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(1999) 08 KAR CK 0009

In the Karnataka High Court

Case No : Civil Revision Petition No. 4117 of 1996

Smt. Ningamma and another — APPELLANT

Vs

Chikkaiah and another — RESPONDENT

Date of Decision : 10-08-1999

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 115, 151
Constitution of India, 1950 — Article 21
Evidence Act, 1872 — Section 112, 4

Citation : AIR 2000 Kar 50 : (2000) 1 CivCC 515 : (1999) ILR (Kar) 3389 : (2000) 1 KarLJ 281

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : Sri Mohan Shantanagoudar, for the Appellant; Sri Vinayswamy for M/s. Swamy and Swamy Associates, for the Respondent

Judgement

1. This civil revision petition raises important question touching jurisdiction of Court below and law whether the Court below in the context of the provisions of Article 21 of the Constitution of India and Sections 4 and 112 of the Indian Evidence Act, could direct plaintiff 2 and plaintiff 1 i.e., revision petitioners to subject themselves to medical examination and undergo the blood group test, in exercise of powers u/s 151 of the CPC and whether the powers u/s 151, CPC could at all be exercised in such a case where plaintiff 2 and plaintiff 1 had hotly resisted and opposed the prayer for such direction being made as mentioned in the application.

2. The facts of the case in nutshell are:

That plaintiffs 1 and 2, who are revision petitioners 1 and 2 in this Court filed the suit for maintenance in the Court of the Munsiff at Mandya, against defendant-respondent 1. Defendant 1 has filed his written statement in the suit denying the plaint allegations that plaintiff 2 was the daughter of plaintiff 1 from defendant 1. In other words defendant 1 i.e., respondent 1 denied his relationship with

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plaintiff 2 as father and daughter. Defendant 1 asserted that plaintiff 2 is not his daughter as plaintiff 1 had left defendant 1''s house in the year 1968 and she was not living with defendant 1 as husband and wife and as such there had been no cohabitation between plaintiff 1 and defendant 1 and on this basis defendant 1 denied his liability to maintain plaintiff 2. The Trial Court framed the issue whether defendant 1 proves that the second plaintiff was not born to him and plaintiff 1 never had family life with him since 1968. Defendant 1 moved the application u/s 151, CPC viz., I.As. 14 and 15 with the prayer to the effect that in the circumstances of the case and in view of the issue involved, this Court may direct plaintiffs 1 and 2 to subject themselves for medical examination of their blood group test in order to determine the paternity of plaintiff 2. This application was made after the closure of the evidence of both parties.

This application made by defendant 1 had been hotly contested and opposed by the plaintiffs-revision petitioners herein.

3. The Trial Court held that in view of Section 112 of the Indian Evidence Act, though it is true that legal presumption of paternity is in favour of the plaintiffs, but the same is rebuttable presumption and in such circumstances the Court opined that when legal presumption is in favour of one party, the burden lies heavily on the opposite party to show that the facts of the case in hand are not in consonance with the said legal presumption. Therefore, an opportunity will have to be given to defendant 1 to rebut the legal presumption which is in favour of the plaintiffs. The Trial Court as such observed in the circumstances deemed it just and proper to direct the District Surgeon, Mandya, to carry out the paternity test of plaintiff 2 by medically examining plaintiffs 1, 2 and defendant 1. The Trial Court directed the District Surgeon, Mandya, to carry out the paternity test of plaintiff 2 by medically examining plaintiffs 1 and 2 (revision petitioners) and defendant-respondent 1. It is further directed that plaintiffs 1 and 2 along with defendant 1 to appear before the District Surgeon, Mandya, for undergoing medical examination for the aforesaid purpose on the date mentioned in the order i.e., 4-12-1996. It is further observed by the Trial Court at the bottom of the order that "it is also made clear if any one of the parties mentioned above fails to appear before the District Surgeon on the above said date, adverse inference will be drawn as per law".

4. Feeling aggrieved by the order dated 21-11-1996 passed by the First Additional Munsiff, Mandya, plaintiffs 1 and 2 have filed this revision petition u/s 115 of the Code of Civil Procedure.

5. I have heard Sri Anand Navalingimath for Sri Mohan Shanthanagoudar, learned Counsel for the petitioners and Sri Vinayswamy, Advocate for M/s. Swamy and Swamy Associates for a great length.

