

Chapter-VI

Judicial Response & DNA Technology

This section will analyze various important decisions of the Supreme Court and High courts of India in order to provide a comprehensive understanding of the application of the DNA technique in matters of evidence and the law in its present scenario in India.

1. Judgement delivered by supreme court of India

(1) Goutam Kundu v. State of West Bengal (A paternity dispute)²³²

Legal provisions involved:

Section 112 of Indian Evidence Act

Section 125 of Code of Criminal Procedure

In this case the appellant claimed a DNA test in order to establish that he was not the father of the child in order to consequently absolve him of paying maintenance to mother and child under Section 125 of the Criminal Procedure Code.

The Court held:

- That Courts in India cannot order blood tests as a matter of course;
- Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
- There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.
- 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 the child illegitimate and the mother an unchaste woman?
- No one can be compelled to give a sample of blood for analysis.

²³² AIR 1993 SC 2295, 1993 Cri. LJ 3233, 1993 SCC 418, 1993 AIR SCW 2325

2) In Mr. X v. Hospital ²³³(conflict between right to life and right to privacy)

Constitution of India- Article 21

The Supreme court was confronted with the task of striking a balance between two conflicting fundamental rights; the AIDS patient's right to life which included his right to privacy and confidentiality of his medical condition, and the right of the lady to whom he was engaged to lead a healthy life.

The Supreme Court concluded that,

Since the life of the fiancés would be endangered by her marriage and consequent conjugal relations with an AIDS victim, she was entitled to information regarding the medical condition of the man she was about to marry and that there was no infringement of the right to privacy.

3) Sharad v. Dharmapal²³⁴ (divorce proceeding and medical examination/DNA testing/power of the court to compel medical examination)

In a very important and recent judgment delivered by the Hon'ble Supreme court of India in the case of Sharda v. Dharampal, where the core question was, whether a party to a divorce proceeding can be compelled to a medical examination. In this case the Respondent on the ground that such an order violates his right to privacy opposed an order for DNA test. The three Judge Bench of the Hon'ble Supreme court held that: "If for arriving at the satisfaction of the Court and to protect the right of a party to the lis who may otherwise be found to be incapable of protecting his own interest, the court passes an appropriate order, the question of such action being violative of Art. 21 of the Constitution of India would not arise. The court having regard to Art. 21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected." It further held that if respondent avoids such medical examination on the ground that it violates his/her right to privacy or for a matter right to personal liberty as enshrined under Art. 21 of the constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It was

²³³ AIR 1999 SC 495 ;1998 SCW 3662

²³⁴ AIR 2003 SC 3450.

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

Provisions of law discussed:

Hindu Marriage Act 1955, Section 5, 12(1) (b) and 13(1) iii.

Civil Procedure code 1908 Section 151 and order XXXII, RULE 15.

Lunacy Act 1912 section 41.

Constitution of India Article 21 –Right to Privacy (in matrimonial proceeding, read with section 12 and 13 of Hindu Marriage Act)

Legal issues involved: whether a party to divorce proceeding can be compelled to a medical examination?

Whether there is a breach of right to privacy guaranteed by Indian Constitution under Article 21?

Judicial interpretation:

However, as a corollary to the decision in Goutam Kundu²³⁵ in this case the Supreme Court held that:

Supreme Court in divorce proceedings considered the question of compulsion to undergo medical examination and held that it was well within the power of the Court to compel such examination

- A matrimonial Court has the power to order a person to undergo a medical test. Either at the instance of a party or suo motu. Party not entitled to Constitutional protection under Article 20 of constitution of India in civil litigation

²³⁵ AIR 1993 SCC 2295

- Inherent power of court to be exercised for complete justice to parties(though the specific provision In this regard has not been mentioned in C.P.C. and Evidence act-in the interest of child it is to be made)
- Passing of such an order by the Court would not be in violation of the right to personal liberty or the right to privacy under Art.21 of the Constitution.
- Order for test may be passed if strong prima facie case is made out.
- It is pertinent to note here that through no person can be compelled to give a sample of blood against his or her will and no adverse inference can be drawn against him for this refusal, in case of divorce proceeding before a matrimonial Court, the Court can order an individual to submit himself to medical examination and in case of refusal, can draw an adverse inference from his refusal.

Judicial pronouncement: Appeal dismissed.

5) Kamalnath and others v. St. Of Tamilnadu ²³⁶

(Reliability /admissibility of expert evidence/rape and murder case)

One instance of the application of DNA profiling/fingerprinting evidence being used to convict the accused persons can be seen in this sensational case involved the rape and murder of several teenage girls in the Ashram of a god-man Premananda alias Ravi,

In a lengthy judgment the Madras High Court considered 4 important questions:-

1. Whether the DNA evidence is generally accepted by the scientific community?
2. Whether the testing procedure used in this case is generally accepted as reliable, if performed properly?
3. Whether the tests were performed properly in this case?
4. Whether the conclusion reached in this case is acceptable?

²³⁶ 2005 (2) SCC (cri.) 1121, 2005(4) SCJ 724 SC

Judicial pronouncement: Appeal dismissed.

“.....having regarded to the amplitude of gravity of the offence, perpetrated in the organized and systematic manner, the nature of the offence and its deleterious effect not only against the victim, but the civilized society at large needs to be curb by strong judicial hands. We are inclined to confirm the sentence and conviction as recorded by the trial court and confirmed by the High court...”²³⁹

Judicial interpretation: Section 45 Indian Evidence Act:

- 1) DNA test conducted. Evidence of the private doctor not acceptable in the phase of DNA test.
- 2) DNA test carried out by Expert Accepted. Dr. Lalji Singh , Deputy Director, C.C.M.B.Hyderabad was examined as P.W. 59 as an Expert in this case.

The Supreme Court has relied on the expert evidence on DNA evidence that has stated that out of 3.3 billion base pairs only about 3 million vary from person to person. i.e. % DNA is useful for analysis.

