

IN THE COURT OF THE III ADDITIONAL DISTRICT AND SESSIONS JUDGE,
COIMBATORE

Present : Thiru. C. Sanjai Baba, B.A., L.L.B.,
III Additional District & Sessions Judge,
Coimbatore.

Wednesday, the 19th day of February, 2020.

[Thiruvalluvar Andu 2050 Sree Vihari Varudam Masi Thingal 7th]

CRIMINAL APPEAL No. 55 of 2019
and
CRIMINAL APPEAL No. 155 of 2019

1.	From what court the appeal is preferred	:	Judicial Magistrate No. 2, Pollachi.
2.	Number of the case in that court	:	C.M.P. No.8233/18 in D.V.A. No. 9 of 18 and C.M.P. No. 5635/2018 in D.V.A. No. 9 of 18
3.	Number of the appeal	:	C.A. No. 55 of 2019 (C.M.P. No. 8233/18 in D.V.A. No. 9 of 18) and C.A. No. 155 of 2019 (C.M.P.No.5635/2018 in D.V.A.No. 9 of 18)
4.	Name and description of the Appellant/Accused	:	Poongodi (28/2018)
5.	Name of Respondent/Accused	:	Thavamani (32/2018)

These Criminal Appeals coming on 31.01.2020 for final hearing before me with Thiru G. Gobi, Advocate appearing for the Appellants and of Thiru Shaju, Advocate appearing for the respondents in both appeals and upon hearing arguments of both, perusing the case records and having stood over for consideration till this date, this court delivered the following

J U D G M E N T

The appellant herein is the wife and original petitioner before the trial court in DVA. No. 9/2018. Pending the DVA proceedings she filed Crl.M.P. No. 5635/2018

seeking for interim maintenance of Rs.20,000/- per month. The respondent/husband had also filed C.M.P. No.8233/2018 seeking for DNA test for the child said to have been born to the wife due to illegitimate contact.

2. The trial court after enquiry allowed the application filed by the husband for DNA test in C.M.P. No. 8233/2018 against which the wife has filed C.A. No. 55 of 2019. The trial court dismissed the application in C.M.P. No.5635/2018 filed by the wife seeking for interim maintenance under Section 23 of the DV Act. Challenging both the same the wife has come forward before this court in C.A. No.155/2019.

3. Heard both sides. The facts of the case is that the marriage between the appellant/wife and the respondent/husband was solemnized on 14.07.2016. However, the marriage was finalized even in the month of January 2016. According to the wife, after finalizing the marriage in the month of January 2016, the respondent/husband started chatting with her over phone and had met her several time. Despite objections raised by the mother of the petitioner, he had continued to meet her in her house and had taken her to picnic places, had physical relationship with her and both had lived as husband and wife. Due to such physical relationship the wife become pregnant even before the marriage and on knowing that, the respondent/husband had also spent for her medical expenses. Subsequently, on 14.07.2016 in the presence of the both families, the marriage was performed between the petitioner and the respondent and after marriage the attitude of the husband changed, he started consuming liquor and started demanding the

petitioner to get money from her father. On 15.08.2016 at 10.00pm he had beaten her and harassed her. His parents did not oppose his activities. Therefore, she was forced to live in her parents home. Later the child was born and the expenses were borne by the husband and after that he had pestered her to get Rs.5lakhs from her father to start a business. When she attempted to rejoin the husband, he refused to accept alleging infidelity. He has also filed HMOP No. 264/2007 before the Subordinate Court, Tirruppur to declare the marriage as null and void alleging that even at the time of marriage the wife was pregnant by 4 ½ months due to her contact with some other persons before marriage and the same is also pending. Since the petitioner/wife is depending on her parents, she has prayed for interim maintenance of Rs.20000/- per month.

4. The husband has filed his counter admitting the date of marriage but denying the relationship between him and the wife prior to the marriage. He has also denied the plea that he borne the medical expenses during her pregnancy. According to the husband, the wife lived with him only for 15 days and even during that period they were visiting her relatives houses and the wife had avoided having physical intimacy with him. Since the husband's mother died on 31.08.2016 he had permitted her to live in her parents home. On 21.12.2016 around 3.00am the petitioner's mother called the respondent /husband over phone and informed that the petitioner/wife was not well and that she was admitted at Pollachi Thirumalai Hospital. The respondent/husband reached there and was shocked to know that a male child was born within 4 ½ months from the date of marriage. According to

him the petitioner/wife had suppressed about her physical relationship with some other person and had married him, therefore, the marriage itself is null and void and that he has filed HMOP No. 264/2017 to declare the marriage as null and void and in this proceedings, he has also filed an application to subject the baby and himself for DNA test. Therefore, under such circumstances, he is not liable to pay any maintenance to the wife and the child.

5. In the application filed by the wife, the trial court has observed that since husband has disputed the paternity of the child and has filed an application in CMP. No.8233/2018, only after conclusion this application, the court could decide whether the wife would be entitled for maintenance and has held that in the mean while the application seeking for interim maintenance is not sustainable and by such observation has dismissed the application and has allowed the application filed by the husband for DNA test.

