Goutam Kundu vs State Of West Bengal And Anr on 14 May, 1993

Equivalent citations: 1993 AIR 2295, 1993 SCR (3) 917, AIR 1993 SUPREME COURT 2295, 1993 (3) SCC 418, 1993 AIR SCW 2325, 1993 CRIAPPR(SC) 202, 1993 SCC(CRI) 928, 1993 CALCRILR 92, 1994 (1) BLJR 221, 1993 (3) SCR 917, 1993 (2) ALL CJ 1177, 1993 (3) JT 443, (1994) SC CR R 1, 1993 CHANDLR(CIV&CRI) 620, (1993) 2 RECCRIR 497, (1993) 2 DMC 162, (1995) 1 CIVILCOURTC 160, (1993) 2 LS 1, (1993) MARRILJ 387, (1993) 2 ALLCRILR 548, (1993) 3 CURCRIR 266, (1993) 2 CRIMES 481, (1993) 2 GUJ LH 996, (1993) 2 HINDULR 253, (1993) 3 SCJ 206, (1993) ALLCRIC 416, (1993) EASTCRIC 534, (1993) MATLR 341, (1994) 1 BLJ 307

Author: S. Mohan

Bench: S. Mohan, A.M. Ahmadi

PETITIONER:
GOUTAM KUNDU

Vs.

RESPONDENT:
STATE OF WEST BENGAL AND ANR.

DATE OF JUDGMENT14/05/1993

BENCH:
MOHAN, S. (J)
BENCH:
MOHAN, S. (J)
AHMADI, A.M. (J)

CITATION:
1993 AIR 2295 1993 SCR (3) 917
1993 SCC (3) 418 JT 1993 (2) 443
1993 SCALE (2)994

ACT:
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Code of Criminal Procedure, 1973 :
S. 125-Maintenance-Granted to wife and child-Paternity of child-Disputed-Husband's application for blood group test of wife and child-Held, purpose of application to avoid payment of maintenance--Prayer rightly refused by courts below.

Evidence Act, 1872
Ss. 4, 112-Child born during continuance of valid marriage-Paternity-Presumption-Held, presumption can only be displaced by strong, preponderance of evidence and not by mere balance of probabilities.
Blood group test-Evidention value of-When can be ordered-courts must examine consequence of ordering blood group test.

HEADNOTE:
Respondent no. 2 was married to the appellant. She went to reside with her parents in order to prepare for Higher Secondary Examination. In the meantime she conceived. The appellant and his family members asked her to undergo abortion but she refused, and a child was born to her.
In a petition under s. 125, Cr. P.C. riled by respondent no. 2, against her husband, the wife and the child were granted maintenance.
The appellant, disputing the paternity of the child, riled a criminal miscellaneous application for blood group test (if respondent no. 2 and the child. It was claimed that if it was established that he was not father of the child he would not be liable to pay the maintenance. The application was dismissed. Appellant's revision application was also rejected by the High Court. The appellant filed the appeal by special leave.
Dismissing the appeal, this Court
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HELD: 1.1 Courts is India cannot order blood group test as a matter of course. Unlike the English law* 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,
*Affiliation Proceedings Act., 1957; Family Reforms Act., 1969; Family Reforms Act, 1987.
1.2 Wherever applications are made for blood group test in order to have roving inquiry, the prayer cannot be entertained.
Bhartiraj v. Sumesh Sachdeo & Ors: 1986 AIR Allahabad 259, approved.
2.1 Section 112 read with s.4 of the Evidence Act debars evidence except in cases of non-access for disproving the presumption of legitimacy and paternity. It is a rebuttable presumption of lam, that a child born during the lawful wedlock is legitimate, and that access occurred between the parties. This presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities.
2.2 There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under s. 112 of the Evidence Act.

