ALLAHABAD HIGH COURT

Bharti Raj

Vs.

Sumesh Sachdeo

Habeas Corpus Petn. No. 4064 of 1982

(B.D. Agarwal, J.)

22.01.1986

ORDER

B. D. Agarwal, J.

1. These are petitioner's applications.

Facts relevant in so far as material for this purpose are that a child was born to Smt. Alka Sachdeo wife of Sri Sudesh Sachdeo on 16th Nov., 1981 at 10.40 p.m. in the Nazareth Hospital, Allahabad. Smt. (Dr.) Bharti Raj wife of Baldeo Raj delivered twins the same day at 10.50 p.m. and 11.00 p.m. respectively in the same hospital. The petitioner's case is that one of these twins was a male and the other a female and further that the child born of Smt. Alka Sachdeo was female. It is alleged that the hospital staff in collusion made an interchange whereby the petitioner's male child was passed over to Smt. Alka Sachdeo and replaced by the female child of the latter. Sri Baldeo Raj gave an application to the Director, Nazareth Hospital on Nov. 20, 1981, expressing doubt that one of his children had been changed in this hospital from the labour room. The Director replied the same day after inquiry made by him that there had been no replacement or change of any kind and pointing further that blood test could not be had in the hospital and that the applicant might get the blood test of the female babies done if he so wished. Sri Baldeo Raj also lodged first information report in P.S. Canning ton at 5.45 p.m. the same day for offence under Section 420 Penal Code. The two female babies died on Nov. 23, 1981. On Dec. 16, 1981 Sri Baldev Raj filed a petition under Section 25/12 of the Guardians and

Wards Act read with Section 6.8 of the Hindu Minority and Guardianship Act, 1956, in the Court of the District Judge, Allahabad with the prayer that the opposite parties be directed to deliver custody of the male child in question to the petitioner and that they be restrained from removing or sending the child from Allahabad and his interim custody be given to the petitioner. This was followed up by Original Suit No. 2 of 1982 filed by Sri Baldev Raj on Jan. 13, 1982. in the Court of the District Judge, Allahabad wherein the reliefs claimed are declaration under Section 7 of the Guardians and Wards Act, that the plaintiff is the guardian of the male child, interim custody of the child and the setting aside of the adoption deed dt. Dec. 1, 1981, with a declaration that the same is invalid. Thereafter another suit registered as Original Suit No. 401 of 1982 has also been filed by Sri Baldev Raj in the Court of Munsif, West Allahabad on Nov. 22, 1982, claiming that the adoption deed dt. Dec. 1, 1981, be cancelled and a declaration made to the effect that the alleged adoption of the male child is invalid. This is in sequence to the contention on the other side that the male child has been given in adoption by Smt. Alka Sachdeo and her husband to Smt. Vinod Goomar (wife of Sri Yashpal Rai Goomar) who is the sister of Suresh Sachdeo for herself and her husband both of whom have acquired the citizenship of Canada.

2. In the petition under the Guardians and Wards Act registered as Case No. 286 of 1981, referred to above, the District Judge made an interim order dt. Jan. 12, 1982 on an application of Sri Baldeo Raj for comparison of the blood of the child with the blood of the parents of both sides. The order provides :

> "This is an application by the petitioner for comparison of the blood of the child with the blood of the parents on both sides. The counsel for the opposite parties have objected to this application on the ground that today is the date fixed for evidence and the petitioner must lead evidence available with him and the court should pass suitable orders on this application thereafter. This appears to be proper.
> The petitioner shall adduce evidence available with him today and after the close of such evidence, suitable orders shall be passed about the blood test."

3. Against this order Sri Baldeo Raj filed Writ Petition No. 424 of 1982 in this

Court on Jan. 14, 1982 with the prayer *inter alia* :

> "(i) to issue a writ, order or direction in the nature of *certiorari* quashing the impugned order of the opposite party 1. (District Judge, Allahabad), dt. 12-1-1982;
> (ii) to issue a writ, order or direction in the nature of mandamus directing the opposite party 1 to proceed with the case in accordance with the procedure prescribed in the Civil Procedure Code
> (iii) to issue a writ, order or direction in the nature of mandamus restraining the opposite parties 2 to 8 from removing the child Master Neal from Allahabad.
> (iv) to issue a writ, order or direction in the nature of mandamus directing the opposite parties 2 to 8 to produce Master Neal for the Blood Parentage Test.
> (v) to issue a writ, order or direction in the nature of mandamus/habeas corpus directing the opposite parties 2 to 8 to deliver the child Master Neal to the petitioner."