The accused were convicted and sentenced to imprisonment.

- (6) Kamti Devi v. Poshni Ram.²⁴⁰(Civil dispute relating to paternity)

Legal provisions involved:

Section 112 of Indian Evidence Act

In the facts of this case the respondent was the husband of the appellant. After fifteen years after marriage the appellant gave birth to a child. The respondent filed a civil suit for declaration that he was not the father of the said child. Though the issue was not directly in issue in the instant case, the Supreme Court opined that even a DNA test that indicated that the respondent was not the father of the child would not be

²³⁹ Para 79 of Supreme Court Judgment in Kamalantha's case.

²⁴⁰ AIR 2001 SC 2226 (The first reported paternity case of DNA typing is in re Baby Girl. Another important case of inheritance is Alexander Valexander where an illegitimate child claiming an inheritance permits it to disinterment for a DNA test. Similar enthusiasm to resolve questions of paternity have embrace DNA analysis in King v. Tanner where the Court granted summary judgment for defendant alleged to have slandered married man by asserting that he fathered her child.)

enough to rebut the conclusiveness of the marriage as proof of legitimacy of the child. The Court held that the only way of rebutting the conclusive proof provision would be to adduce evidence of non-access.²⁴¹

That case concerned DNA evidence but the Supreme Court refused to permit the evidence on the ground that except non-access no other evidence is permissible to prove that a person is not the father.

Judicial Interpretation:

Permissibility of DNA test unless non-access proved

DNA test results are scientifically accurate.

Appeal was dismissed.

7) Dwarika Prasad Satpathy v. Bidyut Prava Dixit.²⁴²

(An adverse inference could be drawn if the party refuses to undergo a DNA test)

This decision of the Supreme Court has also been followed in the case of K. Selvaraj v. P. Jayakumari²⁴³

And it was also stated that an adverse inference could be drawn if the party refuses to undergo a DNA test. The point of adverse inference is also referred to in another case Sadashiv Mallikarjun Kheradkar v. Nandini Sadashiv Mallikarjun Kheradkar²⁴⁴. This seems to be a preferable interpretation and strikes a balance between the two extremes. The Court does not have the power to direct the giving of a sample, but if it is not given the Court may draw an adverse inference.

Section 125 of Cr.P.C.

²⁴¹ See Arukumar v. Turaka Kondalal 1998 Cri. L. J.4279 Where a single locus probe RFLP AND STR analysis was carried out to prove the paternity of the child in Kanti Devi v. Poshi Ram, AIR 2001 SC 2266: 2001 Cri LJ 2615. Judgment of the Supreme Court in 1993 also highlighted the fact that there is no provision in Indian laws to force or compel people to undergo blood tests or any other type of DNA testing. (Ibid AIR 2001 SC 2266: 2001 Cri LJ 2615

²⁴² 2000 Cri LJ 1 : AIR 1999 SC 3348, 1999 (3) ACR 732 SC

²⁴³ 2000 Cri LJ 4748 (Kerala

²⁴⁴ 1995 Cri LJ 4090 (Bom

Claim of maintenance was made by wife for herself and child, Petitioner disputed on paternity of child.

Wife asked for DNA test. Petitioner showed unwillingness for the same.

Court observed that if the Magistrate is prima facie satisfied regarding performance of marriage the maintenance is payable.

Judicial Interpretation:

Unwillingness for DNA test means appealant was disentitled to dispute paternity.

8) Smt. Dukhlar Jahan ²⁴⁵

Supreme court relying upon its judgment in Smt. Dukhlar Jahan observed that such a test should not be directed for upholding the legitimacy of a child unless the facts are compulsive and clinching as to necessarily warrant a finding that a child could not at all have been begotten to the father and such a legitimating of the child would result in rank injustice to the father.

The Apex Court further remarked Courts have always desisted from lightly or hastily rendering a verdict and that too on the basis of slender materials which will have the effect of branding a child as a bastard and its mother unchaste woman.

9) Banarsi Das V. Mrs. Teeku Dutta and Others²⁴⁶

(Succession dispute and DNA test)

Legal issues:

Evidence Act Section 45-DNA Test-order for propriety,

Case under section 372 Indian Succession Act-Parentage of daughter- Applicant denied- Applicant seeking blood test of alleged daughter.

²⁴⁵ AIR 1987 SC 1049

²⁴⁶ 2005 (52) A Cri C 481 SC

Application allowed by the trial court Set aside by High Court. (No one can be compelled to give evidence against himself. It violates Article 20(3) of the constitution. Article 21, right to privacy).no compulsion to give sample of blood for analysis.²⁴⁷

Petition to Supreme Court was filed.

Held, Grant of succession certificate does not establish the title of grantee as the heir of the deceased, but only furnishes the authority to collect his debts.

It is for parties to produce evidence to prove their claims.

The core question involved in the appeal was whether a direction for DNA test can be given in a proceeding for issuance of succession certificate under Indian Succession Act, 1925

Provisions of law discussed:

Indian Evidence act 1872. Section 45,112, 4

Indian Succession Act 1925- Section 372

Code of Civil Procedure 1908, Section 151

Judicial pronouncement:

Direction for DNA test as was given by Trial court is clearly unsuitable and High Court has rightly set it aside.

Appeal Dismissed.

“.....We may remember that Section 112 of Indian Evidence Act was enacted at a time when the modern scientific advancement with DNA and RNA test were not even in contemplation of Legislature. The result of the genuine DNA test is said to be scientifically accurate. But that is not enough to escape from the conclusiveness of the section 112 of the Act, e.i. if a husband and wife were living together during the time of

²⁴⁷ AIR 2004 del 205

conception, but the DNA test reveals that the child was not born to the husband, the conclusiveness in law would remain irrebuttable.....(see Komti devi v.Poshiram, 2001, (5) SCC 311)......”

Judicial interpretation: DNA test to be directed only in deserving cases and not as a matter of routine.