6. It has been contended on behalf of the revision petitioners that the order impugned suffers from jurisdictional error on the part of the Court below as powers u/s 151 of the CPC could not be exercised for roving enquiry, as well as

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to compel the plaintiffs to subject themselves to the blood group test or medical examination for the blood group test to determine the paternity of the revision petitioner i.e., plaintiff 2. The learned Counsel contended that there is no provision of law either under the Code of Civil Procedure, Indian Evidence Act or under the Code of Criminal Procedure to compel a person or party against her or his wish or consent, to be subjected for medical examination and the blood group test to determine his or her paternity, leaving aside the case of a party which voluntarily consents himself or herself to be subjected to such test. The learned Counsel further contended that in view of the provisions of law including the one relating to the dignity of an individual and the dignity of a woman in particular as well as in view of the provisions of Section 112 of the Indian Evidence Act read with Section 4 thereof defining the expression ''Conclusive Proof'', and Article 21 of the Constitution of India, the Court below had no jurisdiction to direct and to compel the revision petitioners that they should subject themselves to the medical examination or the blood group test to determine the paternity or to create doubt one way or the other. The learned Counsel contended that the fact a person was born during the continuance of the valid marriage between his mother and any man or born within 280 days after the dissolution, and the mother remaining unmarried, it shall be the conclusive proof that the person so born is and has been the legitimate son or daughter of the man to whom his mother has been married. The learned Counsel contended that this section not only lays down the provision of legal presumption simpliciter, but the doctrine of conclusive proof in this regard subject to one exception viz., where it has been shown or where it is shown that the parties to marriage had no access to each other at any time during the period when the person or child concerned could be begotten. The learned Counsel contended that this section mandates the Court to take it to have been conclusively proved on proof of facts and circumstances referred to in Section 112 of Evidence Act that the person concerned has been the legitimate son of the person to whom mother of such person was married. The learned Counsel contended that use of the expression "conclusive proof clearly indicates that on proof of the facts mentioned in Section 112 viz., that the mother of the person concerned was legally married to a man concerned and the child was either born during the continuance of the marriage, or was born within 280 days of the dissolution of the marriage and the mother having not remarried, it shall be taken to be proved that the person or child concerned was the legitimate child of the man whom his mother was married and the Court shall not allow giving of any evidence for the purpose of disproving the said fact of legitimacy. The learned Counsel contended that the use of expression "unless it can be shown that the parties to the marriage has no access to each other at any time when the child could have begotten and provides a limited scope of evidence to be lead to rebut that conclusive proof viz., if it is shown that the parties to the marriage had no access to each other at any time when the person or child concerned could have been begotten and it is then that conclusive proof, doctrine will not apply. The learned Counsel contended that the expression unless it can be shown that the parties to marriage could have no or had no access to

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each other at the relevant period, then Section 112 will apply. The learned Counsel contended that reading of Section 112 along with the definition of "Conclusive proof given in the Evidence Act, vide Section 4 clearly reveals that no evidence could be lead to disprove a fact which is said to be conclusive proof of the legitimacy, except that person denying paternity, may lead evidence to the effect that he had no access or parties to the marriage had no access to each other during the relevant period when the child could be conceived. The learned Counsel contended that investigation is of limited scope and medical test or direction to medical test compelling the parties to subject themselves for medical test could not be issued even in exercise of powers u/s 151, CPC as inherent powers are not meant to be exercised to render nugatory an effective provision of law. The learned Counsel further contended that right to life includes in the case of man or woman includes in itself right to live with dignity, honour and reputation and no person can be deprived of such right of life under Article 21 of the Constitution except according to the procedure established by law. The learned Counsel contended that exercise of power u/s 151 in this case appears to run counter to the basic principles of law u/s 112 of the Evidence Act read with Section 4 thereof as well as runs counter to the letter and spirit of the provisions of Article 21 of the Constitution. The learned Counsel contended that unless the provisions of law authorises or entitles the Court to subject a person or party and to compel him to be put to blood group test to determine paternity, the Court below, in view of the provisions of Section 112 read with Section 4 of the Evidence Act as well as in view of Article 21 of the Constitution and the concept of dignity of woman had no jurisdiction as well as to direct the revision petitioners to subject themselves against their wish and desire and against their volition and free will to such medical test or to observe that on failure to appear before the District Surgeon for medical examination and blood group test the Court would raise adverse inference against such a party. The learned Counsel contended that in this view of the state of law as above as well as the order runs counter to the dignity of the revision petitioners, this Court may be pleased to exercise its powers u/s 115 of the CPC and set aside the impugned order.

7. The above contentions of the learned Counsel for the petitioners have been hotly contested by Sri Vinayswamy, learned Counsel for the respondents.

