
(2017) 04 KAR CK 0091
In the Karnataka High Court
Case No : 31182 of 2016

P.S. SHIVAKUMAR

APPELLANT

Vs

P.H. SUBBARAYAPPA & ORS

RESPONDENT

Date of Decision : 20-04-2017

Acts Referred:

Constitution of India, Article 21 -
Amendment of the Schedule
Code of Civil Procedure, 1908, <a href=3859 — Order 14Rule
5>Order 14Rule 5 -
Evidence Act, 1872, <a

Citation : (2017) 04 KAR CK 0091

Hon'ble Judges : Aravind Kumar

Bench : SINGLE BENCH

Advocate : A.V. GANGADHARAPPA, S.K. VENKATA REDDY

Final Decision : Allowed

Judgement

1. Though matter is listed for preliminary hearing, by consent of learned Advocates appearing for the parties, matter is taken up for final disposal. I have heard the arguments of Sriyuths A.V.Gangadharappa and S.K.Venkatareddy, learned Advocates appearing for parties and perused the records.

2. Pleadings in respect of both the writ petitions are one and the same. Parties in both the writ petitions are also same. Hence, both the writ petitions are taken up together for adjudication and disposal.

3. W.P.No.36236/2015 is preferred by defendants 1 to 3 in O.S.No.1/2010 being aggrieved by the order dated 31.07.2015 passed on I.A.No.49 filed by plaintiff under Order 14 Rule 5 of CPC for recasting of issue No.1, which has since been allowed. W.P.No.31182/2016 is preferred by plaintiff in O.S.No.1/2010 being aggrieved by the order dated 29.04.2016 passed on I.A.No.54 filed by first defendant under Order 26 Rule 10(A) read with Section 151 CPC and Section 45 of the Evidence Act for a direction to the plaintiff to undergo DNA test with first

defendant and his wife Smt. Radhamma for confirmation of his paternity, which has since been allowed. Parties are referred to as per their rank in the trial Court.

BRIEF BACKGROUND OF THE CASE:

4. Plaintiff has filed the suit O.S.No.1/2010 for the relief of partition and allotment of half share in the suit schedule property and to declare that the gift deed dated 20.11.2009 executed by first defendant in favour of third defendant is null and void. The contention of plaintiff in brief as alleged in the suit is: First defendant Sri. P.H.Subbrayappa is his father; second defendant is the second wife and she is a "Dasi" as per Hindu Law and third defendant is the son born through second defendant and "Dasi Putra", plaintiff is the son of first defendant through his first wife Smt. B.N.Radhamma. Hence, claiming that he and first defendant constitute a Hindu Undivided Joint Family, has sought for share in the suit property. Though several pleas have been raised in the plaint, this Court is of the considered view that it would not be necessary to delve upon them, since it would have no bearing on the adjudication of impugned orders.

5. On service of suit summons, defendants - 1 to 3 have appeared and filed their written statement and it is specifically denied that first defendant is the father of plaintiff and it is contended that plaintiff is the second son of late Sri.K.L.Vasanthaiah. It is also contended that marriage of first defendant with second defendant was with the consent of first wife Smt.B.N.Radhamma. It was also admitted by the defendants that first defendant has executed a registered gift deed in favour of third defendant. However, it is contended that it is the self acquired property of first defendant. Except to the extent expressly admitted in the written statement, all other averments made in the plaint has been denied.

6. Trial Court on the basis of the pleadings has framed issues on 03.11.2012. Issue No.1 framed earlier was deleted by order dated 14.12.2012, additional issues came to be framed on 05.10.2013 and issue No.1 was recasted by order dated 31.07.2015. They read as under: "1. Whether the plaintiff proves that he is the biological son of defendant No.1 born through Smt. Radhamma, the 1st wife of defendant No.1? (Deleted as per order dated 14.12.2012)

2. Whether the plaintiff proves that he and defendant No.1 are the members of Hindu Joint Family and the suit schedule properties are their joint family properties and they are in joint possession of the same?

3. Whether the plaintiff proves that gift deed dated 20.11.2009 executed by defendant No.1 in favour of defendant No.3 is not binding on the share of plaintiff in the suit schedule properties?

4. Whether defendant No.1 to 3 prove that the suit is barred by limitation?

5. Whether plaintiff is entitled to the relief sought for?

6. What decree or order?"

Recasted Issue No.1.