10) Narinder Singh Bogarh V. State Of Punjab²⁴⁸

(A murder case)

Section 166-B of Criminal procedure Court

Narinder singh was suspected of murdering his wife Mrs. Sminder Kuar in Canada. Blood of suspect found during the investigation in Canada. Request made by the Canadian Government to obtain statement of suspect residing in India as well as taking his blood sample voluntarily for DNA analysis. Suspect was not volunteering.

Held, that if the appellant is not willing to make any statement to give his blood samples, the C.B.I. can not take the recourse to section 166-B of the Code of Criminal Procedure because that is not the request of the Canadian Government.

Order of the lower Court for giving statement and blood test was set aside and Petition was allowed.

Judicial Interpretation: Taking of blood sample voluntarily for DNA analysis and if suspect not volunteering C.B.I. can not ask the recourse to section 166-B, Cr.P.C. 1973.

11) Nirmaljit Kaur V. State Of Punjab and Others²⁴⁹

Provisions of law discussed : Guardians and Wards Act 1890 Section 25

Hindu succession Act 1925 Section 63, 192, 193, 194

Hindu Minority and Guardianship Act, 1956

²⁴⁸ 2004 (2) Crimes 166, 2004, Cri.LJ 1446 SC

²⁴⁹ (2005) 8 SLT 755

DNA test proved that the child produced before the court was not the child of the petitioner.

2. High court decisions

12) In the case of CBI v. Santosh Kumar Singh²⁵⁰ (rape and murder case)

DNA evidence was sought to prove that the deceased had been raped.²⁵¹ There existed a possibility of tampering with the samples that were sent for DNA testing. The burden was on the State to show that the samples had not been tampered with.

13) M. V. Mahesh v. State of Karnataka ²⁵² (malpractices or irregularities in the scientific processes)

The Court acquitted the accused, one of the grounds being that the requisite amount of DNA of high molecular weight was not present so as to make the test results sufficiently conclusive and accurate. The Court further went on to say that the DNA test was not a fool proof one and also commented on the fact that there were no national standards set or established for DNA testing in India.

Such scrutiny of the DNA testing procedure is commendable and any benefit of doubt arising from malpractices or irregularities in the scientific processes involved ought to go to the accused.

14) Sadashiv Mallikarjun Khedarkar v. Nandini Sadashiv Khedarkar, ²⁵³ (case of adultery, maintenance and paternity, court can direct and cannot compel a person to give blood sample)

²⁵⁰ AIR 1994 SC 786

²⁵¹ The defense submitted that it was a malicious attempt to connect the accused with the DNA profile. When the science and other evidences are present at the scene of the crime were not suggestive of sexual intercourse, the presence of the semen on the vaginal swab and the underwear of the deceased was not believable. , When the underwear was sent for the testing, white stains were found on it, but during the post-mortem examination the report had clearly indicated that no such stains had been found on the underwear. The absence of the stains during the post mortem and presence during the examination at the laboratory was caused for further doubt. The state had to satisfy the court that correct laboratory procedure , protocol and quality control had been exercised .The DNA evidence adduce in the case was held inadmissible and was rejected.

²⁵² 1996 Cri LJ221 (Kant),

²⁵³ 1995 Cri. L. J. 4090(Bom) 4093

Bombay High Court in the case of Sadashiv Malikarjun Kheradkar v. Smt. Nandini Sadashiv Kheradkar, it was further held that the Court has power to direct blood examination but it should not be done as a matter of course or to have a roving inquiry. The Bombay High court even felt that there should be a suitable amendment by the Legislature and after nothing that no body can be compelled to give blood sample, it was held that the Court can give a direction but cannot compel giving of blood sample.

R.J. Vidyanath J.Observed as under –

“There may be instances where the husband and wife are living together and the wife may have gone astray and then delivered a child through illicit connection. But in the view of legal presumption under sec-112 of Indian Evidence Act the husband cannot be allowed to prove that the child is not born to him since husband and wife are living together, even if it is proved that wife had some illicit relationship with another person. What should be done in such a case is a question death has cropped up in my mind ... but if we go by rigor or presumption under Sec-112 of the Evidence Act no husband can be permitted to prove that the child born to the wife is not his, if the husband and wife ere together even if wife is proved to be living in adultery. in some cases it has been held that the Courts are seized to inherent powers, which can be exercised ex debito justitiae.”

Bombay High Court has also lamented the absurdity of having only proof of non-access when DNA evidence can decide the matter in a more scientific manner.

15) Arukumar v. Turaka Kondalal Ro²⁵⁴

(Where a single locus probe RFLP AND STR analysis was carried out to prove the paternity of the child)

The court pronounced that.....

“.....In India DNA fingerprinting and analysis has been widely used in paternity cases in this section of the project, several interesting issues will be dealt with.

²⁵⁴ 1998 Cri.L. J.4279

Prominent among these is the effect of the new developments in forensic in the form of DNA profiling/fingerprinting and the case for an amendment to S.112 of the Indian Evidence Act dealing with conclusive proof in paternity cases. The other major issue with respect to paternity cases, on which there is much conflicting case, law deals with whether the Courts can direct one of the parties to give a sample of DNA and the effect of refusal to undergo a DNA test. This has obvious constitutional implications.....”

16) Syed Mohammad Ghouse v. Noorunnissa Begum²⁵⁵

Section 125 of Criminal Procedure Code.

Claim for maintenance of wife and child was made.

The Andhra Pradesh High Court held that the respondent in this case was under no compulsion to submit to a DNA test.

Before ordering the blood test either for DNA or other test court has to consider the facts and circumstances of the given case and the ramification of such an order.

But the court cannot compel a person to give the sample of blood. However if that person refuses to give blood sample without any valid reason the court is at liberty to draw the inference as a necessary corollary in sequel there of.

17) Kanchan Bedi v. Gurpreet Singh Bedi²⁵⁶

(Parents patria jurisdiction of Court was invoked)

However there have been several High Court cases that have distinguished Kundu's case while dealing with cases of DNA testing and paternity.