8. The learned Counsel for the respondents submitted that medical science has developed and the blood group test can provide reliable medical and substantial circumstantial evidence to determine the paternity of plaintiff 2 i.e., to determine if defendant 1 is or has been the father of plaintiff 2. The learned Counsel submitted that many English Courts have allowed such medical blood group tests and it being one of the best and scientific modes for determining the paternity and legitimacy, the Court below in the absence of any specific provisions did exercise its inherent jurisdiction u/s 151, CPC in the interest of justice and particularly when presumption u/s 112 of the Evidence Act has to be rebutted by defendant 1-respondent 1. The learned Counsel contended that presumption u/s 112 is rebuttable and to rebut the said presumption medical blood group test of

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the three could have provided best possible evidence and therefore the Court below did not act illegally or in exercise of jurisdiction in passing the order u/s 151. The learned Counsel has submitted that powers u/s 151 conferred on the CPC are very wide and in the absence of any other provision one way or other on the subject, recourse could be validly had to Section 151 of the Civil Procedure Code, which is declarative of inherent powers being vested in the Code to pass such orders as are necessary in the interest of justice and for doing justice to the parties. The learned Counsel further contended that Section 151 is one of the provisions of procedural law viz., CPC and Article 21 of Constitution provides that right to life and personal liberty shall not be deprived to a person except according to procedure established by law. So the impugned order cannot be said to be hit by Article 21 and the order impugned does not suffer from any jurisdictional error or illegal in exercise of the jurisdiction. As such the revision needs be dismissed. The learned Counsel further submitted that the impugned order has been passed for the purpose of the case and it does not determine any rights of the parties and so it does not amount to a case decided. As it does not amount to a case decided, the revision petition may be dismissed as not maintainable.

9. I have applied my mind to the above contentions advanced by the learned Counsels for the parties.

10. As regards the last contention whether the order impugned in this petition amounts to a case decided, in my opinion, the preliminary objection is without any substance. It is no doubt well settled in the case of Major S.S. Khanna Vs. Brig. F.J. Dillon, , that the expression "case" is not synonymous with a suit. Even on interlocutory order which has the effect of determining or deciding the rights of a party whether involved in the suit or in relation to the proceedings of the suit may amount to a case decided. In the present case, the Court deems to have taken the view that it can compel a party to subject itself even against his wishes and without his or her consent to medical examination involving blood group test. As such the order really has the effect of deciding or being determination in connection with the right of a party to the effect that consent or no consent, it has got right to direct the party to subject itself to medical examination i.e., blood group test as claimed by defendant-respondent 1 and such an order impugned in view of the expression "case decided" as per explanation u/s 115 and the law laid down in Major S.S. Khanna''s case, supra, amounts to be a case decided and in view of the above preliminary objection raised on behalf of the respondents is hereby rejected.

11. The powers u/s 151, CPC are inherent powers of Court. Section 151 by itself does not confer inherent jurisdiction upon the Court. Section 151 is declarative of inherent powers of the Court and provides that inherent powers of the Court can be exercised to make orders as may be necessary in the ends of justice and to prevent abuse of the process of the Court and no provision in the CPC shall be deemed to limit or otherwise effect inherent powers of the Court. Every Court is

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constituted for the purpose of doing justice according to law and must be deemed to possess, as a necessary corollary and as inherent in its very constitution, all such powers as may be necessary to do the right and to undo a wrong in the course of the administration of justice. Section 151 does not authorise the Court to pass any order which may run counter to the express provisions of law of a statute on a subject. Section 151 declares that nothing in the CPC shall be deemed to limit or otherwise affect the inherent power of the Court. Thus, it makes it clear that nothing in the CPC will be deemed to limit or otherwise affect the inherent power of the Court to make such orders necessary in the ends of justice. The expression nothing in the Code indicates that it is only the provisions of CPC which provisions cannot be deemed to limit or otherwise affects the inherent power of the Court and inherent power can be exercised even the provisions of the Code do not cover a particular situation of fact, but the Court finds that the order is necessary to be passed in the ends of justice, it can pass such order as is necessary for the ends of justice and to avoid abuse of process of Court. But so far as the provisions of other statutes or enactments are concerned, which prescribe for certain mode of exercise of power vested in the Court including in the matter of admissibility and relevancy of evidence shall remain operative and may control exercise of inherent powers. Inherent power have to be exercised so as not to conflict with the sound principles of general law or other special law. It is well-settled that the Court is expected to do justice according to law. When I so observe I find support for my view from the decision of their Lordships of the Supreme Court in the case of Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, , in the context of power of the Court to grant temporary injunction under the inherent powers in a case not covered by Order 39, Civil Procedure Code. Their Lordships observed as under:

"But while exercising this inherent power, the Court should not overlook the statutory provision, such as Section 41(b), which clearly indicates that injunction to restrain initiation of proceeding cannot be granted. Section 41(b) is one such provision. And it must be remembered that inherent power of the Court cannot be invoked to nullify or stultify a statutory provision".