Vasu v. Santha: [1975] Kerala Law Times 533 and Raghunath v. Shardabai, [1986] AIR Bombay 388, referred to.
Morris v. Davies 1837 5 Cl. & Fin. 163. cited.
3 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.
Smt. Dikhtar Jahan v. Mohammed Faroog. AIR 1987 SC 1049, referred to.
4.1 Blood group 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.
4.2 No person can be compelled to give sample of blood for analysis and no adverse inference can he drawn against a person on account of such refusal.
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Hargovind Soni v. Ramdulari, AIR [1986] M.P. 57, approved.
Vasu v. Santha, [1975] Kerala Law Times 533, Polavarapu Venkeeswarlu v. Polavarapu Subbayya, [1951] 1 Madras Law Journal 58, referred to.
Subayya Gounder v. Bhoopala, AIR [1959] Madras 396; Venkateswarlu v. Subbayya, AIR [1951] Madras 910; Hukum Chand Boid v. Kamalan-and Singh, (1905) ILR. 33 Cal. 927, cited.
Wilson v. Wilson, Lancet [1942] 1.570; Re L 1968 [1] All England Reports 20; B. R. B. v. J. B., [1968] 2 All Eng. Reports 1023, referred to
Tauylor's 'Principles and Practice of Medical Jurisprudence (Vol. 2); 'Medical Jurisprudence and Toxicology (8th Edition) by Rai Bahadur Jaising P. Mod, cited.
`Forensic Sciences' edited by Cyril H. Wecht, referred to.
5. In the instant case the purpose of the application for blood group test was nothing more than to avoid payment of maintenance, without making any ground whatever to have recourse to the test. The High Court was right in confirming the order of the court below rejecting the application.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 443 of 1993.

From the Judgment and Order dated 22.4.92 of the Calcutta High Court in Crl. Revision No. 800/92.

A.K. Sen, S.C. Ghosh, Rajiv K. Dutta and B.B. Tawakley for the Appellant.

Amlan Ghosh and Ranjan Mukherjee for the Respondents. The Judgment of the Court was delivered by MOHAN, J. leave granted.

The appellant herein was, married to second respondent on 16th January, 1990 according to Hindu Rites and Customs. They lived together for sometime until second respondent left the matrimonial home to reside with her parents in order to prepare for Higher Secondary Examination which commenced on 5.4.90 and continued upto 10.5.90. In the month of April, 1990 she conceived, on coming to know that she was pregnant, the appellant and the family members did not want her to beget a child. Therefore she was forced to undergo abortion which was refused by the second respondent. During the stay She was meted out cruetreatment both physically and mentally. She came back to the matrimonial home during Durga Pooja in the month of October, 1990. A female child was born on 3.1.91. She filed a petition under section 125 Cr. P.C. before the Learned Chief Judicial Magistrate, Alipore in Misc. Case No. 143 of 1991 both for herself and the child. By an order dated 14.8.91 which was passed ex-parte he awarded a sum of Rs. 300 per mansum to the mother and Rs. 200 to the child. Against that order, he moved a revision to the High Court. That revision is pending as 1837 of 199

1. Thereafter the petitioner filed a Crl. Misc. Case No. 143 of 1991 for blood group test of the second respondent and the child.

In that proceeding the petitioner herein disputed the paternity of the child and prayed for blood group test of the child to prove that he was not the father of the child. According to him if that could be established he would not be liable to pay maintenance. That application was dismissed on two grounds: (i) there were other methods in the Evidence Act to disprove the paternity (ii) moreover it is settled law that medical test cannot be conclusive of paternity.

Aggrieved by this order, a revision was preferred before the High Court. Dismissing the revision it was held that section 112 of the Evidence Act says where during the continuance of valid marriage if a child is born that is a conclusive proof about the legitimacy. This section would constitute a stumbling block in the way of the petitioner getting his paternity disproved by blood group test. The English law permitting blood test for determining the paternity of legitimacy could not be applied in view of section 112 of the Evidence Act. Therefore it must be concluded that section 112 read with section 4 of the said Act debars evidence except in cases of non-access for disproving the presumption of legitimacy and paternity. It is the contention of Mr. Ashok Sen, learned counsel for the appellant that the only way for the father to disprove the paternity is by blood group test. Having regard to the development of medical jurisprudence to deny that request to the appellant will be unreasonable. As a matter of fact, in England, this is commonly resorted to as it will leave no room for doubt. In 1968 (1) All England Reports p. 20 Re. 1 it was held that even without the consent of the guardian ad litem, the court had power to order an infant be subjected to a blood group test.

There is no justification for the court below to refuse the same on the ground that section 112 of the Evidence Act would be an obstacle in seeking relief of blood group test. Before we deal with the arguments, we will examine the law as available in England. At the beginning of the century scientists established that human blood had certain characteristics which could be genetically

transmitted. The first recognised system was ABO blood group. The blood group of a child is determined by the parents' genetic make- up but the number of possibilities is such, that it is not possible to prove that certain individuals are the father on the basis of comparing blood groups, only, that they are not the father.

