

R.Selvaraja Vs. S.Latha

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Court : Chennai

Decided On : Apr-04-2013

Judge : The Honourable Mr. Justice M.Venugopal

Appellant : R.Selvaraja

Respondent : S.Latha

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED:4.04.2013
CORAM: THE HONOURABLE Mr. JUSTICE M.VENUGOPAL C.R.P.PD.No.3147
of 2011 and M.P.No.1 of 2011 R.Selvaraja ... Petitioner Vs. S.Latha ...
Respondent Prayer: Petition filed under Article 227 of the Constitution of India,
against the Fair and Decretal Order dated 29.06.2011 made in I.A.No.401 of 2011
in G.W.O.P.No.1 of 2010 on the file of the Sub Court, Perundurai. For Petitioner :
Mr.N.Manokaran For Respondent : Mr.S.Kaithamalai Kumaran ORDER The
Petitioner has filed the present Civil Revision Petition as against the order dated
29.06.2011 in I.A.No.401 of 2011 in G.W.O.P.No.1 of 2010 passed by the Learned
Sub Judge, Perundurai. 2.The Learned Sub Judge, Perundurai, while passing the
orders in I.A.No.401 of 2010 in G.W.O.P.No.1 of 2010 on 29.06.2011, has
categorically observed that '... It is important that while examining the minor son,
this petitioner has not at all raised any objection and after finding that his evidence
is totally against this petitioner, as an after thought, this petitioner has filed this
petition belatedly with malafide intention. Further it is important to note that in the
petition this petitioner has prayed to scrap the evidence of RW2. But the RW2 is a

major aged 45 years. Therefore the prayer in this petition to scrap the evidence of RW2 itself wrong and it would establish that this petition has been filed with sole intention to drag on the proceedings. Therefore, the prayer in the petition itself wrongly framed by the petitioner' and has come to a resultant conclusion that the minor is a competent person to give evidence and the Court has followed all norms before examining minor witness and as such, his evidence is sustainable and it need not be scraped and dismissed the application without costs'. 3.The Learned Counsel for the Petitioner/Husband submits that the Petitioner/Husband has filed G.W.O.P.No.1 of 2010 on the file of the Learned Sub Judge, Perundurai under Section 10 of the Guardian and Wards Act praying for custody of his minor son aged 12, studying in 8th Standard and living with the Respondent/Wife. 4.The Learned Counsel for the Petitioner/Husband urges before this Court that minor son has been examined as R.W.3 in I.A.No.401 of 2011 in G.W.O.P.No.1 of 2010, notwithstanding the fact that in law, he cannot give evidence in respect of the dispute pending before the Court. 5.According to the Learned Counsel for the Petitioner, a minor child cannot be administered oath or affirmation and as such, the trial Court cannot allow a minor to give evidence in support of the parties. 6.Yet another plea taken on behalf of the Petitioner is that a minor is incapable of being administered oath as per the ingredients of Section 118 of the Indian Evidence Act, 1872. 7.The Learned Counsel for the Petitioner projects a legal plea that a minor cannot be examined before a Court of Law unless the Court has conducted some preliminary examination in order to ascertain the level of understanding by putting some questions to him. Also, a ground has been taken in the grounds of revision that failure to hold an preliminary examination of a child witness by the trial Court is fatal to the case. 8.In support of the contention that the affidavit signed by a child witness is incompetent and inadmissible in evidence before a Court of Law, the Learned Counsel for the Petitioner cites the decision of this Court in S.Amutha V. C.Manivanna Bhupathy, (2007) 1 MLJ 91.at special page 917 wherein, it is held thus: "(i) Affidavit signed by a child witness is incompetent, and inadmissible in evidence as per the Oaths Act, read with the General Clauses Act. (ii)Though a child is competent to testify as per Section 118, Evidence Act, 1872, Court should take into consideration the fact that such child witness could be influenced by interested parties and that the evidence of such child witness