"1. Whether the defendant No. 1 to 3 proves that the plaintiff is not the son of defendant No.1 born through Smt.Radhamma the 1st wife of defendant No.1?"

Addl. Issue:

"1. Whether the plaintiff proves that marriage of first defendant with 2nd defendant is void and the 3rd defendant born out of void marriage is illegitimate by virtue of Hindu Marriage Act, 1955?"

Addl. Issues:

"2. Whether plaintiff proves that defendant No.5 has relinquished her share in the suit properties?

3. Whether defendant No.5 proves that defendant No.1 and Lakshamma have played fraud to deceive share of 5th defendant in the suit properties?

4. Whether defendant No.4 proves that she is having 1/6th share in the suit properties?"

7. Parties have gone for trial and plaintiff got himself examined as P.W.1 and also examined his uncle Sri.P.H.Subbarayappa as P.W.2 and got marked Exs.P1 to P78(b). First defendant entered the witness box as D.W.1 and on behalf of defendants D.W.2 to D.W.5 were got examined and got marked Exs.D-1 to D-59(a). D.W.5 is Smt.B.N.Radhamma, whom plaintiff claims as his biological mother. RE: W.P.No.36236/2015:

8. In this writ petition, order passed on I.A.No.49, which is an application filed by plaintiff under Order 14 Rule 5 of CPC for recasting of issue No.1 which has been allowed, is called in question. In the affidavit supporting the application, it was contended by the plaintiff that issue No.1 is erroneously framed by putting the burden of proof on the plaintiff contending interalia that defendants 1 to 3 have admitted the marriage of first defendant with his first wife Smt. Radhamma in their written statement and as such, burden was on defendants to prove that "plaintiff is not the son of defendant No.1 born through Smt. Radhamma, first wife of first defendant". Hence, seeking shifting of the burden of proof on the defendants, issue No.1 was sought for being recasted. Objections to said application came to be filed by the defendants denying the averments made in the plaint and contending that since plaintiff has claimed that he is the son of first defendant born through Smt. Radhamma, Court below has rightly cast burden on plaintiff to prove the said issue. It was also specifically contended that Smt.Radhamma could not bear any children and as such, first defendant married second defendant and on account of Smt.Radhamma herself having entered the witness box and denied that plaintiff is not her son, burden was on plaintiff to prove issue No.1 and there was no necessity to recast issue No.1. Hence, defendants sought for rejection of I.A.No.49.

9. Trial Court after considering rival contentions, on the ground that Section 112 read with Section 4 of the Indian Evidence Act, 1872 (hereinafter referred to as

"Act" for short) would completely debar the party from leading any evidence with respect to the fact which the law says to be the conclusive proof of legitimacy and paternity of child, held that since defendants 1 to 3 have admitted the marriage of defendant No.1 with his first wife namely, Smt.Radhamma and plaintiff has been contending that he is their son, a presumption under Section 112 of the Act is available to him and the onus to rebut the said presumption is on the defendants and as such, held that burden is on defendant 1 to 3 to prove this fact. Hence, ordered for recasting of issue No.1 and following issue came to be re-casted by deleting the issue framed earlier: Recasted Issue No.1.

"1. Whether the defendant No. 1 to 3 proves that the plaintiff is not the son of defendant No.1 born through Smt.Radhamma the 1st wife of defendant No.1?"

10. It is the contention of Sri. S.K.Venkata Reddy, learned counsel appearing for petitioners that defendants 1 to 3 in their written statement have not only denied that plaintiff is not the son of first defendant, but have also contended that plaintiff is the second son of Sri.K.L.Vasanthaiah. It is in this background, trial Court had rightly cast the burden on plaintiff to prove issue No.1 and re-casted issue would indicate a negative burden has been cast on defendants and same is impermissible since burden always lies on the plaintiff to establish his case for which he has sought for relief. Hence, he prays for allowing the writ petition by setting aside the order dated 31.07.2015 - Annexure-A.

11. Per contra, Sri. A.V.Ganagadharappa, learned counsel appearing for first respondent / plaintiff would support the order of trial Court and contends that trial Court has rightly held that a presumption would arise in favour of paternity of a child born out of a valid marriage and the fact that defendants have admitted that first defendant had married Smt.Radhamma, presumption available under Section 112 of the Act would arise and the rebuttal evidence, if any, has to be led by the party who asserts that husband had no access to wife so as to doubt or dispute the consummation of marriage. Hence, he submits that there is no error committed by the trial Court calling for interference.