By 1930s other immunological test became available. As a result the possibility of establishing paternity increased. An attempt by way of statutory provision to make blood test compulsory in En-land failed in 1938. However, in 1957 the Affiliation Proceedings Act was passed. Under that Act, it was assumed that a man was the father once a sexual relationship with the mother at the time of conception was proven unless he could show another man had intercourse with her at that time. Failing the father's attempt, the mother's evidence had to be corroborated by facts such as blood test etc. Under the Act either party could ask for a blood test and either was entitled to refuse to take part, although only the mother can apply for maintenance.

The Family Reforms Act, 1969 conferred powers on the court to direct taking blood test in civil proceedings in paternity cases. Courts were able to give directions for the use of the blood test and taking blood samples from the child, the mother and any person alleged to be the father. Since the passing of 1969 Act the general practice has been to use blood tests when paternity is in issue. However, it is to be stated the court cannot order a person to submit to tests but can draw adverse inferences from a refusal to do so. Now under the Fan-lily Reforms Act, 1987 in keeping with modern thinking on the continuing and shared responsibility of parenthood, 'parentage' rather than paternity has to be determined before the court. Fathers as well as mothers can apply for maintenance. Therefore contests can include mothers denial of paternity. This Act finally removed the legal aid for corroboration of mother's statement of paternity.

Two cases may be usefully referred to: Re L Lord Denning M.R. [1968] All England Reports p. 20 stated thus "but they can say positively that a given man cannot be the father, because the blood groups of his and the child are so different."

(emphasis supplied).

In B.R.B. v. J.B. [1968] 2 All England Reports 1023 applied this dictum and held as under:-

> "The Country court judge will refer it to a High Court Judge as a matter suitable for ancillary relief, and the High Court Judge can order the blood test. Likewise, of course, a magistrate's court has no power to order a blood test against the will of the parties. The magistrate can only do it by consent of those concerned, namely, the grown-ups and the mother on behalf of the child; but, nevertheless, if any of them does not consent, the magistrate can take that refusal into account1 adhere to the view which expressed in Re L. that (6) "If an adult unreasonably refuses to have a blood test, or to allow a child to have one, I think that it is open to the court in any civil proceedings (no matter whether it be a paternity issue or an affiliation summons,or a custody proceedings) to take his refusalas evidence against him, and may draw an inference there from adverse to him. This is simple common sense."

"The conclusion of the whole matter is that a judge of the High Court has power to order a blood test whenever it is in the best interests of the child. The judges can be trusted to exercise this discretion wisely. I would set no limit, condition or bounds to the way in which judges exercise their discretion. To object of the court always is to find out the truth. When scientific advances give us fresh means of ascertaining it, we should not hesitate to use those means whenever the occasion requires."

"Having heard full argument on the case, lam satisfied beyond any reasonable doubt (to use the expression used in rebutting the presumption as to legitimacy) that LORD DENNING, M.R., was right in saying that such an order may be made in any case where the child is made a party to the proceedings and in the opinion of the judge of the High Court it is in the child's best interests that it should be made."

As regard United States the law as stated in Forensic Sciences edited by Cyril H. Wecht is as under:-

Parentage testing is the major (but not the exclusive) involvement of forensic serology in civil cases. The majority of disputed parentage cases involve disputed paternity, although an occasional disputed maternity, or baby mix-up case does arise, and can be solved using the tools of forensic serology described in this chapter. Blood typing has been used to help resolve paternity cases since the mid- 1920's. According to Latters, there were 3,000 cases tested in Berlin in 1924, and Schiff and Boyd said that the first case went to court in Berlin in 1924. Ottenberg, in this country published paternity exclusion tables in 192 1, as did Dyke in England in 1922. It took somewhat longer to satisfy the courts, both in Europe and in country, that parentage exclusions based upon blood grouping were completely valid. Wiener said that he had obtained an exclusion in a paternity case in this country which reached the courts early in 1933. In January of 1934, Justice Steinbrink of the New York Supreme Court in Brooklyn ordered that blood tests be performed in a disputed paternity action, using a s precedent a decision by the Italian Supreme Court of Cassation, but his order was reversed upon appeal. Soon afterward, however, laws were passed in a number of states providing the courts with statutory authority to order blood testing in disputed paternity cases. Paternity testing has developed somewhat more slowly in the Unitted States than in certain of the European countries, but today the differences in the number of systems employed, and judicial acceptance of the results, are no longer that great. A number of authorities have recently reviewed the subject of paternity testing in some detail, and in some cases have summarized the results of large number of cases that they have investigated. Walker points out that failure to exclude a man, even at the 95 percent level of paternity exclusion does not mean that the alleged father is proven to be biologic father, because absolute proof of paternity cannot be established by any known blood test available. Although this fact is well known and appreciated by workers it), the field of blood grouping and by attorneys active in this area, it is not generally understood by the lay public. However, blood group serology, using proven genetic marker systems, represents the most accurate scientific information concerning paternity and is so recognised in the

