whether the order is speaking: **Yes**
Whether the order is reportable: **Yes**