In the case of Mrs. Kanchan Bedi v. Shri Gurpreet Singh Bedi Where the parentage of the *infant was in question*, and the application filed by the mother for conducting DNA test was vehemently opposed by the father contending that it would violate his rights.

²⁵⁵ 2001 Cri LJ 2028

²⁵⁶ 2003 (103) Delhi LT 165, AIR 2003 Delhi 446

The defendant denied that any marriage had taken place between him and the plaintiff, and therefore he was not the father of the child. A DNA test was demanded to determine the paternity of the child and the direction of the Court with respect to the DNA test was challenged. Kundu's case was distinguished on facts²⁵⁷ and on the ground that the future of a minor infant was in question and the Court's parens patriae jurisdiction had been invoked in this regard.

Hon'ble Vikramjit Sen, J. held that: "it appears to me to be difficult to resist that the law, as it presently stands, does not contemplate any impediment or violation of rights in directing persons to submit themselves for DNA test, especially where the parentage of a child is in controversy for the grant of maintenance. It was further held that where the parentage of a child is in controversy for the grant of maintenance, parties submitting themselves for the DNA test is not violation of rights...."

18) Geeta Dahi v. NCT of Delhi (DB)²⁵⁸

(DNA test was conducted on the fetus of the rape victim)

Hon'ble Supreme Court in the case of Geeta Dahi v. NCT of Delhi (DB), where a Division Bench of Hon'ble Supreme Court had ordered that a DNA test be conducted on a foetus of a rape victim. Hon'ble Vikramjit Sen, J. distinguished this case from the case of Goutam Kundu v. State of West Bengal, ²⁵⁹, where it was held that "wife cannot be forced to give blood sample and no adverse inference against her for this refusal"

19) Sajeera v. P.K. Salim²⁶⁰

A direction to undergo a DNA test was given.

Paternity dispute.

Section 112 of evidence Act.

²⁵⁷ The difference being that in the facts of Kundu's case the marriage of the spouses was admitted in the possible reason for the decision was that the legitimacy of the child was presumed and the subjection of the wife to a test was an attempt to "outrage her modesty".

²⁵⁸ 1997(1) JCC 101

²⁵⁹ 1993 Cri LJ 3233; AIR 1993 SC 2295

²⁶⁰ 2000 Cri L J 1208 (Ker).

For proof of paternity, blood test is an important piece of evidence to determine paternity. Negative finding in blood test is definite. Positive finding indicates a possibility. But no person can be compelled to give blood for testing.

Blood test is ordered if strong prima facie case of non-access by husband to wife is established.

However in this case it was already admitted by the mother that the child was born out of wedlock and there had been an illicit relationship. (With the brother of the husband residing in the same house, husband living in foreign country.) Moreover the Respondent had expressed willingness to undergo the test at the petitioner's cost and there was no question of compulsion.

20) *Alika Khosala v. Thomas Mathew*²⁶¹

No, question of compulsion would arise in case of preserved foetus and directions to conduct paternity test can be made.

It has been held by the Supreme Court that refusal to undergo a paternity (DNA) test would bar a party from challenging the paternity of the child.

21) *K. Selvaraj v. P. Jayakumari*²⁶² (Adverse inference can be drawn when the party refuses to undergo the DNA test)

An adverse inference could be drawn if the party refuses to undergo a DNA test.²⁶³ This seems to be a preferable interpretation and strikes a balance between the two extremes. The Court does not have the power to direct the giving of a sample, but if it is not given the Court may draw an adverse inference.

22) *Perumal Nadar v. Ponnu Swami*²⁶⁴

²⁶¹ 2000 cri.l.j. 1208(ker) manu/de/2001,

²⁶² 2000 Cri LJ 4748 (Kerala)

²⁶³ 1995 Cri LJ 4090 (Bom) (The point of adverse inference is also referred to in another case *Sadashiv Mallikarjun Kheradkar v. Nandini Sadashiv Mallikarjun Kheradkar v. Nandini Sadashiv Kheradkar*

²⁶⁴ Air 1971 Sc2352 and *Amathyeev. Kumare Sain* Air 1967 Sc 549 and *Baldev raj Meghani v. Urmila Meghani* Air 1979 sc 879

It was held that.....Irresistible inference is a presumption juris at de jure and being little less than “shall presume” under sec-3 of the Indian Evidence Act.

“Blood test cannot show positively any man is the father but can show positively that a given man could or could not be the father. It is obviously the latter aspect that puts the blood test as the most valuable in determining the paternity.

23) Raghunath v. Shardabai ²⁶⁵

Bombay H.C. observed that blood grouping tests have their limitations, as they cannot possibly establish paternity, but can only indicate possibilities.

24) Vasu v. Santha, ²⁶⁶

The Kerala High Court Had held that taking of a blood sample is a constraint on personal liberty and cannot be carried out without consent. The Madras High Court relying upon a very old case had laid down that it appears doubtful whether such a compulsion can be made even under legislation. It also questioned the power of a guardian ad litem to give consent in such cases.

25) Bharu Raj v. Sumesh Sachdeo ²⁶⁷

Realizing the value of such tests for determining paternity, maternity, and fixing identities, a Bench of Allahabad High court in Bharu Raj v. Sumesh Sachdeo, held that such a test puts a child on the anvil of legitimacy and illegitimacy and therefore it would be unjust and not fair either to direct a test for collateral reason to assist a litigant in his or her claim. He Hon'ble Allahabad High Court further held that the child could not be allowed to suffer because of his incapacity and that if in a case the Court has reasons to believe that the application for blood test is of fishing nature or was made for some ulterior motive it would be justified in not acceding to such a prayer.