12. Section 112 of the Evidence Act, has been enacted to consolidate, define and amend Law of Evidence. Evidence Act is a complete Code on the Law of Evidence. It is well-settled principle of law that a finding on question of fact has to be recorded on the basis of the relevant and admissible piece of evidence. Relevancy and admissibility of evidence is controlled by the Evidence Act. Section 112 of the Evidence Act, provides that conclusive proof of legitimacy of a person 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. It provides and reads as under:

"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

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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".

13. A reading of this section reveals that in two types of cases or of proof of other two sets of facts, conclusive proof of legitimacy shall apply. It provides that if it is proved as fact that any person was born during the continuance of a valid marriage, between his mother and any man, then birth of a person during the continuance of a valid marriage between his mother and any man will itself be the conclusive proof of his being legitimate son of that man or in a case where it is proved as a fact that the person concerned was born within two hundred and eighty days of the dissolution of the marriage between his mother and the man concerned and that mother during this period i.e., these two hundred and eighty days remained unmarried, then the person concerned born during the period of two hundred and eighty days from the dissolution of the marriage i.e., the child shall be presumed or the said person should be presumed to be the legitimate son or daughter of the man to whom his mother was married and whose marriage has been dissolved prior to his birth. The latter part of the section which says unless it can be shown that the parties to the marriage bad no access to each other at any time when he could have been begotten. This latter part indicates that the conclusive proof will not arise and shall not be made u/s 112, if it is shown and established by the person denying the paternity that the parties to the marriage had no access to each other at any time when he could have been begotten. It means that if the party is denying legitimacy, that party has to establish that the parties to the marriage had no access to each other at the relevant time i.e., during the period when the child on person whose legitimacy in dispute could have been conceived or could have been begotten. The expression "May presume", "Shall presume" and "Conclusive proof" have been defined in Section 4 of the Evidence, Act. That Section 4 provides and reads as under:

" "May presume" -- Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"Shall presume" -- Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof -- When one fact is declared by this Act to be conclusive proof of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it".

The distinction between the three expressions has been made very clear by the Legislature by defining the three expressions "May presume", "Shall presume" and "Conclusive proof.

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14. As regards "Conclusive proof, the Evidence Act provides and declares that the proof of one fact will be the conclusive proof of another fact, then Evidence Act mandates that no evidence shall be given for the purpose of disproving that fact. Section 112 provides the conditions that when and in what circumstances the doctrine of conclusive proof will really apply viz., when it is proved as a fact that a person was born during the continuance of a valid marriage between his mother and any man or the proof of the fact that the person concerned was born within two hundred and eighty days after the dissolution of the marriage and his mother remained unmarried. It provides on proof of either of these two sets of facts and its not having been shown and established by the other party challenging the legitimacy that parties to the marriage had no access to each other at any time when the person or child conceived could have begotten. The Court shall deem the earlier facts to be conclusive proof of legitimacy of the person concerned that he is the legitimate son of that man. No evidence, as such, can be lead to disprove the legitimacy on establishment of the above-mentioned facts. If the person denying the legitimacy of a child has to show that the doctrine of conclusive proof of legitimacy does not apply, he can lead limited evidence only to show that parties to the marriage had no access to each other at any time when the child could have been begotten. Thus, it appears that where doctrine of conclusive proof is applicable and it has not been shown that the parties to marriage had no access to each other at the material and relevant period when the child i.e., person concerned could have been begotten, the person denying is not entitled to disprove the fact of legitimacy by evidence of any other nature including medical examination and blood group test of the mother, child and himself, in view of Section 4 in particular which defines "Conclusive proof. When Section 112 read with Section 4 of the Evidence Act reveals that no other evidence can be lead to dislodge conclusive proof except the evidence that parties to the marriage had no access to each other at the relevant time, in my opinion, the Court below could not have and had no jurisdiction to direct the parties to undergo medical examination of their blood group test in exercise of its inherent powers.

15. In the case of Smt. Dukhtar Jahan Vs. Mohammed Farooq, , their Lordships of the Supreme Court observed as under:

"Section 112 lays down that if a person was horn during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution and the mother remains unmarried, it shall be taken as 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. This rule of law based on the dictates of justice has always made the Courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on

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the basis of slender materials, which will have the effect of branding a child as a bastard and its mother as unchaste woman".