could be a tutored one. (iii) Though a child can testify, as per Section 118, Evidence Act, 1872, the evidence of a child witness should, normally be, corroborated. (iv) When it is not a criminal case or one of custody, but a case of pure matrimonial discord, where, taking sides could affect the future interests of the child, the child cannot be a witness in such a matrimonial dispute, the welfare of the child being of paramount importance." 9. Per contra, the Learned Counsel for the Respondent/Wife submits that it is not correct to contend that minor cannot be examined before a Court of Law and in the instant case on hand, the trial Court before examining the minor as a witness has examined his intelligence capability by putting few questions and eliciting certain answers and only thereafter, after subjectively satisfying itself about the minor's knowledge, capability etc. has permitted to examine the minor as a witness. Therefore, contra plea taken on behalf of the Petitioner that the trial Court has not adhered to the norms before examining the minor witness is not legally correct and a tenable one, in the eye of law. 10. It is to be pointed out that Section 118 of the Indian Evidence Act, 1872 speaks of competency of witnesses is the rule. However, their incompetency is an exception. As a matter of fact, the following witnesses come within the exceptional group viz., Those who are, in the considered opinion of a Court of law (1) unable to understand the questions put to them, or (2) unable to give rational answers to those questions owing to (i) tender age, (ii) extreme old age, (iii) disease of mind or body, or (iv) any other cause. Indeed, dumbness, deafness, idiocy, lunacy etc. may render an individual either from understanding the questions put to him or from giving rational answers to these questions. Therefore, the intellectual capability/capacity is the prime test of competence. No definite/precise rule can be laid down as to the limit of age, or decree of knowledge and intelligence, which will exclude the deposition of infants. Really speaking, their competency depends not so much on age as persons of the same age differ in mental growth. The capacity to understand, and not the age, is the decisive/determining factor, in the considered opinion of this Court. 11. If a child is under 12 years of age, he need not be sworn. There is no reason to begin with the presumption of untrustworthiness in the assessment of evidence of child. But the merit of evidence has to be judged on the touchstone of its own inherent credibility. A Court of Law, while permitting the examination of such witnesses ought to be careful to see that they are not

subjected to unnecessary harassment, confusion or unduly made conscious of the fear of formal Court atmosphere and the public attraction. The broad test for appraising the evidence of child witness is for the Court of Law to find out whether there is a possibility of any tutoring. If the test is found positive, a Court of Law will not, as a rule of prudence, rely/act on the evidence of a child witness. That apart, if the deposition of a child witness does not appear to be tainted with any such infirmities then it is worthy of credence and acceptance, in the considered opinion of this Court. A Court of Law is to accept the evidence of a child witness with care and caution and also may require substantial corroboration before acting upon it.

12. It is to be remembered that a child witness often be expected to furnish a true version because of his/her innocence. Also, one may not ignore an important fact that a child witness might have been coached to approach a version by persons who may have influence on him. When once a Court of Law has determined the competence of a child/infant witness and the examination has commenced, then, it should not reverse its former decision, although an objection can be raised at the time of arguments being projected in respect of a pending proceedings/given case. It cannot be gainsaid that competency is not the same as that of credibility.

13. At this stage, this Court worth recalls the observation made by Mr. Justice Brewer, in the decision *Jorge L. Wheeler V. United States* (1895) 59 US 52. at 524], has stated that there is no precise age which determines the competency of a witness and observed the following: "This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous."

14. Added further, in order to test the credibility of a the witness, a Court of law is not only to limit itself the manner in which a particular witness has deposed or to the demeanour of such a witness, but also to look into the encircling circumstances as well as the probabilities, so as to enable it to come to a definite idea about the

credibility/reliability of the witnesses. 15. Apart from the above, the term 'Competency' is to be differentiated from the term 'Compellability'. An individual may be allowed to give evidence, though in certain cases, he may not be compelled by the Court to do so. Generally, all individuals are not only competent but also compellable, in the considered opinion of this Court. An individual, although may be competent and compellable as a witness, may not be competent or may not be forced to give evidence as to certain matters. As such, admissibility is not entirely dependent on competency of the witness. Under Section 118 of the Indian Evidence Act, an individual may be seen as a competent witness, but his evidence may be inadmissible, if he speaks of 'HEARSAY EVIDENCE'. 16. In this connection, this Court worth recalls the decision in Nafar Sheik V. Emperor, AIR 191. Calcutta 276 wherein, it is held as follows: "By S. 118, Evidence Act, the legislature has not prescribed an inflexible rule of universal application to the effect that before a child of tender years is questioned, the Court must by preliminary examination test his capacity to understand and to give rational answers, and must form an opinion as to the competency of the witness before the actual examination commences. The mere circumstance therefore that a Sessions Judge did not interrogate the witnesses of tender years before their examination began with a view to test their capacity, does not invalidate the trial. The question of the capacity of a witness to testify is a question for the Judge himself to decide and not for the jury, although after he has decided in favour of the competency of a witness, it is for the jury to determine the amount of credit to be given to the statements made by such witness." 17. This Court aptly points out the decision of the Hon'ble Supreme Court in Naresh Shridhar Mirajkar and others V. State of Maharashtra and another, AIR 196. Supreme Court at page 1, wherein it is, inter alia, held that 'The High Court has jurisdiction to hold trials in camera or part of a trial in camera or to prohibit excessive publication of a part of its proceedings'. Further, it is observed that 'Some statutory provisions namely S.53 of Indian Divorce Act (4 of 1869), S.14 of Indian Official Secrets Act 1923 S.22(1) of Hindu Marriage Act, 1955 the Proviso to S. 352 of Criminal P.C. 1898 and S.151 of Civil P.C., 1908, which specifically deal with the topic of holding trials in camera merely illustrate how the power of the Court to hold certain trials in camera either fully or partially, is inevitably associated with the administration of justice itself'. 18. It