²⁶⁵ AIR 1986 Bombay 386

²⁶⁶ 1975 Ker LT 533

²⁶⁷ AIR 1986 All 259

26) State v. Sheshappa Dudhappa Tambade²⁶⁸

“.....the true character of the legislation has to be ascertained when a provision of law is impugned on the ground that it is ultra virus, the power of the legislature which enacted it or that it is violation of the rights guaranteed by the constitution, having regard to the nature of enactment as a whole to its objects.

27) Bipin Chandra Shantilal Bhattv. Madhuriben Bhat²⁶⁹

(Forced medical test cannot be ordered.-Article -21)

No adverse inference can be drawn against a person refusing to submit for blood test.

‘.....an individual can be deprived of his life or personal liberty only by action of the state either under the provision of any penal enactment or in the exercise of any other coercive process vested in it under law.....”. Further it was held that there must be some statutory provisions under which it would be open to the court to compel medical examination of a party thus restricting the enjoyment of personal liberty of that person.

28) krish Murthi Aiyer v. Govind Swami Palley²⁷⁰

It may be mentioned at the very outset that dealing with *civil cases*, Courts in India have adopted a trend that a party cannot be compelled to give sample of blood for blood group tests. Therefore such a sample cannot be collected against the will of such a person Courts in India have adopted this general trend, in the absence of any statutory law in this field.

29) Hargovinda Soni v. Ram Dularey,²⁷¹(Person can be compelled to give a sample of blood against consent)

(Rampal Singh.J.) The Madhya Pradesh High Court was categorically of the opinion that no person can be compelled to give a sample of blood against consent. In a case where a party does not consent for giving his sample for blood or DNA fingerprint

²⁶⁸ AIR 1964 Bom. 253

²⁶⁹ AIR 1963 Gujarat 250

²⁷⁰ AIR 1966 Mad.443

²⁷¹ AIR 1986 MP 57(62)

test, the maximum the Courts can do is to draw an adverse inference against that party for such refusal.

Indicating a gap in law on such question, a single Judge of Madras High Court had, however, held it long back ²⁷², that “there is no procedure either in the Civil Procedure Code or the Evidence Act which empowers the Court to enforce” the taking or giving of blood samples.

However, in some cases it has been held that the Courts are seized to inherent powers, which can be exercised *ex debito justitiae*. Following Madras High Court, the Bombay High Court²⁷³ was also of the considered opinion that though a Court can direct respondent to give blood sample, it cannot compel her to do so.

Bombay High Court, however, clearly held that the Court lacked powers in enforcing the giving of blood samples in case of failure to do so, even inspire, of the directions by the Court. It ultimately favored for merely drawing an adverse inference in case there was a clear dental for giving such samples.

30) R.P. Uloganambi v. K. C. Loganayaki ²⁷⁴

(No person can be compelled to give blood against his/her will)

The Madras High Court has gone to the extent holding that a party having consented to give such a sample on one stage of the proceedings can validly make a withdrawal of such an offer and the principle of estoppels (Section 115 of Evidence Act) would not come across.

The Apex Court upholding Madras High Court observed that it required to be carefully noted no person can be compelled to give sample of blood for analysis against (his or) her will and that no adverse inference can be drawn against (him or) her for such a refusal . What weighed the mind of the Apex Court appears to be the effect over the paternity of a child, since there was likelihood for terming him bastard.

31) Najabhai v. State of Gujarat²⁷⁵ :

²⁷² olavarupu Venkataswarlu v. Polavarappu Subbaya, AIR 1951 Madras 910.

²⁷³ Sadashiv Khedarkar v. SMT. Nandidni sadashiv Khedarkar ,Cr.L.J.1995 4090

²⁷⁴ 1986 Cr LJ 1522.

A single Judge of Gujarat High Court has held that the bar of Article 20(3) of the Constitution of India would extend with regard to compelling the accused to submit him to medical examination also.

32) *Ananth Kumar v. State* ²⁷⁶(Section 53 Of Cr. P.C. was discussed)

Referring to the powers conferred under Section 53, Cr. P.C. the Andhra Pradesh High Court has held that although there is no clear provision in Cr. P.C. for taking such blood samples yet there is no prohibition for taking such blood samples of an accused by exercising powers under Section 53 Cr. P.C. The Court observed that taking samples of blood and semen would come within the scope of examination of the person of the arrested person and therefore, “examination of a person by a medical practitioner must logically take in examination by testing his blood, sputum, semen, urine etc. The Court further held that Section 53 provides the use of such force as it reasonably necessary for making such an examination. Therefore, it held that whatever discomfort might be caused, when samples of blood of semen are taken from an arrested person, would be justified under the provision of Section 53 and 54 of Cr. P.C.

33) *Jamshed v. st. of U.P.* ²⁷⁷

On the other hand a Division Bench of Allahabad High Court dealing with a criminal case, was of the view that though there was no specific provision in Indian Law permitting taking of blood yet in a criminal case, an examination of person can be made under Section 53(1) of the Cr. P.C. which shall include the taking of blood samples, including an examination of an organ inside the body. The Court drew the aforesaid conclusion per force the provisions of Section 367 (1) and Section 482 of the Cr. P.C. It also held that there is nothing repulsive of shaking to conscience in taking the blood of an accused person in order to establish his

Guilt and so far as the question of causing hurt is concerned, even causing some pain may be permissible under Section 53, Cr. P.C.

²⁷⁵ ST1972 Cr. LJ 1605

²⁷⁶ *Ananth Kumar v. ST*

²⁷⁷ 1760 CR. LAW. J.1680

34) Polavarrappuvenkatasvarallu And Others V. Polavarrappu Subbaiya²⁷⁸

The Madras High Court relying upon a very old case had laid down that it appears doubtful whether such a compulsion can be made even under legislation. It also questioned the power of a guardian ad litem to give consent in such cases. It may be mentioned at the very outset that dealing with civil cases.²⁷⁹

35) Subayya Gounder v. Bhoopala Subramaniam²⁸⁰

It may be observed that in given circumstances, simply an adverse inference may not be of any consequences since such a process would tantamount the prevention of positive evidence before the Court. The law as laid down by Madras High Court in Subayya Gounder v. Bhoopala Subramaniam, 1959 Cri LJ 1087 was considered in the light of these circumstances, but that view was not disturbed by the Apex Court in Gautam Kundu.