16. The conclusive presumption u/s 112 is rather based on a sound policy of affording protection to the sanctity and stability of the family relationship so that for every trifling suspicion or for oblique purpose the question of legitimacy of a child born or conceived in the wedlock does not become a handy target of scandalisation and indecent investigation. The Calcutta High Court in the case of Tushar Roy Vs. Sukla Roy, , has been pleased to consider Section 112 in the context of Section 4. The observations of the Calcutta High Court in this regard are worth being quoted and read as under:

"The term access as used in Section 112 has been consistently interpreted to include the existence of opportunities for marital intercourse between the husband and the wife at the time when the child could have been begotten according to the ordinary course of nature. A conclusive presumption of legitimacy attracted by Section 112 can be rebutted only by showing that the husband and the wife had no access to each other at any time when the child could have been begotten. What is required to be shown for rebutting the conclusive presumption, which is a presumption of law is that the husband and the wife had no access to each other at any time when the child could have been begotten. The words "at any time" and "could have been begotten'''' are very significant. The requirement of the section for rebutting the conclusive presumption is not to show "non-access" exactly at the time when the child was begotten, but the requirement is still more onerous and pervasive so much so that the contending party will have to show non-access at any time when the child could have been begotten which means non-access not at any particular moment but during the whole span ot the time when the conception according to the ordinary course of nature possibly could have taken place. The expressed terms of the provision of Section 112 require the contending party to show that during the whole of the period when the child could have been begotten according to the ordinary course of nature, the husband and the wife had no access to each other. If instead of undertaking to discharge that pervasive and wider responsibility or onus, the contending party slices out only a fraction of that responsibility and proposes to rebut the conclusive presumption of law only by showing non-access in a derivative way at the particular moment when the child was actually begotten by proving through blood test that the husband is not the biological father of the child plainly the same does not constitute a proposal to satisfy the whole of the requirement of the rebuttal responsibility imposed by the section itself. That being so there cannot be any question of permitting the contending to undertake only a fractional responsibility out of the requirement of the total responsibility prescribed u/s 112 for dislodging the conclusive presumption of law which the section projects. This is more so where, as it must be in most of the cases the venture of blood test is only exploratory or investigative in nature due to the fact that the husband also had access to and sexual intercourse with the wife during the possible period of conception even if

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any other person also had such access at any possible time to the same woman thereby rendering it a matter of narrow chance or purely fortuitous coincidence that either of the two men can turn out to be the biological father of the child. Blood test in the circumstances is only an investigation for ascertaining, if possible, a biological fact. It is not an evidence till it yields a particular result in a particular manner. If blood test evidence is to be allowed on the reasoning that in case the test establishes that the husband is not the biological father of the child this will show that the husband had no access to the wife at the moment when the child was actually begotten because two men cannot have access to the same woman at the same time where the question of conception by such access is concerned, then this test will have to be allowed even when as a matter of fact the husband actually had access to and sexual intercourse with the wife at the possible time when the conception could have taken place. This is plainly contrary to the terms of Section 112 and will be rather tantamount to putting the cart before the horse. Section 112 is clear enough that once the husband is shown to have had access to the wife at any time when the conception could have taken place the scope of adducing rebuttal evidence becomes non-available. The contending party cannot be permitted to say that that he will rebut the conclusive presumption of law regarding paternity by proving directly by blood test that the husband is not the biological father of the child which will virtually be an abrogation of the existing provision of Section 112. That would have been permissible had there been no provision of statutory presumption in the matter in which case the matter would have been governed by the ordinary rules of evidence regarding proof and disproof. That would have been also permissible as I have already pointed out, had Section 112 instead of the existing provision, contained a provision for keeping the matter in the domain of shall presume as defined in Section 4 of the Evidence Act, to which case the contending party would have been at liberty to adduce any sort of rebuttal evidence admissible under the law for dislodging the statutory presumption of paternity because provides that whenever it is directed by the Act that the Court shall presume a fact it shall regard such fact as proved, unless and until it is disproved. The provision of Section 112 being what it is the conclusive presumption of law raised by it will have to be accepted. But if that conclusive presumption is to be assailed it has to be assailed in the limited manner prescribed by the section namely by showing non-access during the whole of the period when the child could have been begotten according to the ordinary course of nature and not otherwise. It must be noticed that Section 112 requires proof of non-access during the whole of the relevant period, so that the presumption that the husband is the father of the child can be demolished. The process is not reversible. Contrary to the conclusive presumption of law, the husband is not allowed to directly prove first that he is not the father of the child born during the wedlock and then to say that since he is not the father therefore he did not have access (to the wife) in the sense of sexual intercourse with the wife at least at the time when the child was actually begotten and therefore the presumption of legitimacy stands rebutted. The question of blood test is not a question of

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effect of the evidence that may or may not be projected by such test, but it is rather the threshold question of admissibility of evidence in the context of the provision of Section 112 of the Evidence Act".