12. Having heard the learned Advocates appearing for parties and on perusal of pleadings and order under challenge, as also the issues framed initially and issue No.1 and which came to be re-casted, it would disclose that plaintiff has filed a suit for partition and separate possession of suit properties, contending interalia that he is the son of first defendant born through Smt. Radhamma, first wife. On the other hand, it has been specifically contended by defendants that plaintiff is the son of Sri.K.L.Vasanthaiah and Smt.B.N.Rangamma. It is in this background, issue No.1 was cast by the trial Court on 03.11.2012 by casting the burden on plaintiff to prove that he is the biological son of first defendant born through Smt. Radhamma, first wife of first defendant.

13. Under Order 14 Rule 5 CPC the Court has power to amend the issues framed including framing of additional issue at any time before passing of a decree on such terms as it thinks fit, which in its opinion may be necessary for determining

the matters in controversy between the parties. A bare reading of Order 14 Rule 1(1) CPC would indicate that when a material proposition of fact or law is affirmed by one party and denied by the other, then, an issue would arise for being framed. Whoever desires any Court to give a judgment as to any legal right dependent on the existence of facts which he asserts, must prove that those facts exist. *ei incumbit probatio qui dicit, non qui negat* - The proof lies upon him who affirms, not upon him who denies. In other words, burden will lie on the party who asserts the fact to be taken note of by the Court in his favour and as such, burden shifts on the person so asserting. *cum per rerum naturam factum negantis probatio nulla sit* - Since by the nature of things he who denies a fact cannot produce any proof. In other words, a negative is usually incapable of proof.

14. Thus, onus is always on a person who asserts a proposition or fact, which is not self evident. For instance, to assert that a man who is alive was born requires no proof. The onus, is not on the person making the assertion, because it is self evident that he had been born. However, if he asserts that he had been born on a certain date or to a certain person, it requires proof, the onus would be on the person making such assertion.

15. The burden of proof cannot be held would always be static. It keeps oscillating and in the event of the initial burden cast on a person is discharged by tendering evidence in that regard, then automatically, the burden shifts on the other person to disprove the said fact and likewise, it shifts back to the person who originally asserted the said fact on other person discharging his burden by rebuttal evidence. In this background, when the facts on hand are examined, it would clearly disclose that plaintiff has categorically asserted in the plaint that first defendant is his father and he was born through his first wife Smt.Radhamma. Plaintiff in paragraph 2 of the plaint has stated as under: "2. The 1st defendant is the father of the plaintiff. The second defendant xxx parties to the suit. The 1st wife of 1st defendant is alive and since she did not derive any right over the suit properties during the life time of 1st defendant, she has not been arrayed as party to this proceedings. The plaintiff is the son of 1st defendant through his 1st wife Radhamma."

16. On the basis of above pleading, plaintiff has contended that he and first defendant constituted a Hindu undivided joint family and as such, he is entitled for a share in the suit properties. It is because of this specific plea raised, burden had been cast on the plaintiff under issue No.1 which has since been recasted. Only in the event of plaintiff discharging the said burden, defendants would be required to disprove the said fact. Mere production of documents like School records would not give scope for presumption being raised with regard to existence of facts. An admission insofar as facts are concerned would bind the maker of admission but not insofar as it relates to a question of law vide Section 17 of the Evidence Act.

17. At the same time, it requires to be noticed that defendants had also raised a

plea in their written statement filed on 16.04.2010 to the effect that first defendant is not the father of plaintiff and plaintiff is the second son of late Sri K.L.Vasanthaiah. In the additional written statement filed on 19.10.2012, it is specifically pleaded by defendants that plaintiff is not the biological son of first defendant Sri P.H.Subbarayappa and his first wife Smt.Radhamma. It is also pleaded that parents of plaintiff are Sri K.L.Vasanthaiah and Smt.B.N.Rangamma of Bukkapatna, Koratagere Taluk. In the light of said plea, trial Court ought not to have deleted issue No.1 and substituted the same by recasting it on 31.07.2015, but on the other hand, it could have retained the original issue which was framed on 03.11.2012 and also framed the additional issue, which has now been re-casted on 31.07.2015. In other words, both the issues could have been retained so as to give an effective finding on the pleadings of parties since burden of proof does not depend upon the form of proposition but burden of proving a claim or defence is on the party who asserts it. The burden lies on the person who would fail if no evidence were given on either side. Whenever the law places a burden of proof upon a party, a presumption operates against it. Thus, burden of proof and presumption have to be considered together.