4. The District Judge made an order on 16th Dec., 1981 directing the opposite parties not to remove the child outside the jurisdictional limits of this Court. In modification thereof a detailed order after hearing the parties was passed by the District Judge on Feb., 1,1982 wherein he came to the findings that;

> i) The petition filed by Sri Baldeo Raj under the Guardians and Wards Act is maintainable:
> ii) The order restraining the opposite parties from removing the child outside the jurisdictional limit of the Court be modified so that the opposite parties might remove the child outside the territorial jurisdiction of this Court subject to the opposite party 5, Sri Jagrati Lal Sachdeo (father of Sudeh Sachdeo) furnishing a personal security to the tune of Rs. 50,000/- to ensure the compliance of the orders of the Court and requiring him to furnish to the Court every month information about the welfare of the child and also a certificate from a qualified doctor about his health.
> iii) The application made by the petitioner asking for security from the opposite parties for the safety of the child besides the costs of the petition

be rejected.

5. Consequent upon this order of the District Judge dt. 1-2-1982 Sri Baldeo Raj sought amendment on Feb., 4, 1982 in Writ Petition No. 424 of 1982, referred to above. Through this amendment the prayer made by him was for the issue of a writ, order of direction in the nature of *certiorari* quashing the impugned order dt. 1-2-1982 passed by the District Judge and for taking appropriate action against him.

6. The writ petition was decided by a learned single Judge (J.M.L. Sinha, J.) on Feb., 8, 1982. In regard to the relief No. 1 contained in the original writ petition the finding recorded was :-

> "So far as the reliefs contained in the original Writ Petition are concerned, the first prayer, therein is that the order dated 12-1-1982 passed by the District Judge, may be quashed. What had happened is that during the pendency of the application under Section 25s of the Guardians and Wards Act the petitioner moved an application for comparison of blood of the disputed child with the blood of the parents on both sides. The District Judge disposed of this application by his order dt. 12-1-1982 saying that the petitioner should first adduce some evidence in support of his allegation and it is only thereafter that suitable orders shall be passed about the blood test. I do not think that there was anything wrong on the part of the District Judge calling upon the petitioner first to produce evidence to afford *prima facie* satisfaction of the fact that the disputed child was born to the petitioner's wife. It deserves consideration in this context that, according to the petitioner, his wife gave birth to a male and female child as twins while respondent 3 gave birth to female child, but as a result of collusion between the respondent and hospital authorities, the male child of the petitioner was substituted with the female child of the respondent 3. According to the District Judge this fact was not apparent on a bare perusal of the hospital records and the respondents claimed that respondent 3 gave birth to a made child, a fact supported by hospital records. In the context of these circumstances it was a proper exercise of discretion on the part of the District Judge to ask

> the petitioner to produce some evidence to afford at least a *prima facie* satisfaction that the story put forward by him had some substance. The order passed by the District Judge, was, therefore, a sound order and calls for no interference."

7. Concerning the fourth relief in the Original Writ Petition the learned Judge observed :-

> "Further, I am in agreement with the District Judge that an order should not be passed directing a couple to submit for paternity test (of) a child in their custody and claimed by them as their own child, merely because another person suspects that the child belongs to him. As already pointed out, the District Judge in this case has called upon the petitioner to first adduce *prima facie* evidence, but that evidence has not been adduced yet. The petitioner cannot claim that relief by this writ petition."

8. In regard to the fifth relief the observation made is :

> "The fifth relief is for issue of a writ, order or direction in the nature of mandamus or Habeas Corpus directing the opposite parties 2 to 8 to deliver the child, Master Neal, to the petitioner. The question whether, the child belongs to the petitioner or belongs to the respondents 2 and 3 is a complicated question of fact which will involve examination and cross-examination of witnesses."

9. Regarding the prayer introduced by amendment dt. Feb., 4, 1982 to the Writ Petition, the learned Judge held that the petitioner had an alternative remedy of appeal or revision and hence that could not be entertained.

10. Sri Baldeo Raj followed this up by filing Civil Revision No. 80 of 1982 in this Court directed against the aforementioned order of District Judge dt. Feb., 1, 1982. After contest the revision was decided by brother V.K. Khanna, J. on March 26, 1982. The relevant portion of the judgment reads :

> "I have taken into account the totality of all the circumstances and facts of the case and in my opinion the evidence which exists on the record at

> this stage does not make out a *prima facie* case in favour of the applicant and the finding of the District Judge on the aforesaid question cannot be said to suffer from any error of jurisdiction or any material irregularity in the exercise of the jurisdiction. It is, however, made clear that no final opinion is being expressed regarding the applicant's case. At the time of hearing of the case the applicant may be able to produce clinching evidence to prove his case."