United States, as well as in a number of countries abroad."

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. In 1951 (1) Madras Law Journal p.58O Polavarapu Venkteswarlu, minor by guardian and mother Hanwnamma v. Polavarapu Subbayya in that case the application was preferred under section 151 of the Code of Civil Procedure invoking the inherent powers of the Court to direct a blood test. The learned judge was of the following view:-

Section 15 1, Civil Procedure Code, has been introduced in to the Statute book to give effect to the inherent powers. of Courts as expounded by Woodroffe, J., in Hukum Chand Boid v. Kamalan and Singh. Such powers can only be exercised ex debito justice and not on the mere invocation of parties or on the mere volition of courts. There is no procedure either in the Civil Procedure Code or in the Indian Evidence Act which provides for a test of the kind sought to be taken by the defendant in the present case. It is said by Mr. Ramakrishna for the respondent before m e that in England this sort of test is resorted to by Courts 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 page 69 of Taylor's Principles and Practice of Medical Jurisprudence, Volume 2, where it is stated thus :

"In Wilson v. Wilson, Lancet [1942] 1. 570, evidence was given that the husband's group was OM, that the wife's was BM and that the child's was ABN. The Court held that the husband was not the father of child, and granted a decree for nullity."

"It is also pointed out by learned counsel that in the text books on Medical Jurisprudence and Toxicology by Rai Bahadur Jaising P. Moi, (8th Edition), at page 94, reference is made to a case decided by a Criminal Court at Mercare in June, 194 1, in which the paternity and maternity of the child being under dispute, the Court resorted to the results of the blood grouping test."

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 Court can force them to do so."

The same view was taken by the Kerala High Court in Vasu v. Santha 1975 Kerala Law Times p. 533 as "A special protection is given by the law to the status of legitimacy in India. The law is very strict regarding the type of the evidence which can be let in to rebut the presumption of legitimacy of a child. Even proof that the mother committed adultery with any number of men will not of itself suffice for proving the illegitimacy of the child. If she had access to her husband during the time the child could have been begotten the law will not countenance any attempt on the part of the husband to prove that the child is not actually his. The presumption of law of legitimacy of a child will not be lightly repelled. It will not be allowed to be broken or shaken by a mere

balance of probability. The evidence of non-access for the purpose of repelling it must be strong, distinct, satisfactory and conclusive see Morris v. Davies, (1837) 5 Cl. & Fin. 163. The standard of proof in this regard is similar to the standard of proof of guilt in a criminal case. These rigours are justified by considerations of public policy for there are a variety of reasons why a child's status is not to be triffled with. The stigma of illegitimacy is very severe and we have not any of the protective legislations as in England t o protect illegitimate children. No doubt, this may in some cases require a husband to maintain children of whom he is probably not their father. But, the legislature alone can change the rigour of the law and not the court. The court cannot base a conclusion on evidence different from that required by the law or decide on a balance of probability which will be the result if blood test evidence is accepted.