18. As such, this Court is of the considered view that deletion of issue framed on 03.11.2012 and substituting it by order dated 31.07.2015 was not called for. Hence, it is hereby ordered that issue No.1 originally cast on 03.11.2012 be retained along with issue casted on 31.07.2015 for the respective parties to prove the plea asserted by them and to the said extent, order under challenge dated 31.07.2015 ? Annexure-A requires to be modified. RE: W.P.No.31182/2016

19. Order dated 29.04.2016 passed on I.A.No.54, which application had been filed by first defendant under Order 26 Rule 10-A read with Section 151 CPC and Section 45 of the Indian Evidence Act, 1872, having been allowed, is questioned in this writ petition.

20. Interlocutory application - I.A.No.54 - Annexure-L is accompanied by the affidavit of first defendant. It is the specific plea of first defendant that plaintiff is the son of Sri K.L.Vasanthaiah and his wife Smt.B.N.Rangamma. He has specifically denied that plaintiff is not his son and he is not born to him through his first wife Smt.Radhamma. Hence, it is pleaded by first defendant that to arrive at the truth, plaintiff should be subjected to DNA test along with him and Smt.Radhamma. Said application having been allowed by trial Court, plaintiff is before this Court assailing said order.

21. It is the contention of Sri A.V.Gangadharappa, learned Advocate appearing for petitioner that order passed by trial Court is erroneous, since it has failed to consider the positive evidence available on record namely, Annexures-A to E produced before trial Court, which came to be marked as Exhibits.P-1, P-2, P-72, Annexure-G and other documents, which clearly indicate that plaintiff is the son of first defendant and Smt. Radhamma. He would also contend that defendants not only admit that Smt.Radhamma was the first wife of first defendant and solemnization of their marriage in the year 1950 and as such, access to each of

them is proved and thereby a presumption arises that Smt.Radhamma and first defendant were living together for more than 280 days and as such, presumption arises with regard to paternity of child born during the subsistence of a valid marriage and same cannot be rebutted by a DNA test ? proof. Only the non-access of wife to husband can be proved by rebuttal evidence and the evidence led by plaintiff and admissions tendered by defendants and all the witnesses have failed to prove non-access of first defendant to Smt.Radhamma and as such, trial Court ought not have allowed the application for conducting DNA test.

22. He would also submit that direction issued to plaintiff to undergo medical test would amount to interference with his fundamental right of life and personal liberty conferred under Article 21 of the Constitution of India. He would also submit that said DNA test is not a direct evidence but it is a circumstantial evidence and as such, application was liable to be dismissed. He would contend that Section 112 of the Evidence Act would clearly indicate that defendants had failed to prove the paternity of plaintiff by tendering positive evidence and when there is no dispute that first defendant and Smt.Radhamma were living together under the same roof and had led a marital life and also lived continuously for a long period from 1950 to 1960 as husband and wife, presumption of legitimacy of child born during the subsistence of valid marriage would arise.

23. In support of his submissions, he has relied upon the following judgments:
(1) AIR 1993 SC 2295 GOUTAM KUNDU VS. STATE OF WEST BENGAL AND ANOTHER

(2) AIR 1987 SC 1049 SMT. DUKHTAR JAHAN VS. MOHAMMED FAROOQ

(3) Unreported judgment in the case of T.N.ERANAIIKA vs RAGHU AND OTHERS rendered in CRP No.2021/1996 disposed of on 03.09.1999.

24. Per contra, Sri S.K.Venkata Reddy, learned Advocate appearing for respondents ? defendants would support the order under challenge and contend that there was no sufficient evidence available before the trial Court to accept the plea of plaintiff that he was the son of first defendant and Smt.Radhamma since the said Smt.Radhamma had appeared as witness ? D.W.5 and had specifically stated that she was unable to beget children and at her instance, first defendant had married Smt.Gowramma - second defendant who is her brother's - Sri B.N.Rangadhamaiah's daughter. As such, the trial Court had opined that there is a dispute between plaintiff and defendant No.1 about paternity and birth of plaintiff namely, as to whether plaintiff was born out of the wedlock of defendant No.1 and Smt.Radhamma or was the son of Sri K.L.Vasanthiah and Smt.Rangamma. He would submit that trial Court was also of the view that even on perusal of entire evidence on record, still there is ambiguity as to the paternity of the plaintiff and it can be cleared only by an Expert's opinion and on this ground, trial Court had allowed the application for conducting DNA test and the presumption available under Section 112 of the Indian Evidence Act is not applicable to the facts of the present case. Hence, he submits that writ petition

be dismissed.