The revision was accordingly dismissed. Three successive applications for review were filed by Sri Baldeo Raj against this judgment which were dismissed on July 26, 1982, Dec., 22, 1982 and Feb. 2, 1983 respectively.

11. Writ Petition No. 4064 of 1982 has been filed thereafter by Smt. (Dr.) Bharti Raj on 23rd April, 1982 for the issue of a writ of habeas corpus directing the respondents to produce the male child aforesaid before this court and to deliver his custody to the petitioner. In the course thereof the petitioner has put in the applications, referred to above through Sri Baldeo Raj, Advocate appearing on her behalf and he has insisted upon these applications being disposed of before the writ petition is taken up for hearing. The contention advanced is that the respondents be directed to produce the male child in question before this Court for the purpose of blood test being got done and a comparison of blood group being made with that of the two sets of parents.

12. I have heard Sri Baldeo Raj, Advocate, appearing for the petitioner and Sri P. Basu who appears for the respondents 1, 2 and 5. Sri N. C. Upadhya also appeared for the respondent 1, but since he has expired, the arguments on his behalf were concluded by Sri Basu. Sri Lalji Sinha appearing for the respondents 6 and 7 adopted his arguments.

13. Sri P. Basu raised a preliminary objection to the effect that the relief sought by the petitioner in this application for the production of the male child for blood test and a comparison of the blood group without the petitioner being called upon to give evidence such as may support her claim in this behalf cannot be entertained being barred by res judicata. It is submitted that this stands concluded against the petitioner as a result of the decision of this Court in Civil Revision No. 80 of 1982, dt. 26th Mar. 1982 and the decision in Writ

Petition No. 424 of 1982, dt. Feb. 8, 1982. However, Baldeo Raj has refuted this contention. The revision, as I mentioned above, was directed against the order of the District Judge dt. Feb. 1, 1982 refusing to grant temporary injunction in favour of the revisionist. It is in connection therewith that this Court considered if there existed a *prima facie* case to support the claim and answered it in the negative. The learned Judge made it clear at the same time that the finding given was for the purpose of the impugned application for injunction alone leaving it open to the Court below to consider evidence on merits as and when it is adduced in the case. The revision, therefore, decides only that, in declining to grant the temporary injunction, the District Judge did not commit an error of jurisdiction or any material irregularity. That is no longer the issue before us. There is no question, in my view for these reasons for this decision in the Civil Revision operating as *res judicata* in this proceeding. This cannot be said, however, in so far as the decision in Writ Petition No. 424 of 1982, dt. 8th Feb. 1982 is concerned. The petitioner therein (Sri Baldeo Raj) not merely assailed the order of the District Judge dt. Feb. 1, 1982 but also the order passed on Jan. 12, 1982 and specifically sought the issue of a writ, order or direction in the nature of mandamus/habeas corpus for the delivery of the male child and for his production for the Blood Parentage Test. This Court declined to interfere with the order concerning the temporary injunction on the ground that the petitioner had an alternative remedy available to him. But so far as the other reliefs claimed in the writ petition as mentioned above, are concerned, those were gone into and considered upon merits. The relevant portion of the judgment recorded by the learned single Judge has been extracted above and does not require to be reproduced. This Court is categorical as will appear from those extracts in maintaining that till the petitioner produces evidence to afford *prima facie* satisfaction to the fact that the disputed child was born to Smt. (Dr.) Bharti Raj, the petitioner could not ask for or have the child produced for the blood test being gone into. There has been no evidence adduced on the spot till then nor has this been done thereafter despite more then 4 years having elapsed and the lis in the Court below remains pending still. The learned Judge, it may be recalled, expressed agreement with the view of the District Judge that an order should not be passed directing the couple to submit for paternity test of the child in their custody and claimed by them as their own child merely because another person disputes that the child belongs to him.