There is an aspect of the matter also. Before a blood test of a person is ordered his consert is required. The reason is that this test is a constraint on his personal liberty and cannot be carried out without his consent. Whether even a legislature can compel a blood test is doubtful. Here no consent is given by any of the respondents. It is also doubtful whether a guardian ad litem can give this consent. Therefore, in these circumstances, the learned Munsiff was right in refusing the prayer for a blood test of the appellant and respondents 2 and 3. The learned Judge is also correct in holding that there was no illegality in refusing a blood test. The maximum that can be done where a party refuses to have a blood test is to draw an adverse inference (see in this connection Subayya Gounder v. Bhoopala, AIR 1959 Madras 396, and the earlier decision of the same court in Venkateswarlu v. Subbayya AIR 1951 Madras 910. Such an adverse inference which has only a very little relevance here will not advance the appellants case to any extent. He has to prove that he had no opportunity to have any sexual intercourse with the 1st respondent at a time when these children could have been begotten. That is the only proof that is permitted under S. II 2 to dislodge the conclusive presumption enjoined by the Section."

In Hargavind Soni v. Ramdulari AIR 1986 MP at 57 held as:-

"The blood grouping test is a perfect test to determine questions of disputed paternity of a child and can be relied upon by Courts as a circumstantial evidence. But no person can be compelled to give a sample of blood for blood grouping test against his will and no adverse inference can be drawn against him for this refusal."

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 invididual 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 will and no adverse inference can be drawn against her for this refusal.

In Raghunath v. Shardabai 1986 AIR Bombay 388, it was observed blood grouping test have their limitation, they cannot possibly establish paternity, they can only indicate its possibilities.

In Bhartiraj v. Sumesh Sachdeo & Ors., 1986 AIR Allahabad 2591 held as:-

"Discussing the evidentiary value of blood tests for determining paternity, Rayden on Divorce, (1983) Vol. 1) p. 1054 has this to say "Medical Science is able to analyse the blood of individuals into definite groups: and by examining the blood of a given man and a child to determine whether the man could or could not be the father. Blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father. It is obviously the latter aspect the proves most valuable in determining paternity, that is, the exclusion aspect for once it is determined that a man could not be the father, he is thereby automatically excluded from considerations of paternity. When a man is not the father of a child, it has been said that there is at least a 70 per cent chance that if blood tests are taken they will show. positively he is not the father, and in some cases the chance is even higher: between two giver men who have had sexual intercourse with. the mother at the time of conception, both of whom undergo blood tests, it has likewise been said that there is a 80 per cent chance that the tests will show that one of them is not the father with the irresistible inference that the other is the father.

The position which emerges on reference to these authoritative texts is that depending on the type of litigation, samples of blood, when subjected to skilled scientific examination, can sometimes supply helpful evidence on various issues, to exclude a particular parentage set up in the case. But the consideration remains that the party asserting the claim to have a child and the rival set of parents put to blood test must establish his right so to do. The court exercises protective jurisdiction on behalf of an infant. In my considered opinion it would be unjust and not fair either to direct a test for a collateral reason to assist a litigant in his or her claim. The child cannot be allowed to suffer because of his incapacity; the aim is to ensure that he gets his rights. If in a case the court has reason to believe that the application for blood test is of a fishing nature or designed for some ulterior motive, it would be justified in not acceding to such a prayer."

"The above is the dicta laid down by the various High Courts. In matters of this kind the court must have regard to section 112 of the Evidence Act. This section is based on the well known maxim pater est quem nuptioe demonstrant (he is the father whom the marriage indicates). The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it. The law presumes both that a marriage ceremony is valid, any that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immoratility."

It is a rebuttable presumption of law that a child born. during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderannce of evidence, and not by a mere balance of probabilities.

In Smt. Dukhtar Jahan v. Mohammed Faroog AIR 1987 SC 1049 this court held.

"Section II 2 lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within two hundren 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 anytime 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 the basts of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman."

This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation.

The effect of this section is this: there is a presumption and a very strong one though a reubttable one. Conclusive proof means as laid down under section 4 of the Evidence Act.

From the above discussion it emerges:- (1) that courts in India cannot order blood test as 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 primafacie 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.

Examined in the light of the above, we find no difficulty in upholding the impugned order of the High Court, confirming the order of the Addl. Chief Judicial Magistrate, Alipore in rejecting the application for blood test. We find the purpose of the application is nothing more than to avoid payment of maintenance, without making any ground whatever to have recourse to the test. Accordingly Criminal Appeal will stand dismissed. Cr, M.P.No. 2224/93 in S.L.P.(cr No. 2648/92 filed by Respondent No. 2 will stand allowed. She is permitted to withdraw the amount without furnishing any Security.

R.P. S.L.P. dismissed.