25. In support of his submissions, he has relied upon the following judgments:

(1) (2015) 1 SCC 365 DIPANWITA ROY vs RONOBROTO ROY

(2) (2014)2 SCC 576 NANDLAL WASUDEO BADWAIK vs LATA NANDLAL BADWAIT & ANOTHER

(3) (2010) 8 SCC 633 BHABANI PRASAD JENA vs CONVENOR SECRETARY, ORISSA STATE COMMISSION FOR WOMEN & ANOTHER

(4) AIR 2012 DELHI 151 ROHIT SHEKHAR vs NARAYANA DUTTA TIWARI & ANOTHER

(5) (2003)4 SCC 493 SHARDA vs DHARMPAL

26. Section 112 of the Indian Evidence Act, 1872 reads as under: "112. Birth during marriage, conclusive proof of legitimacy.-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, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten." Thus, it emerges from a plain reading of above provision that a child born during the continuance of a valid marriage shall be conclusive proof that child is a legitimate child of the man to whom the lady giving birth is married. The provision makes legitimacy of the child to be a conclusive proof, if the conditions indicated or specified therein are satisfied. It can be denied only if it is established that parties to the marriage had no access to each other at any time when the child could have been born. The period of 280 days indicated therein would also disclose that a person who was born during the continuance of a valid marriage between his mother and any man or within 280 days after its dissolution, the mother has remained unmarried, shall be conclusive proof that he is the legitimate son of that man. However, in the event of person denying it, the burden is on him to show that parties to the marriage had no access to each other at any time when the child could have begotten.

27. Hon"ble Apex Court in the case of DIPANWITA ROY vs. RONOBROTO ROY reported in (2015) 1 SCC 365 has held that depending on the facts and circumstances of the case it would be permissible for a Court to direct the holding of a DNA examination to determine the veracity of allegation(s), which constitute one of the grounds, on which the party concerned would either succeed or lose and has also held that if such direction to hold the test can be avoided, it should be so avoided. It has been held by the Hon"ble Apex Court to the following effect: "16. It is borne from the decisions rendered by this Court in Bhabani Prasad Jena v. Orissa State Commission for Women (2010)8 SCC 633 and Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik (2014)2 SCC 576 that depending on the facts and circumstances of the case, it would be permissible for

a court to direct the holding of a DNA examination to determine the veracity of the allegation(s) which constitute one of the grounds, on which the party concerned would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not put to peril.

17. The question that has to be answered in this case is in respect of the alleged infidelity of the appellant wife. The respondent husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person who was the father of the male child born to the appellant wife. It is in the process of substantiating his allegation of infidelity that the respondent husband had made an application before the Family Court for conducting a DNA test which would establish whether or not he had fathered the male child born to the appellant wife. The respondent feels that it is only possible for him to substantiate the allegations leveled by him (of the appellant wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent ? husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant wife is right, she shall be proved to be so.

18. We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation leveled by the respondent husband against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the court concerned by drawing a presumption of the nature contemplated in Section 114 of the Evidence Act, especially, in terms of Illustration (h) thereof. Section 114 as also Illustration (h), referred to above, are being extracted hereunder:

"114. Court may presume existence of certain facts .-The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." "Illustration (h) - that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;"

This course has been adopted to preserve the right of individual privacy to the

extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved."

28. Hon"ble Apex Court in the case GOUTAM KUNDU VS. STATE OF WEST BENGAL AND ANOTHER reported in AIR 1993 SC 2295 after having examined various facets of ordering DNA test by the Courts and the case laws on the said aspect, has held as under: "26. From the above discussion it emerges:

- (1) That Courts in India cannot order blood test as a matter of course;
- (2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained;
- (3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act;
- (4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman;
- (5) No one can be compelled to give sample of blood for analysis."