14. Sri Baldeo Raj raised an argument that the parties to the present writ petition are not the same as those arrayed in the Writ Petition No. 424 of 1982. This has only to be said to be rejected. The record bears out that ever since the inception, Sri Baldeo Raj has been fighting this out in his name or in the name of his wife. Their interest is naturally common in this respect and absolutely no conflict of any kind is involved inter se. In Writ Petition No. 424 of 1982 the respondents arrayed were Smt. Alka Sachdeo and her husband, besides Jagrati Lal Sachdeo, his wife and his other son. Smt. Vinod Goomar and her husband were also impleaded apart from the District Judge by name. In the Habeas Corpus Writ Petition now pending the respondents arrayed are Smt. Alka Sachdeo, her husband and the father-in-law besides Smt. Vinod Goomar and her husband. In addition Dr. K. Sthalckar and Dr. Abhilasha Chaturvedi of the Nazareth Hospital have also been arrayed as respondents Nos. 6 and 7 in addition to the Inspector P. S. Connington. They are truly speaking in the form of pro forma parties - the crux of the dispute being directed as against Smt. Alka Sachdeo, her husband and the father-in-law besides Smt. Vinod Goomar and her husband. The fact that in the previous writ petition it was thought fit to implead some other members of Sachdeo family is of no material consequence. Considering the identity of interest involved, there is no difference in substance created, in my view, because of this writ petition being filed in the name of Smt. (Dr.) Bharti Raj instead of Sri Baldeo Raj himself.

15. In *Lallubhai Jogibhai Patel v. Union of India,* [1] their Lordships considered the question whether the doctrine of constructive *res judicata* applied to a subsequent petition for a writ of habeas corpus on a ground which the petitioner might and ought to have taken in his earlier petition for the same relief. After discussing the decisions of the Supreme Court in *Daryao v. State of U. P.,* [2] and *Ghulam Sarwar v. Union of India,* [3] it was laid down that:

> "The position that emerges from the survey of the above decisions is that the application of the doctrine of constructive *res judicata* is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not taken in the earlier petition for the same

> relief."

16. It was also noticed that Bachawat, J. in Ghulam Sarwar's case (supra) in his concurring judgment while holding that the order of dismissal of the High Court does not operate as *res judicata* and does not bar the petition under Article 32 of the Constitution asking for the issue of a writ of habeas corpus on the same facts, clarified that the petitioner would not have the right to move the Supreme Court under Article 32 more than once on the same facts. The Full Bench decision of the Punjab High Court in *Ram Kumar Peary Lal v. District Magistrate, Delhi,* [4] was cited also :

> "No second petition for writ of habeas corpus lies to the High Court on a ground on which a similar petition had already been dismissed by the Court. However, a second such petition will lie when a fresh and a new ground of attack against the legality of detention or custody has arisen after the decision of the first petition, and (also) where for some exceptional reason a ground has been omitted in an earlier petition, in appropriate circumstances, the High Court will hear the second petition on such a ground for ends of justice. In the last case, it is only a ground which existed at the time of the earlier petition, and was omitted from it that will be considered. Second petition will not be competent on the same ground merely because an additional argument is available to urge with regard to the same."

17. Are there fresh grounds existing then in the instant case in aid of the prayers made through these applications which Sri Baldeo Raj insists upon being granted at this stage? The Court has to scrutinize whether there are fresh grounds shown to exist or there are only additional arguments urged with regard to the same ground which was taken up and adjudicated in the earlier writ petition. Sri Baldeo Raj argues that on Dec. 1, 1981 there was a deed of adoption executed and registered in Allahabad. In para six thereof a recital is that Smt. Vinod Goomar on her behalf and her husband adopted the male child in question from Nov. 23,1981. Another deed of adoption came to be executed on Feb. 11, 1982 and registered in Delhi between the same parties wherein it has been recited that the ceremony of giving and taking the child in adoption took place in Delhi on Feb. 9, 1982. The submission made is that this second