17. Dealing with the question of English principles of law which provide for directing the blood test, in the Indian circumstances, the Calcutta High Court observes that in Indian circumstances this doctrine cannot be followed particularly when Evidence Act bars the production of other evidence. It will be appropriate to quote the following observations of the Calcutta High Court in Tushar Roy''s case, supra:

"In both the English cases discussed above the circumstances were such that either the husband or the party cited co-respondent was the biological father of the child and in both the cases either of the two men would have accepted the child, it could be ascertained that he was the biological father of the child. In such circumstances, it may be in the best interest of the child to ascertain the biological father by blood test. It also seems that such is the situation in most of the cases in England where paternity is disputed. But what is the situation in India. Here in India very rarely an adulterer admits his involvement far less claims paternity of a child not born in his own wedlock. Even in the instant case, although the husband/petitioner wants an exploratory blood test for ascertaining whether he is the biological father of the child born in his wedlock, he has not come forward with any specific case that some other particular person must be or is possibly the father of the child. And no second man is coming forward with any admission or confession of adultery not to speak of claiming the paternity of the child. In the circumstances, what interest of the child can be served by bastardizing it through blood test. Assuming for the sake of argument that in this case it is possible to bastardize the child by blood test, in that case the child will be exposed to the risk of starvation or of begging for survival as it will be deprived of support by the husband of the wedlock in which it was born, there being at the same time no substitute or putative father to offer support. Therefore, even if we were to follow the English principle that blood test may be ordered for determining paternity only in cases where such determination will serve the best interests of the child, it is crystal clear that a situation like this will not only not serve any interest of the child. even if it serves the purpose of an adult who may be interested in bastardising it for avoiding maintenance, but may rather jeopardise the very survival of the child for no fault of it".

18. In the case of Polavarapu Venkteswarlu v Polavarapu Subbayya, their Lordships of the Madras High Court lays down at paragraphs (3) and (4) as under

"(3) Section 151, CPC has been introduced into the statute book to give effect to the inherent powers of Cts. as expounded by Woodroffe, J. in Hukum Chand Bold v Kamalan and Singh, at pages 931 and 932. Such powers can only be exercised ex debito justitiae and not on the mere invocation of parties or on the mere volition of Cts. There is no procedure either in the CPC or in the indian Evidence Act which provides for a test of the kind sought to be taken by the deft, in the

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present case. It is said by Mr. Ramakrishna for the respondent before me that in England this sort of test is resorted to by Cts. where the question of non-access in connection with an issue of legitimacy arises for consideration. My attention has been drawn by learned Counsel to p. 69 of Taylor''s Principles and Practice of Medical Jurisprudence, Vol. 2, where it is stated thus:

"In Wilson v Wilson, Lancet, evidence was given that the husband''s group was OM, that the wife''s was BM, and that the child''s was ABN. The Ct. held that the husband was not the father of the child, and granted a decree for nullity".

It is also pointed out by learned Counsel that in the textbooks on Medical Jurisprudence and Toxicology by Rai Bahadur Jaisingh P. Modi (Edn. 8) at p. 94 reference is made to a case decided by a criminal Ct. at Mercara in June 1941, in which the paternity and maternity of this child being under dispute, the Ct. resorted to the results of the blood grouping test.

(4) That may be. But I am not in any event satisfied that if the parties are unwilling to offer their blood for a test of this kind, this Ct. can be forced to do so. Mr. Krishnainurthi, says that his clients are not prepared to offer their blood for such a test".

19. In the case of Goutam Kundu Vs. State of West Bengal and another, , their Lordships of the Supreme Court at para 15 observed that in India there is no special statute governing this. Neither the Criminal Procedure Code nor the Evidence Act empowers the Court to direct such a test to be made.

20. Further their Lordships of the Supreme Court dealing with Section 112 of the Evidence Act have been pleased to observe at paragraphs 25 and 26 of the said report reads as under:

"25. The effect of this section is this: there is a presumption and a very strong one though a rebuttable one. Conclusive proof means as laid down u/s 4 of the Evidence Act.