29. The purport and effect of Section 112 of the Evidence Act with reference to DNA test came to be examined by the Hon"ble Apex Court in the case of NANDLAL WASUDEO BADWAIK Vs. LATA NANDLAL BADWAIK, reported in 2014 (2) SCC 576 and held that it provides for a presumption of a fact, not for a legal fiction and it was also held that interest of justice is best served by ascertaining the truth and the Court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. It was held: "17. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

18. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However, a presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption."

30. Hon"ble Apex Court in the case of BHABANI PRASAD JENA vs CONVENOR SECRETARY, ORISSA STATE COMMISSION FOR WOMEN & ANOTHER reported in (2010) 8 SCC 633 has held that cautious and judicious approach should be made for ordering DNA test, since it is an extremely delicate and sensitive aspect and such direction should be issued only if a strong prima facie case and imminent necessity being made out. It was held: "19. In Banarsi Dass v. Teeku Dutta this Court was concerned with a case arising out of a succession certificate. The allegation was that Teeku Dutta was not the daughter of the deceased. An application was made to subject Teeku Dutta to DNA test. The High Court held that the trial court being a testamentary court, the parties should be left to prove their respective cases on the basis of the evidence produced during trial, rather than creating evidence by directing DNA test. When the matter reached this Court, few decisions of this Court, particularly, Goutam Kundu were noticed and it was held that even the result of a genuine DNA test may not be enough to escape from the conclusiveness of Section 112 of the Evidence Act like a case where a husband and wife were living together during the time of conception. This is what this Court said; (Banarsi Dass case, SCC pp. 454-55, para 13)

"13. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence, the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above." It was emphasized that DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given."

"21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there

should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interest of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act: pros and cons of such order and the test of "eminent need" whether it is not for the court to reach the truth without use of such test.

23. There is no conflict in the two decisions of this Court, namely, Goutam Kundu and Sharada. In Goutam Kundu it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In Sharada while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course."

31. As to whether ordering or subjecting a person to a medical test would be in violation of Article 21 of the Constitution of India or not, has been considered by the Apex Court in the case of SHARADA vs. DHARAMPAL reported in (2003) 4 SCC 493 and it came to be held that it would not be in violation of right to personal liberty enshrined under Article 21 of the Constitution of India. It was held: "17. The Hindu Marriage Act or any other law governing the field do not contain any express provision empowering the Court to issue a direction upon a party to a matrimonial proceedings to compel him to submit himself to a medical examination. However, in our opinion, this does not preclude a court from passing such an order. We may, however, notice that such provisions have expressly been inserted in England by way of Sections 22 and 23 of the Family Law Reform (Amendment) Act, 1987 on the recommendations of the Law Commission. Sections 23 is to the following terms:

"23. Provisions as to scientific tests.-- - (1) For Sub-sections (1) and (2) of Section 20 of the Family Law Reform Act, 1969 (power of court to require use of

blood tests) there shall be substituted the following sub-sections --

(1) In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction --

(a) for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and

(b) for the taking, within a period specified in the direction, of bodily samples from all or any of the following, namely, that person, any party who is alleged to be the father or mother of that person and any other party to the proceedings;

and the court may at any time revoke or vary a direction previously given by it under this sub-section."

32. Yet again the primary duty of a Court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to constitutional protection under Article 20 of the Constitution of India. Thus, the Civil Court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.

33. Discretionary power under Section 151 of Code of Civil Procedure, it is trite, can be exercised also on an application filed by the party.

34. In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms. 76. The matter may be considered from another angle. In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia etc. normally without there being medical examination, it would be difficult to arrive at a conclusion as to whether the allegation made by his spouse against the other spouse seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If the respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash. In matters of the aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent. Thus the Court has

to reconcile these competing interests by balancing the interests involved.

77. If for arriving at the satisfaction of the court and to protect the right of a party to the lis who may otherwise be found to be incapable of protecting his own interest, the court passes an appropriate order, the question of such action being violative of Article 21 of the Constitution of India would not arise. The court having regard to Article 21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected.

78. It is, however, axiomatic that a court shall not order a roving inquiry. It must have sufficient materials before it to enable it to exercise its discretion. Exercise of such discretion would be subjected to the supervisory jurisdiction of the High Court in terms of Section 115 of the Code of Civil Procedure and/or Article 227 of the Constitution of India. Abuse of the discretionary power at the hands of a court is not expected. The court must arrive at a finding that the applicant has established a strong prima facie case before passing such an order.

79. If despite an order passed by the court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out. Section 114 of the Indian Evidence Act also enables a court to draw an adverse inference if the party does not produce the relevant evidences in his power and possession.