deed of adoption would have been uncalled for in case the child were adopted at Allahabad on or about 23rd Nov. 1981. It is argued also that by an order dated February 10, 1982 passed in Civil Revision No. 80 of 1982, the learned single Judge had directed the parties to put in appearance in the Court of the District Judge on Feb. 12, 1982 and the District Judge was given the direction to proceed with the hearing of the case so as to conclude the same before Mar. 1,1982 and further the order recited that Sri N. C. Upadhya made statement that till Mar. 1, 1982 the child will remain in India. This, the petitioner states, was later extended up to 5th Mar. 1982. Earlier on 12th Dec., 1981, the child had been given by the police to the supordigi of Smt. Alka Sachdeo and her husband. The adoptive parents, however, took the child with them to Canada flying thereto on Mar. 6/7, 1982, and in the application dt. 15-2-1982 for the passport in reference to the querry whether a warrant or summons for the appearance of the child or a warrant for his arrest or an order prohibiting his departure from India existed, the answer given was 'NO'. For the respondents it is urged in explanation that the giving and taking ceremony in adoption took place only on 9th Feb. 1982 and the subsequent registration became necessary due to the authority given by Yeshpal Rai Goomar to his wife for adoption being not registered earlier and further that the child was taken from this country subsequent to the order made by the Dsistrict Judge dt. Feb. 1, 1982. which was upheld also both in the earlier writ petition and civil revision, be that as it may, this cannot be claimed to constitute fresh ground on the point of production of the child sought for the purpose of blood test while there is no evidence given still from the side of the petitioner to lay the foundation for her claim as to the parentage. This constitutes at the best only an additional argument put forth by Sri Baldev Raj from the side of the petitioner purporting to be in aid of the same grounds which he had taken in the earlier writ petition but failed. It does not appear that there can be escape from *res judicata* on the subject on this basis in so far as the point raised in issue in these applications concerning the production of the child for the blood test is concerned. The validity of the adoption is pending in dispute in the civil Court both on facts and in law which is still to decide the same. The Court below may in this connection also take into consideration the law laid down by the Supreme Court in *Lakshmi Kant Pandey v. Union of India,* [5]

18. Reference on the point of *res judicata* is made by Sri Baldev Raj to the

decision of the Supreme Court in *Arjun Singh v. Mohindra Kumar,* [6] which affirms that interlocutory orders like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation; they do not decide the merits of the controversy in issue in the suit and do not, put an end to it even in part. Such orders are capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. This serves further to support the conclusion referred to earlier that the decision in Civil Revision 80 of 1982 on the issue of temporary injunction does not operate as a bar to these proceedings, but does not take away the effect of the decision reached in the earlier writ petition between the parties.

19. Assuming as Sri Baldeo Raj contends that there is no bar of res judicala, the question remains whether in the facts and circumstances of the case, the Court should direct immediate production of the child for the blood test to be gone into. In *Sebastian M. Hongray v. Union of India,* [7] the Supreme Court referring to the procedure which should be followed ordinarily in these matters observed :-

> "The normal practice is that when a petition for a writ of habeas corpus is moved, the Court would direct a notice to be served upon the respondents with a view to affording the respondents to file evidence in reply. If the facts alleged in the petition are controverted by the respondents appearing in response to the notice by filing its evidence, the Court would proceed to investigate the facts to determine whether there is substance in the petition for a writ of habeas corpus. (See Halsbury's Laws of England, Fourth Edition Vol. II paragraph 1482). If on investigation of facts the Court rejects the contention of the respondent and is satisfied that the respondent was responsible for unauthorised and illegal detention of the person or persons in respect of whom the writ is sought, make it obligatory for the respondents to file a return."

20. The crux of the dispute in the present relates to the parentage of the male child. As at present, the position available on the record in short is that the child was born in the Nazareth Hospital on 16th Nov. 81. In the Hospital record, that, is, the Bed Head Tickets, the Delivery Register, the Maternity Discharge Card,

the entries are that the male child was born of Smt. Alka Sachdeo at 10.40 p.m. and the petitioner - Smt. (Dr.) Bharati Raj - delivered female twins at 10.50/11 p.m. respectively. On 20th Nov., 1981, Sri Baldev Raj gave application to the Director. Nazareth Hospital in which he said "I have various doubts that one of my children (the first one born in your hospital on the night of 16-11-1981) has been changed in your hospital from the labour room." He enquired therein the particulars of the parents of children born in the hospital on 16th November between 10 to 11 p.m. and also the names of the hospital staff. The Director (Father I Farnandez) queried the members of the staff including Dr. K. Sthalekar and Dr. Abhilasha Chaturvedi who in writing refuted that there took place any interchange. It was also stated that when Mrs. Bharti's placenta was cut the sex of her babies was also declared and she was shown the babies and that likewise immediately on birth the baby delivered by Smt. Alka Sachdeo had been shown to her. The Director replied to Sri Baldev Raj in writing on the 20th itself that after conducting the necessary queries he had found that there was no exchange of babies. He also pointed that paternity tests are not conducted in that Hospital and advised that the petitioner may if so desired get the blood test of the twin babies done. Sri Baldev Raj lodged First Information Report at about 5.45 p.m. on 20-11-81 without reference to any other fact in this connection. In the Nagar Mahapalika record the reports recorded regarding the male child by the brother of Sudesh Sachdeo and of the female children by the Administrator of the Hospital were on the same pattern. In the Petition No. 206 of 1981 dt. 16-12-1981 filed under the Guardians and Wards Act, Sri Baldev Raj had this to say in support of his claim vide para 1:-

> "The faces of these two babies are totally different and the so-called first female child was premature and the second female child was normal or mature. The face of the second child given to the petitioner was similar to the male child given to Smt. Sachdeo. Moreover, the face of the male child is similar to the daughter of the petitioner born in Nazareth Hospital on 21-1-81."