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 u/s 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".

21. Similar view has been expressed by the Madras High Court in the case of

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Ranganathan Chettiar v Chinna Lakshmi Achi . In the case of Subayya Gounder v Bhoopala, his Lordship Ramaswami, J. has observed the value of blood group test is however limited and thereafter quoted from Glaister Medical Jurisprudence as under:

"The tests, however have their limitation they may exclude a certain individual to the possible father of a child, but they cannot possibly establish paternity. They can only indicate its possibilities. Another man with the same group as the father of the child could be responsible for the child".

His Lordship further observed in the same report that in India there is no special statute and there is no provision either in the Criminal Procedure Code or in the Indian Evidence Act empowering Courts to direct such a test to be made. Similarly, as pointed out by Raghava Rao in Venkteswarlu''s case, supra, there is no procedure either in the CPC or in the Evidence Act which provides for a blood test being made of a minor and his mother when the father is disputing the legitimacy of the minor and held "that if the parties are unwilling to submit to such a test the Court has no power to direct them to submit themselves to such a test".

22. Article 21 of the Constitution confers fundamental right of life and personal liberty. Life full of dignity and honour. In India chastity of the woman and paternity of the child have got their importance and pride places. No person in India will ever tolerate nor cherish or like to be called bastard nor a woman will tolerate to be called unchaste. Legitimacy of the paternity of a child or person and chastity of a woman are parts of the dignity and honour for each man and woman according to law. Article 21 confers right to life and provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Right to life is not merely animal life. Right to life means life full of dignity and honour and right to live with honour and dignity. Right to personal liberty is also very important. To compel a person to undergo or to submit himself or herself to medical examination of his or her blood test or the like without his consent or against his wish tantamounts to interference with his fundamental right of life or liberty particularly even when there is no provision either in the CPC or the Evidence Act or any other law which may be said to authorise the Court to compel a person to undergo such a medical test as blood group test or the like against his wish, and to create doubt about the chastity of a woman or create doubt about the man''s paternity. It will amount to nothing but interference with the right of personal liberty. Here as mentioned earlier, Section 112 read with Section 4, Evidence Act really has the effect of completely closing and debarring the party from leading any evidence with respect to the fact which the law says that to be the conclusive of proof of legitimacy and paternity of child covered by Section 112 of Evidence Act, except by showing that during the relevant period of time as referred to in Section 112 the parties to the marriage had no access to each other, the allowing of medical test to test the blood group to determine paternity would run counter to the mandate of Article

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21 of the Constitution as well and inherent powers are not meant to be exercised to interfere with the fundamental right of life and liberty of the person nor to nullify or stultify any statutory provision.

23. In the case of Revamma v Shanthappa, this Court had an opportunity to consider this question of medical examination as to whether the Court can compel a person to undergo medical examination. His Lordship Hon''ble H.B. Datar, J., as he then was had been pleased to observe at paras 4 and 5 are as under:

"4. In a case where a party alleges that a person is impotent or suffering from other such incurable disease, it is for the person making such an allegation to prove the same. A party cannot be compelled to undergo medical examination. As stated by the High Court of Gujarat,

"There is no provision under the Hindu Marriage Act or the Rules framed thereunder, or in the Code of Civil Procedure, or by the Indian Evidence Act, or any other law which would show any power in the Court to compel any party to undergo medical examination".

A medical examination for ascertaining whether a person is insane or impotent are all cases in which unless by the law of the land a person can be compelled to undergo medical examination, an order directing a person to medical examination would be clearly illegal and without jurisdiction. In Pulavarthi Sreeramamurthi Vs. Pulavarthi Lakshmikantham and Another, , when an order was passed directing medical examination, it was held that there must be some statutory provision under which it would be open to the Court to compel medical examination of a party, thus restricting the enjoyment of personal liberty of the person. It was also held that in a case like this, it was not right to rely upon the general or inherent powers of the Court u/s 151 of the Civil Procedure Code. It may be rejected and that even medical examination is specifically provided as under the terms of the Indian Lunacy Act. In the absence of any provision, it is not competent to any party to compel the other party to undergo medical examination.

5. In the case of Ranganathan Chettiar, supra, it has been held that it is not open to the Court u/s 151 of the Code of Civil Procedure, to order a medical examination of a party against the consent of such party. To pass such an order is that amounts to treating a human being as a material object, which no Court should do under its inherent power. It is, thus, clear that it is not open to the Court to invoke Section 151 of the CPC to order a medical examination against his consent. In that view the order directing the medical examination of the petitioner is one which has been passed by the learned Judge in excess of the jurisdiction and the same is liable to be set aside".