6. The appeal is filed on the ground that the Protection of Women from Domestic Violence Act does not differentiate between the legitimate and illegitimate child. Moreover the relationship between the parties as husband and wife is admitted therefore the reason stated by the trial court is not justifiable, hence the same has to be dismissed and that since the marital relationship is admitted, the trial court should not have allowed the application filed by the respondent/husband for DNA test and should not have dismissed the application filed by the wife for the relief of interim maintenance.

7. Heard, the learned counsel for the appellant as well as respondent. The learned counsel for the appellant submitted that the DVA act does not differentiate between the legitimate and illegitimate child and when the relationship is admitted till disposal of the DVA proceedings, the would be entitled for interim maintenance. The learned counsel for the respondent submitted that the relationship as pleaded by the wife before marriage is denied and child was born within 4 ½ months from the date of marriage, and that the above circumstances would show that the child could not have been born to the husband and that therefore the respondent/husband and has also filed an application HMOP to declare the marriage as null and void and the same is pending and till the report in DNA test arises, the respondent/husband cannot be compelled to pay any maintenance to the wife and the child, hence both the appeals have to be dismissed and the order of the trial court has to be confirmed. The learned counsel for the appellant in turn argued that in a DVA proceedings an application to send DNA text cannot be ordered.

8. The Hon'ble High Court of *Himachala Pradesh in the matter of Sarada .vs. Surat singh decided in CR.MMo. No. 198/16* has decided whether the order to conduct DNA test would be maintainable in a proceedings under DVA act. In the above cited case, the wife filed an application for DNA test and that was dismissed by the trial court and challenging the same the wife preferred an appeal before the Hon'ble High Court and the Hon'ble High Court after elaborately considering various provisions of law has concluded in para 16 of the Judgment that, if the husband and children are directed to undergo DNA tests only, the truth will come out in such

test and it has to be remembered that every trial in a voyage of discovery in which the truth is the quest and that it will be the duty of the court to ensure that the truth in a case comes out. By making such observation, that Hon'ble High Court had set aside order passed by the trial court dismissing the application filed by the wife for DNA test. In this case the trial court has allowed the application filed by the husband to subject to wife himself and child of DNA test. Therefore, the contention of the learned counsel for the wife that this application could be filed only in the HMOP proceedings, need not be accepted in view of the above Judgment and in the given circumstances. This court cannot once again drive the husband to file a fresh petition in the HMOP proceedings for DNA test and that would only multiple the proceedings and it is not the object to the court to multiply the litigation. Therefore, the contention raised by the counsel for the appellant regarding the order to conduct DNA test has to be dismissed and the above application cannot be accepted. Therefore, this court has no reason to interfere with the order of the trial court in directing the petitioners to undergo DNA test. Therefore, the appeal in respect of C.A. No. 55 of 2019 stands dismissed. Confirming the order passed by the trial court in CMP. No. 8233/2018.

9. As far as the interim maintenance is concerned, this court is of the view that the marriage is admitted and the parties have lived together as husband and wife for certain period. In this case the wife had not sought for maintenance for the child she has claimed maintenance only for herself. The observation made by the trial court that since application to conduct DNA test was pending, the wife would

not be entitled for interim maintenance cannot be accepted. Mere pendency of DNA test report would not disqualify a legally wedded wife from claiming interim maintenance. Pending proceedings the wife will be entitled for the relief of interim maintenance. Therefore this court is of the view that the order of the trial court on this aspect requires interference. Hence the order of the trial court passed in C.M.P. No. 5635/2018 is set aside and the said application is partly allowed. The respondent/husband is directed to pay interim maintenance of Rs.5000/- per month to the appellant/wife till disposal of the DVA, including the arrears amount also.

In the result

I. The appeal in C.A. No. 55/2019 stands DISMISSED and the order passed by the Judicial Magistrate No.2, Pollachi in C.M.P. No.8233/2018 in D.V.A. No.9 of 2018 dated 31.12.2018 is hereby confirmed.

II. The appeal in C.A. No. 155/2019 partly ALLOWED. The order of the trial court passed in C.M.P. No. 5635/2018 in D.V.A. No.9 of 2018 dated 30.11.2018 is hereby set aside and the said application is partly allowed. The husband/respondent is directed to pay interim maintenance of Rs.5000/- per month to the appellant/wife from the date of filing of this application till disposal of the DVA. No. 9 of 2018, together with arrear amount also.

Dictated to Steno-Typist, transcribed by her corrected and pronounced by me in Open Court, this the 19th day of February 2020.

Sd/- Thiru C. Sanjai Baba, B.A., L.L.B.,
III Additional District and Sessions Judge,
Coimbatore.

*Copy to
The Judicial Magistrate No.2
Pollachi.*

*DRAFT/COPY/FAIR JUDGMENT
C.A. No. 55 of 2019
and
C.A.NO. 155 of 2019
DT: 19.02.2020
III ADJ, CBE.*