21. In the application made on 27th Jan. 1981, for amendment in the above petition, the narration of Sri Baldev Raj was that Smt. Shanti the Sweeperess had come out and asked for sweets and gifts and further vide para 16 :-

> "that after some time the Sweeperess Shanti came out of the Delivery Room and gave female babies to the petitioner's sister. The petitioner asked Shanti why she was asking sweets and gifts. She said that there has been a mistake. The petitioner's sister took the babies to the General Ward. After some time the petitioner's wife was brought to bed No. 10 where she saw the two female babies and was in doubt as according to her she had a slight glance at baby as male baby while Dr. Abhilasha gave him to Dr. K. Sthalekar. The petitioner could not believe this because of the Mission Hospital and weak health of his wife.'

22. In para 19 he again refers to the facial resemblance and says that he attributed this to the act of God and kept satisfied as he could not doubt of any illegal act at a Hospital run by the Mission people. On Nov. 19, according to him, he heard a person (whose identity was not disclosed) saying at the Hospital gate that on the night of the 16th preceding babies were changed in the Labour room. This, it is added, aroused his suspicion and it was confirmed by Smt. Shanti (the sweeperess) and Km. Usha a nurse in confidence. The twins in the petitioner's custody, as mentioned above, died on Nov. 23, 1981, without any blood test being got done. It may be said that the child should be preferably at least six months' of age, and certainly more than two months of age before testing is performed. The Criminal Branch of the Criminal Investigation Department, it appears, interrogated the Director, Dr. Sthalekar, Dr. A, Chaturvedi, Sister Shalini, Smt. Shanti besides the members of the Sachdeo family, the petitioner and Sri Baldev Raj. To them the version given by the Hospital staff remains the same. Sri Baldev Raj states that on his move, the State Government has written to the Government of India on July 11, 1985, saying that there is no objection if this case be entrusted to the C.B.I, so that blood tests and other relevant tests to establish the parentage of the disputed baby with the two sets of parents on either side may be done. This, according to him, remains pending with the Interpol Wing of the C.B.I. The child at present is in Canada with his alleged adoptive parents the validity of the adoption remains under challenge in the civil proceeding. In para 11 of the present writ petition filed after much water has flowed (down) the river, it is recited that when the petitioner delivered the first baby, she got "a slight glimpse of the organ of the baby who probably was a male baby".

23. Upon careful perusal of these bare facts, 1 am unable to accept that a case is made out at this stage to direct production of the child to undergo the blood test. It is up to the petitioner to lay the requisite foundation for such a claim. The petitioner might be having doubts; this may even be *bona fide* on the subjective plane but the speculative possibility definitely has not attained the level of *prima facie* proof. There was opportunity accorded to the petitioner in this behalf right from the inception of this lis but unfortunately it has not been thought fit all the time to avail of the same. It does not appear to be realized that on entering into the arena and after giving evidence from her side the petitioner will as well have the chance to cross-examine members of the Hospital Staff and as the years roll by that serves only to weaken the testimonial credibility of the concerned witnesses. The petitioner does not also seem conscious of the benefit of presumption which may in a given situation he had in view of Section 114 of the Evidence Act. It would be hazardous, in my view, if on the mere expression of doubts at a subjective level, the Court were to require a child and those claiming to be his parents to submit themselves to blood lest. The dominant factor after all is not the rights of the warring parties but the protection of the rights of a child as a human being. Their Lordships of the Supreme Court in *Rosy Jacab v. Jackob A. Chakramakkal,* [8] expressed their entire agreement with Maharajan J. (Madras High Court) in his view that in proceedings under the Guardians and Wards Act, "the controlling consideration governing the custody of the children is the welfare of the children concerned and not the right of their parents."

24. Sri Baldev Raj has made submissions based on the efficacy of blood test in a disputed case of paternity. The principles governing the exclusion of paternity blood testing have been authoritatively stated to be :-

> (i) a blood group antigen cannot be present in a child unless it is also present in at least one parent;
> (ii) if one parent possesses a homozygous allelic gene pair, then that gene must be conferred on all his or her offspring.