Thus considered in my view the Court below committed an error of jurisdiction and acted in excess of jurisdiction in directing the revision petitioners to subject themselves to medical examination for the blood test.

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24. I am further to observe that the Court below has observed that if the parties or any of them fails to appear before the District Surgeon for medical test on 4-12-1996, adverse inference shall be or may be drawn as per law. Here again the Court below acted illegally in making this observation, because Section 4 provides and mandates that when one fact is said to be conclusively proved on establishment of another relevant fact, then it completely shuts down and rules out every sort of evidence to disprove that fact. Adverse presumption u/s 114 may furnish a circumstantial evidence to dislodge the conclusive proof, then that will be running counter to the provisions of Section 112 read with Section 4 of the Evidence Act. The Court below observed illegally that failure or refusal to surrender to medical test will result in raising adverse presumption against the party when in view of Section 112 read with Section 4 of the Evidence Act, every sort of evidence, other than referred in Section 112 is barred and closed including presumptive circumstantial evidence u/s 114 and then the presumption cannot be raised u/s 114 from the failure to surrender. What evidence can be lead so that conclusive presumption or doctrine of conclusive proof u/s 112 may not arise is of the fact that the parties to marriage had no access to each other or occasion to have access during the relevant period i.e., period when the child or person concerned whose paternity or legitimacy in question was conceived as per the latter part of Section 112 of the Evidence Act. Further threat to raise such adverse presumption in such case will amount to interference with fundamental right under Article 21 of personal liberty by implicitly forcing an unwilling person to undergo the medical test i.e., blood group test against his wish and against his or her free will and liberty.

25. When I so observe that neither a person can be compelled to give sample of blood for analysis or to undergo medical examination for blood group test against his or her will as well as no adverse inference can be drawn against the person refusing to undergo such test, I find support for my view from the observations of their Lordships of the Supreme Court in the case of Goutam Kundu, supra, vide the following observations in paragraph 18 of the said report:

"18. Blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by Courts as a circumstantial evidence which ultimately excludes a certain individual as a father of the child. However, it requires to be carefully noted no person can be compelled to give sample of blood for analysis against her wilt and no adverse inference can be drawn against her for this refusal".

This has been the view also expressed by Madhya Pradesh High Court in the case of Hargovind Soni Vs. Ramdulari, , which appears to have been approved by the Supreme Court as per the observations in paragraph 18 referred to above.

26. The learned Counsel for the respondents referred the decision of this Court in Gangadharappa Vs. Basavaraj, , in my opinion this decision will not help to the respondents, as that is not a case with reference to Section 112 read with Section 4 of the Evidence Act, nor Article 21 of the Constitution of India in the

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context of blood group test. This question was not at all raised in that case. The decision of the Himachal Pradesh High Court in Paras Ram Vs. Dayal Das and Others, , relied on by the Counsel for the respondents is also of no help to the respondents. It supports the view taken by the Court that contusive proof u/s 112 can be displaced or can''t be allowed to operate and govern only on proof of certain facts mentioned in the section that no access between the parties at any time when according to the ordinary course of nature the husband could have been the father of the child and if that fact as mentioned in the latter part of Section 112 is established and shown then and then only the doctrine of conclusive proof may not apply.

27. Thus considered, in my opinion, the order allowing I.As. XIV and XV directing the revision petitioners to surrender before the District Surgeon, Mandya for medical examination-blood group test and if they fail to appear before the District Surgeon on 4-12-1996 adverse inference will be drawn is nothing but an act of the Court which is in excess of the jurisdiction, as which the Court had no jurisdiction to direct. The order impugned, as such, is without jurisdiction and against the spirit of law and the one passed without due application of mind to the relevant provisions of the Evidence Act and the provisions of Article 21 of the Constitution of India referred to above and per se appears to be an order without jurisdiction as well as suffers from jurisdictional error amounting to illegality on the part of the Court as well. The order having got tendency to jeopardise the fundamental right of personal liberty conferred under Article 21 of the Constitution of India deserves to be set aside and is hereby set aside.

28. The revision petition as such is hereby allowed with costs.

29. The order dated 21-11-1996 passed by the First Additional Munsiff, Mandya, in O.S. No. 492 of 1992 on I.As. XIV and XV is hereby set aside and the said applications are dismissed herewith.

30. The costs are assessed at Rs. 1,100/- payable by the respondents to the revision petitioners.

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