81. To sum up, our conclusions are:

1. A matrimonial court has the power to order a person to undergo medical test.
2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
3. However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If, despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."

32. Thus, keeping in mind the above position of law, when the facts on hand are examined it would indicate that trial Court while ordering for a DNA test by the impugned order has held to the following effect: "9. According to the plaintiff, he is the son of defendant No.1 and Smt. Radhamma. Out of their wed-lock he born in the year 1955. The defendant No.1 who appeared before the Court and filed written statement specifically denying the paternity. The defendant No.1 and Smt. Radhamma specifically denied the birth of plaintiff out of their wed-lock. They contended that plaintiff is the son of K.L. Vasanthaia and Smt. Rangamma (This Rangamma is the sister of Smt.Radhamma). Thereby, it appears that the specific dispute between the plaintiff and defendant No.1 is about paternity and birth of plaintiff out of the wed-lock of defendant No.1 and Smt.Radhamma.

10. Now, both the parties have lead their part of evidence. Both the parties have produced many documents and produced oral evidence. On perusal of entire

evidence on record still there is an ambiguity in the mind of the Court as to the paternity of the plaintiff. The ambiguity can only be cleared and clarified by the experts opinion.

11. The plaintiff has specifically opposed this application on the ground that the defendant No.1 himself admitted before the Tribunal about the relationship. He further contended that the defendant No.1 has not proved non-access and there is a conclusive presumption under Sec.112 of Indian Evidence Act. The defendant No.1 and Smt. Radhamma lead marital life for a period of 10 years from 1950 to 1960. Hence, it cannot be held that there is no non-access between them. But it is relevant to note here that, the non-access between the defendant No.1 with Smt. Radhamma is not at all disputed by the defendants. Even the martial relationship between the defendant No.1 with Smt. Radhamma is not at all disputed and denied by the parties. Only the dispute between the parties is whether the plaintiff is born out of the wedlock of defendant No.1 and Smt.Radhamma. This is the main question before the Court. Therefore, question of non-access and presumption Under Sec.112 of Evidence Act is not applicable to the present case. The documents and oral evidence on record supports the contention of their respective claim. No amount of oral evidence can prove the paternity of the plaintiff. The D.N.A. test will set at rest the dispute between the parties. The evidence on record does not speaks about that the plaintiff is biological son of defendant No.1 and Smt. Radhamma or not. Therefore, the opinion of the experts through D.N.A. test is very much necessary to adjudicate the matter in just and proper."

33. Reasons assigned by trial Court for DNA test as could be seen from the above order is on account of: (1) specific dispute between plaintiff and first defendant about paternity and birth of plaintiff out of wedlock between defendant No.1 and Smt. Radhamma;

(2) still there is an ambiguity in the mind of Court as to the paternity of plaintiff;

(3) non-access between defendant No.1 and Smt. Radhamma is not being in dispute; and lastly,

(4) records do not speak that plaintiff is the biological son of defendant No.1 and Smt. Radhamma.

34. The question of presumption about paternity of a child under Section 112 of the Evidence Act would be available when there is no dispute that parties are husband and wife or as man and woman living together, they had access to each other and living together. There may be circumstances where the father in order to avoid the liability or to avoid discharging his marital obligation arising out of such relationship, may attempt to stave-off such liability or obligation by raising a dispute with regard to paternity of the person claiming to be his son or daughter. It is in this background, law presumes strongly in favour of legitimacy of an offspring, as it is birth that determines the status of a person. When a child is born in lawful wedlock, law presumes that married couple had sexual

intercourse between themselves. The principle, underlying the rule is on the ground of public policy. However, the presumption is rebuttable, but only by very strong and clear proof of non-access or when there is a strong evidence to establish that wife was not in a position to beget a child or the wife was not in a position to conceive.

35. In the instant case, there is no dispute to the fact that first defendant was married to Smt. Radhamma and they lived together for almost 10 years i.e., from 1950 to 1960 as could be seen from the admission of defendant No.1 himself, who has disputed the paternity of plaintiff in his cross examination dated 04.12.2015.