25. The blood group antigens are contained in a number of systems, each system containing a number of allelic pairs. The value of a system, according to Forensic Medicine for Lawyers (J.K. Mason) 1983 at p. 184, depends on several factors - the number of allelic pairs it contains, the relative distribution

of the genes in the population and, not least important, the case with which its comparent antigens can be demonstrated.

26. Under the Family Law Reforms Act, 1969, in England Section 20 provides that in any civil proceedings in which paternity of any person falls to be determined by the Court, it may give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of that person. If a person fails to comply with instructions of the Court to provide a blood sample, the Court may draw such inference from this fact as appears proper in the circumstances (S. 23) (Glacier's Medical Jurisprudence and Toxicology (13th Ed.) p. 356. There are then the Blood Tests (Evidence of Paternity) Regulations, 1971, which provide *inter alia* that where the person having the care and control of a disabled subject, does not consent to the taking of a sample, he may record on the direction his reasons and there can be no compulsion in this behalf. No such specific statutory provision exists in our country, however, in an appropriate case presumption is available under Section 114 of the Evidence Act.

27. The authorities are uniform in observing that Wood test is efficacious on the negative side in excluding a particular parentage. Modi : Medical Jurisprudence (1977) p. 93 observes that by using blood group systems - ABO, MNS or Rh there is over 80% chance of excluding the wrong suspected father or mother of a particular child. Learned author appends a note of caution that "in all such tests one can exclude the possibility of one being a parent, but it cannot be stated that one must be the parent of the child". In the Essentials of Forensic Medicine and Toxicology : Dr. K. S. Narayan Reddy (4th Ed.) p. 308 cited for the petitioner it is pointed that these tests have their limitations since they may exclude a certain person as the possible father of the child but they cannot definitely establish paternity. They can only indicate its possibilities. In Legal Aspects of Medical Practice : Bernard Knight (1976) p. 190 the observation is that blood tests are purely an exclusory procedure and can never indicate that a given man is the father of a given child. According to Forensic Medicine : Sir Sydney Smith and Fredrick Smith Fiddes (10th Ed.), grouping tests can never establish a paternity; they may show that an alleged paternity is impossible. Using the full range of blood groups will exonerate 75% of the wrongly accused men.

28. Discussing the evidential value of blood tests for determining paternity, Rayden on Divorce, ((1983) Vol. I) p. 1054 has this to say -

"Medical Science is able to analyze 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 that 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 given 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."

29. Where the Court gives a direction for the use of blood tests and any person fails to take any step required of him for the purpose of giving effect to the direction, the Court may draw such inferences, if any, from that fact as appear proper in the circumstances, (p. 1063). Taylor's Medical Jurisprudence (1984) p. 107 cited by Sri P. Basu, also refers to the inference permissible from the failure to comply with a direction as a matter of tactics if it thinks right to do so in the circumstances. Learned author points out that before any blood groups system can be employed in the investigation of paternity problems certain criteria must be met :

1. The blood group must be simply inherited and the mode of inheritance known with certainty.
2. It must be adequately developed at birth or soon after.
3. It must be permanent throughout life.
4. It must be unaffected by climate, age, disease or by any other environmental or genetical condition.

30. At p. 110 the comment on referring to the dates collected is that there is a

considerable element of chance and that there are cases in which it is accepted that one of two men is the father, but neither is excluded. Further, it is stated that though between 1969 and 1979 nine additional systems were added in the range of systems investigated but the percentage of men shown not to be the father did not increase but the proportion of cases in which other possible fathers were shown to be below 4% increased from 9 to 39%. Sri Baldev Raj seeks HLA system to be adopted about which the opinion in Taylor (supra) at p. 109 is :-
"The HLA system consists of a series of antigens present on the lymphocytes. The chance of excluding a falsely accused man using a comprehensive range of HLA genetic markers is 96%. This high exclusion rate makes it a most attractive system for use in paternity problems but a number of practical difficulties limit its usefulness. Quite a large sample of blood (approximately 5 ml.) is needed in order to isolate a suitable lymphocyte fraction, which would prevent testing on many samples obtained from small babies. Another drawback is the short life span of the lymphocytes so that many samples received by post are unsuitable for testing. The initial cost of acquiring the necessary antis era and ancillary equipment is high, and to ensure accurate result the investigator must have a wide experience of HLA testing."