36) State of Bombay v. Khthikalu²⁸¹

Apex Court in State of Bombay v. Khthikalu wherein, such examinations were held not included within the meaning of becoming a witness.

37) Patangi Balrama Venkata Ganesh And Others V. State Of A.P.²⁸²

Admissibility of Expert evidence in DNA test, Precaution must be taken while conducting DNA test in laboratory, need for quality control

Section 45 of Indian Evidence act.

Section 302,120-B, 449,307,149,138, 506, 397 of Indian Indian PENAL CODE.

Section 27(2), 25 (1-A) of Arms Act.

²⁷⁸ AIR 19951 Madras

²⁷⁹ State v. Sheshappa Dudhappa Tambade, AIR 1964 Bom. 253 and Bipin Chandra Shantilal Bhattv. Madhuriben Bhat AIR 1963 Gujrat 250. And Krishna Murthi Aiyer v. Govind Swami Palley , AIR 1966 Mad.443.

²⁸⁰ AIR 1959 Madras 396:

²⁸¹ 1961 (2) Cr LJ 856 SC : AIR 1961 SC 1809

²⁸² 2003 Cr. LJ4508(A.P.)

This case is related to murder of two persons, one the Member of Parliament and the other his gunman, the assistant left his pink shirt on the place of occurrence. The said shirt was sent to DNA expert to find out whether the shirt belonged to the suspected accused or not. The DNA expert's opinion was that blood stain found on the shirt tallied with the accused who also sustained injuries in the commission of crime.

It was held by the Court that report of the DNA expert (holding MS.C. Ph.d., POST DOCTORAL DEGREES IN Criminology and DNA technology) was fully admissible in evidence as it is a perfect science.

38) Anil Kumar V. Turaka Kondala Rao And Others²⁸³

Section 125 of Criminal Procedure code.

In this case the respondent had illicit relations with the mother of petitioner and the petitioner born out of their relations. Later on respondent denied his fatherhood of petitioner and made the allegation of respondent being in illicit relations of other person.

DNA test proved respondent –father to be a biological father of the petitioner.

Maintenance was granted from the date of petition on the basis of DNA Test.

39) Shaikh Fakruddin V. Shaikh Mohhamad Hasan and Others²⁸⁴

Section 112 of Evidence Act.

Birth of a child during continuance of valid marriage. Suit for perpetual injunction was filed. First defendant claiming to be the son of second defendant. Second defendant denied such relationship. First defendant requested for the DNA test of second defendant to establish his alleged relationship with second defendant. Second defendant alleging that first defendant was born after divorce of a mother of first defendant.

²⁸³ 1998 Cr.LJ 4279 (AP)

²⁸⁴ 2005 (4) CCC 522 (AP)

Held that dispute was purley of property and not of paternity.Paternity was an ancillary issue.

Judicial interpretation :

DNA test would amount to permitting the parties to lead evidence to rebut the conclusive proof.

40) Dharma Deo Yadav V. State Of U.P.²⁸⁵

Expert Evidence admitted, death penalty held Constitutional.

Legal provisions involved: section 235(2),354(3), 366,313 cr.P.c.

Section 27, 45 Indian Evidence Act

Murder of a foreigner lady Diana Clare Routley by a guide. skeleton of deceased recovered, blood sample of alleged father was tested and compared with the humerus and fumer bones of the deceased.it was found biologically related to the boneds of deceased.

Use of STR DNA test Téchnique.

Judicial interpretation:

1. Scope of error in DNA fingerprinting including malfunctioning of the instrument, human error and use of chemicals beyond expiry date, is one in 32 billion. Chief of the DNA fingerprinting laboratory had adopted test as Short /tandem Space repeats Analysis. Blood sample of alleged father was biologically related to the sources of humerus and fumer bones of the deceased. Because life imprisonment is rule and capital sentence is an exception, it was held as possible to prove murder, death penalty was held constitutional.
2. Brutally murder of a foreign tourist in India has tarnished and disgraced the image of country.
3. Death penalty be awarded when collective consequences of community is shocked.

²⁸⁵ 2005 (2) DNR(HC)675

41) Shailesh Munjal And Others V. All India Institute of Medical Science And Others.²⁸⁶

Consumer protection Act 1986, Section 2(1)(o) and 14.

Complainant's son was suffering from thalassaemia major. Mother advised by AIIMS doctors to under go chronic Villus Biopsy test. Mother was advised to go ahead with pregnancy on the basis of Fetal Diagnosis Reports. Son born was also suffering from same ailment. Contention of doctors that DNA technology may commit error up to 1-2 %Complaint was made against the AIIMS doctors for erroneous foetal diagnosis report. Complaint against doctors was maintainable in consumer court under Consumer Protection Act and all India Institute of Medical sciences act 1956.

Judicial interpretation:

When error or imperfection has been crept in, in bifurcation of feutal tissues from mother's tissues, but it could not amount to negligence... direction issued for giving medicine free of charges, getting son periodically examined and blood transfusion be alone without any reservation.

42) Rajesh Chaudhary V. Nirmala Chaudhary²⁸⁷

(paternity dispute, maintenance, DNA test)

Constitution of India Article 227

Indian Evidence act Section 112

Civil procedure Code Order XXVI, Rule 10-A and section 151

Section 125 of Criminal Procedure Code.

Proceeding by wife for maintenance under section 125 against her husband was filed. Husband filed divorce petition. Wife claimed interim maintenance. Husband denied

²⁸⁶ 2004 Consumer Protection Reporter 27(NC) (Del).

²⁸⁷ 205(2) Divorce and Matrimonial cases delhi 814

that he had fathered the child. Application for DNA test by husband was rejected.(case covered by reported decision of 2005, 4, SCC 499)

Held, Husband could not prove non-access to wife. Woman's dignity should not be violated on ill-founded allegations.