36. In the instant case, said Smt.Radhamma, whom plaintiff claims to be his biological mother has entered the witness box as DW5 and she has clearly admitted that she was married to first defendant in the year 1950 and on account of she being unable to conceive and beget children, she had persuaded her husband i.e., first defendant to get married to her brother's daughter Smt.Gowramma (second defendant) herein and accordingly, their marriage came to be solemnized in the year 1973. She has also stated that out of said wedlock between first defendant and second defendant, third defendant was born. She also states that plaintiff is not her son, he is the son of Sri.K.L.Vasanthaiah and Smt. B.N. Rangamma and they had three sons (including plaintiff) and one daughter. She also states that said Smt. B.N.Rangamma is none other than her sister and as such, she is well aware of all these facts. She also states that plaintiff is not born to her out of her wedlock with first defendant. She has also categorically stated that plaintiff has created certain documents to depict as though he is the son of first defendant and herself. She also states that said K.L.Vasanthaiah while being in service was suspended and as such, plaintiff had come to Pavagada and was admitted to the school at Pavagada by her husband - first defendant. In other words, the person whom plaintiff claims has given birth to him, has entered the witness box and denied that plaintiff is her son and she has specifically contended that he is the son of Sri.K.L.Vasanthaiah and Sri.B.N.Rangamma.

37. On the contrary, plaintiff is attempting to rely upon Annexures-A to E which has been produced and marked as Exhibits before trial Court to contend that first defendant himself had declared that plaintiff is his son and as such, a presumption would arise under Section 112 of the Evidence Act with regard to his paternity of plaintiff and in that view of the matter, trial Court was not justified in ordering for conducting DNA test. First defendant was alive when the trial was being conducted. He has entered the witness box and reiterated the plea raised in his written statement. He has also specifically stated in the cross ? examination that Smt.Radhamma did not conceive or deliver any children. In the light of said rival contentions and both oral and documentary evidence being at variance, trial Court was of the considered view that despite entire evidence being available on record, there is still ambiguity in its mind as to the paternity

of plaintiff. Hence, it has ordered for conducting DNA test on the parties.

38. Though learned Advocate appearing for petitioner has made a valiant attempt to contend that Section 112 of the Evidence Act is attracted, same would not get attracted to the facts on hand, inasmuch as, it is not the case of defendants, that first defendant and Smt.Radhamma were not husband and wife or they have never contended that they were not living together or they have contended that they had no access to each other. But on the other hand, it is their specific case that despite they being husband and wife and living together, she namely, Smt.Radhamma was unable to beget children or she did not conceive and it is because of this precise reason, said Smt.Radhamma herself had arranged the marriage of first defendant with second defendant and out of said wedlock third defendant was born. At this stage, her (Smt.Radhamma) evidence cannot be brushed aside.

39. The Hon"ble Apex Court in the case of KAMTI DEVI vs POSHI RAM reported in (2001) 5 SCC 311 has made the following observations in the context of Section 112 of the Evidence Act: "10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or nonaccess as delineated above."

40. The presumption available under Section 112 of Evidence Act would come into play where the husband questions the paternity of son or daughter, as the case may be, by contending that he had no access to the wife. A presumption of a fact depends upon satisfaction of certain circumstances. Those circumstances would ultimately lead to the fact sought to be presumed. This is what Section 112 provides for by way of presumption. Said Section would be inapplicable to the facts on hand, inasmuch as, it is not the case of first defendant that he had no access to his wife or there was no cohabitation between them. But on the other hand, it is not only the case of first defendant ? father of plaintiff but also it is the case of mother ? D.W.5 also that she could not conceive and beget any children and as such she has forced first defendant to marry second defendant. In fact, she has categorically denied that plaintiff is her son. As such, presumption available under Section 112 of the Evidence Act would not come

into play in the instant case or in other words, it would not be applicable to the facts obtained in the instant case.

41. For the above said reasons, order passed by the trial Court allowing the application - I.A.No.54 does not call for interference.

42. In the light of aforestated discussions, this Court proceeds to pass the following: ORDER

(1) W.P.No.36236/2015 is hereby allowed in-part and order dated 31.07.2015 passed in O.S.NO.1/2010 - Annexure-A allowing I.A.No.49 - Annexure-H is set aside partly and it is hereby ordered that issue No.1 as was existing on 14.12.2012 or which was framed on 03.11.2012 along with the issue re-casted on 31.07.2015 would remain for adjudication.

(2) W.P.No.31182/2016 is hereby dismissed and the order dated 29.04.2016 passed in O.S.No.1/2010 on I.A.No.54 - Annexure-P is hereby affirmed.

(3) Costs made easy.