31. The research made by the learned author certainly deserves respect. In *Holmes v. Holmes,* [9] relied for the petitioner, the finding was that both the husband and the wife were blood group O, and the child was blood group A2, which made it plain that the husband could not be the father of that child because the child was to get the A2 group from his father.

31A. The evidential value of blood test arose before the House of Lords for consideration in the context of legitimacy of the child in *S (An Infant) v. W reported in*[10] . Lord Reid thus opined :-

> "Before considering the arguments for or against ordering a blood test I think it necessary to have in mind its evidential value. Blood tests have now been used extensively for many years in many countries and it is now generally recognised that, if a test is properly carried out by a competent serologist, its results are fully reliable. I think it is now common knowledge that blood is a very complex substance, that different

persons' blood may have a variety of different constituents or characteristics, and that those constituents or characteristics must have been derived from one or other parent I suppose that there can be mutations of the kinds that are found throughout the animal and vegetable kingdoms. But mutations are so rare that their possibility can be neglected, because we are not looking for absolute certainty but only a sufficient degree oi probability. So if it is found that a child's blood has some constituent or characteristic that is absent from the blood of both husband and wife the husband cannot be the father: the child must have derived that constituent or characteristic from "some other man who was its father."

32. 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.

33. Emphasis was considerably laid by Sri Baldev Raj on the decision of a learned single Judge reported in *Km. Manju v. Mohd. Yasin*,[11] on which he relies as the sheet anchor of his case. A careful perusal shows that the direction therein given for the blood test proceeded on its own facts and there is no principle as such laid down for general application. The question considered was whether Km. Manju alias Shahnaz Begum aged about 6 to 8 years had to be given in the custody of Dina Nath during the pendency of the trial of Kamla and Smt. Shyampati under Section 363A, Penal Code in the exercise of the inherent powers of this Court. The learned Judge observed that "as it was not possible for Km. Manju alias Shahnaz Begum to state correctly whether Dina

Nath and Smt. Phoola Devi were parents or Mohd. Yasin and his wife Smt. Noorjahan were her parents it was considered necessary to determine her parentage by the performance of blood test." This alone, therefore, constitutes the rationale for the direction given therein. It is of significance as this Court noticed, that both the A.B.O. group blood test and the M and N group blood test proved futile as according to the test both Mohd. Yasin and Smt. Noorjahan and Dina Nath and Smt. Phoola Devi could be the parents of the girl. The Court had, therefore, to discard this and decide the question on other facts and circumstances (see para 9). Conscious of this, Sri Baldev Raj suggests that the Court ought to have directed M.A.L. test which, he feels, could be more effective. It is obvious that in a case as the present where the other side relies strongly on the material available on the record and the petitioner has despite repeated directions refrained from giving evidence in proof of her right to the child, there can be no blood test directed on the authority aforesaid side-tracking the facts and circumstances hereof. The decision is not an authority for the proposition that the considerations which have impelled in the present refusal to accede to the prayer of the petitioner thus far are irrelevant or of no consequence.

34. Lastly, it was argued for the petitioner that the respondents concerned are not submitting before the trial Court satisfactory evidence regarding the identity of the child whose health they have been reporting to the Court in terms of the order of the District Judge dt. 1-2-1982. The Court below must scrutinize this and consider on merit the objection such as is reasonable and legitimate, but not frivolous or vexatious. It is true too that the matter has been pending in the Court below now for pretty long time. The three cases have presumably been transferred by the District Judge to the same Court. If not done so far this should now be done. No effective progress is possible unless the parties reconcile themselves to the existing directions and decide to fight out with due deference thereto. The parties shall appear in the Court below accordingly on Feb. 15, 1985, or such other date as the Court fixes soon thereafter and the Court shall, as far as possible, dispose of these cases within three months thereafter, avoiding in the process to grant adjournment to either side save upon exceptional grounds to be recorded.

35. There is no other point argued in connection with these applications before

me.

36. The applications are accordingly rejected.

Applications dismissed.

Cases Referred.

1. (1981) 2 SCC 427
2. AIR 1961 SC 1457
3. AIR 1967 SC 1335
4. AIR 1966 Pun 51
5. AIR 1984 SC 469
6. AIR 1964 SC 993
7. 1984 Cri LJ 289
8. (1973) 1 SCC 840: AIR 1973 SC 2090
9. (1966) 1 WLR 187
10. 1970) 3 WLR 366
11. 1982 All LJ 936,