Minor child cannot wait for maintenance amount and interim maintenance must be granted till the legitimacy issue is finally decided.

Judicial interpretation: Evidence of non-access is necessary in seeking DNA testing paternity dispute

43) Chandan Pannala Jaiswal V.State Of Gujarat²⁸⁸

Offences punishable under sections 376, 324, 328, 323, 342, 114 of Indian Penal Code .

Sec. 66(1) and 85(1)(3) of Bombay Prohibition Act.

Whether the investigating agency can be conferred with authority to resort to DNA test in absence of any special law enacted by the legislature?

The power of the police to investigate into the cognizable offence is ordinarily not to be interfered with by the judiciary. The legal position is absolutely clear and also settled that the court would not interfere with the investigation. Such an attempt would mean from the time of lodging of FIR till the submission of reports by office in-charge of investigation in the court under section 173 (2) of Criminal Code. This field is being exclusively reserved for the investigating agency.

Care should be taken to seal and label samples properly to ensure the future integrity and the identification of the samples.

Under section 156 of Cr. P.C. the prosecution applied for the DNA test of the accused. Which was allowed by the court? Request made by then accuses to permit joint forensic examination by experts of prosecuting agency as well as forensic

²⁸⁸ 2004 Cri.LJ 2992 (Guj)

examiners and DNA expert were engaged by accused to give their own opinion was not allowed. Plea of alibi was raised by accused.

It would amount to interference in the process of investigation.

Code of criminal Procedure, section 156 for DNA fingerprinting necessary directions were issued as under.

- 1) Blood is collected in jail itself by a responsible medical officer.
- 2) If necessary blood of accused may be collected in civil hospital by a responsible medical officer-accused remaining in custody of jail authorities.
- 3) Expert of Forensic laboratory to ensure that crime exhibits remain intact and not lost totally. It may be required for re-testing.

44) Haribhai Chanabhai Vora And Others V. Keshubhai Haribhai Vora²⁸⁹

Constitution of India Article 20, 21, 22

Property dispute, suit was filed for the declaration; defendant denied that plaintiff is his son. Plaintiff applied for the DNA test of the parties. Trial court allowed the petition.. Writ against the trial court's order was filed by defendant.

Held, since defendant has not given consent for DNA testing he cannot be compelled for the same. Such order would amount to interference with personal liberty. At the most adverse inference can be drawn against him at the end of the final conclusion.

Judicial interpretation:

Consent of the parties is must in DNA testing.

45) Abdul Salam V. Chalil Sajid And Others.²⁹⁰

Section 112 of Evidence Act

Section 125 of Criminal procedure code.

²⁸⁹ AIR 2005 GUJ. 157

²⁹⁰ 2003, 1 DMC 774

Paternity and, maintenance dispute

Judicial interpretation

Even though the result of genuine DNA test is said to be scientifically accurate, but that is not enough to escape from the conclusiveness of section 112 of Indian Evidence Act, 1872.

46) Mathew V. Annamma Mathew²⁹¹.

Indian Divorce Act 1896, Section 10, 18, 19

Section 2, 112 of Indian Evidence Act.

Petition filed for declaring marriage null and void .Husband filed divorce suit after 12 years of marriage and denying paternity of child.

Husband alleging that on very first night wife told him that she was already pregnant and husband did not have sexual intercourse with her.

Husband seeking blood test of mother, child and himself for deciding paternity of child.

Held:

Child born while valid marriage is continuing, between husband and wife is conclusively proved to be legitimate child of the husband, and no evidence in rebuttal can be allowed to be given and further that “access” means opportunity to have sexual intercourse. petition was dismissed.

47) Geetha V. State Of Kerala And Others²⁹²

Section 125 and 293, expert evidence admissible under section 293 of code of Criminal Procedure.

²⁹¹ 1994 (1) DMC 524 (ker)

²⁹² 2005 Divorce and Matrimonial cases 286 (ker)

Petitioner claiming maintenance for her child born due to illicit relationship. Respondent denied the paternity. DNA test was found in favor of the petitioner. Report was not admitted without examining scientific expert. Petition to high court was filed.



Held, Order unsustainable.

Report of DNA Expert is admissible under section 293 of Cr.P.C. However respondent father may examine expert at his expense.

48) K.Selvarjan Alis Surendan V.P.Jayakumri²⁹³

Section 125, 127-Maintenance of destitute wife.

Refusal to DNA test by husband. Inference of marriage can be drawn.

Held, defiant stand of the appellant in refusing to undergo DNA test lead to a strong prima facie satisfaction as to the existence of marriage between appellant and respondent.

49) Kunhiraman V. Manoj²⁹⁴

Section 125 Cr.P.C. maintenance of child , paternity denied. Law allows an illegitimate son also to be maintained by father though the mother who cannot claim to be the wife , is not entitled to get maintenance.

Held, the results of DNA test by itself could be taken as conclusive in deciding paternity.

50) Sajitha V. State Of Kerala²⁹⁵

Evidence act section 112, paternity dispute.

The result of genuine DNA test is said to be scientifically accurate, thus conclusiveness not affected by DNA test.

²⁹³ 2001 (2) DMC13 KER. DB

²⁹⁴ 1991(3) CRIMES 860 (ker)-first case to accept DNA test as EVIDENCE IN COURT.

²⁹⁵ 2003 (1) DMC 222 ker

51) S. Thangavelu V. Kannammal²⁹⁶

Section 45 of Evidence Act.

After 10 years of birth of the child. It was held by the court that petitioner did not make out a prima facie and bona fide case and petition was rightly rejected by the lower court.

In this case, the marriage was solemnized in 1984 and the child was born in 1988. Dispute arises when husband filed an application for divorce on the ground that he had no sexual intercourse with his wife and he also requested to court for DNA test of his wife and disputed child, he had never intercourse with wife. And the child is not his offspring. After 14 years of marriage and 10 years of birth of son. Wife filing suit for partition of property due to attempt b husband to alienate it for wayward wife.