comes to be known that minor Sibi Chakravarthi has been examined as R.W.3 on the side of Respondent/Wife (Mother) in G.W.O.P.No.1 of 2010 on the file of the trial Court. In fact, the trial Court has put some three questions for which the said minor witness has furnished his answers and ultimately, the Court has come to a conclusion that the minor is competent to give evidence. Further, it has allowed the minor to be chief examined on behalf of the Respondent. At that point of time only, the Revision Petitioner/ Husband has chosen to file I.A.No.401 of 2011 to scrap the evidence of minor (examined as R.W.3 in chief before the trial Court). 19.It is to be borne in mind that in regard to the pending matrimonial disputes/G.W.O.P. matters relating to the custody of minor children, a Court of Law is to look into the paramount welfare of the child rather than looking into the version projected by either parties to the litigation, the reason being the welfare and future interest of the children take a primary seat and other issues are relegated to the background. 20.As far as the present case is concerned, before the trial Court in G.W.O.P.No.1 of 2010, the minor son has not sworn to any affidavit and affixed his signature. 21.Be that as it may, in the instant case on hand, before the trial Court in G.W.O.P.No.1 of 2010 even though the trial Court has put some questions to the minor witness R.W.3 and has elicited answers and finally satisfied itself about the competency of the minor to give evidence, it has committed an error in allowing the Respondent to examine the minor [Sibi Chakravarthi in-chief]. Therefore, this Court is of the considered view that the said evidence of R.W.3-minor (in chief-examination) recorded by the trial Court in G.W.O.P.No.1 of 2010 is to be scrapped/eschewed because of the simple reason that the trial Court at best can only ascertain the views/wishes of the minor child in regard to the custody issue. As a matter of fact, both the Revision Petitioner (father of minor son) and the Respondent (mother of the minor child) are only, in law, entitled to seek explanation eliciting views from minor in regard to the custody issue. 22.In such view of the matter, to prevent an aberration of justice, this Court, exercising its parental supervisory jurisdiction in Revision, sets aside the order passed by the trial Court in G.W.O.P.No.1 of 2010 dated 29.06.2011. Further, this Court, in the interest of justice, directs the eschewing of the evidence of minor R.W.3, recorded by the trial Court. Consequently, the Civil Revision Petition succeeds. 23.In the result, the Civil Revision Petition is allowed, leaving the parties

to bear their own costs. The order passed by the trial Court in I.A.No.401 of 2011 dated 29.06.2011 is set aside by this Court for the reasons assigned by this Court in this Revision. Consequently, connected Miscellaneous Petition is closed. 24.It is open to the trial Court to direct the concerned party in G.W.O.P.No.1 of 2010 [pending on its file] to produce the child before it for ascertaining the views of the minor in regard to the custody issue and may grant permission to the parties to seek explanation from the minor/to ascertain his views in regard to the custody issue to promote substantial cause of justice. Further, on appearance/production of minor before the trial Court, the trial Court may permit the parties to seek the views of minor/obtain explanation from the minor in regard to the custody issue in pending G.W.O.P.No.1 of 2010 preferably by conducting in camera proceedings in public Court or in Chambers (with a view to create a serene environment and fear free friendly atmosphere), as the case may be. 4.04.2013 Index : Yes Internet : Yes Sgl To The Sub Court, Perundurai. M.VENUGOPAL,J.

Sgl Order in C.R.P.PD.No.3147 o

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