Held: Though the court has ample power to direct the parties to undergo to give sample of blood for DNA test. but, the party who sought for such relief should have strong and prima facie case..

DNA test was not allowed after 10 years of birth of child.

52) Bommi And Others V. Munirathinam²⁹⁷

Indian Constitution Article 226,

Evidence Act section 112, C.P.C. Order XXVI Rule 10(a)

Paternity f child and mirage denied.

Held, DN test could be ordered proved paternity of child which doe not amount to torture.

²⁹⁶ 2005 (25)AIC 496, AIR 2005 Mad 106

²⁹⁷ 2004 (2) HLR 517 9Mad)

53) D. Rajeswari V. Stte Of Tamilnadu And Others²⁹⁸.

Medical Termination of Pregnancy Act 1971. Section 3, 4

Indian penal Code section 376

Major girl kidnapped and rapped several times by several persons at different interval before her escape from their clutches. The girl became pregnant. Police officers not listening her not taking action. She approached to court for allowing termination of pregnancy.

The court deemed it fit to direct the chairman and superintendent, Government Kasturba Gandhi Hospital for women and children Madras 5 to conduct medical termination of pregnancy to ask for DNA test, which would be helpful to prove the case of rape alleged by the petitioner, against the persons, during the course of trial.

Judicial interpretation: In a case of rape court deems it fit to conduct medical termination of pregnancy and preserve fetus to enable the investigation agency to ask for DNA test.

54) Thogorani Alias K.Damayanti V. State Of Orissa And Others²⁹⁹.

Code of Criminal Procedure 1973, section 53 , 173 (8),

Section 114 of Indian Evidence Act.

Article 20(3), 21 of Indian constitution.

In this case it was held that, DNA evidence is now a predominant forensic technique for identifying criminals where biological tissues are left at the crime scene. DNA testing on sample such as saliva, skin, blood hair or semen not only helps to convict but also serves to exonerate.

The sophisticated technology makes it possible to obtain conclusive results in case in which the previous testing has been 'inconclusive. Moreover DNA sampling may also

²⁹⁸ 1996, Cri. L J3795(Mad)

²⁹⁹ 2004 Cr. L J4003 (Ori.)

impinging familial privacy where information obtained from one person's sample provides information regarding his or her relatives.

Though section 53 of Cr.P.C. refers only to examination of accused by medical practitioner at the request of the police officer, there is no reason the court should not have a wider power for the purpose of doing justice in criminal cases by issuing the direction of the police officer to collect blood sample for the accused and conduct DNA test for the purpose of further investigation under section 173(8) of the Code.

Power of the court to direct DNA test of the accused is discretionary. Discretion exercised if strong prima facie case is made out.

In this case two children were born out after the sexual intercourse with her on promise of marriage. Strong prima facie case was made out, refusal to DNA test not proper. Investigating officer directed to take sample of blood of accused for DNA testing.

If accused refused to give blood sample then adverse inference can be drawn. It is not violative of Article 20(3) and 21. Court has to do balancing act between public interest and rights mentioned under above articles.

Participation of the accused in commission of crime, gravity of offence, age, health both physical and mental of accused, availability of the evidence through other means are relevant factors and are to be considered before ordering DNA test.

1. Power of the court is discretionary to grant DNA test when strong prima facie case is made out.

2. Adverse inference may be drawn on refusal by accused to give blood sample for DNA testing.

55) Vishal Motising Vasava V. State Of Gujarat³⁰⁰

Section 293 Of Cr.P.C. Paternity dispute.

Section 45 and 122 Of Indian Evidence Act.

³⁰⁰ 2004 Cri.L J 3086 (guj)

Judicial interpretation

- 1) In case of second DNA testing of accused and child, it was held permissible.
- 2) But complainant cannot insist for conducting DNA testing at a particular laboratory.

56) Amarjit Kaur v. Harbhajan Singh³⁰¹

In this case, it was held that even though the DNA test is said to be scientifically accurate, even that it is not enough to escape from the conclusiveness of Section 112 of the Evidence Act, for example, if a husband and wife were living together during the time of conception, but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable and that this may look hard from the point of view of the husband, who would be compelled to bear the fatherhood of a child of which he may be innocent; and that but even in such a case the law leans in favour of the innocent child from being bastardised, if his mother and her spouse were living together during the time of conception.

57) Venkatachalam v. Anandha Jothi @ Rasathi³⁰² and another in Minor Shanmugam v. Karuppiyah @ Karuppannan³⁰³

In both the cases, it has been held that compelling minor to give sample of his blood for analysis, is absolutely illegal and not permissible in law and the same is without jurisdiction. Paternity could be proved only at the time of trial after examination of witnesses, on perusal of the documents filed by the parties and the evidence deposed by the witnesses.

58) Sunil Eknath Trambake v. Leelavati Sunil Tambake³⁰⁴

Identical view has been echoed by the Bombay High Court also in Sunil Eknath Trambake v. Leelavati Sunil Tambake, wherein, it is held that DNA test can be ordered only in exceptional and deserving cases, and even it is in the interest of the child and it cannot be directed as matter of routine and the Court, while ordering DNA

³⁰¹ 2003 (10) SCC 228

³⁰² reported in 1997 (II) CTC 763

³⁰³ reported in 1998(1) MLJ 454

³⁰⁴ AIR 2006 Bombay 140

test, has to record its reasons in writing. It is also observed that Courts should record reasons as to how and why such test is necessary to resolve the controversy and is indispensable cases and that result of such test being negative will have an effect of branding a child as a bastard and the mother as an unchaste women, which may also adversely affect the child psychologically and that the Courts have however should not hesitate to direct DNA test, if it is in the best interest of a child.

59) Jothi Ammal v. K.Anjan³⁰⁵

The Division Bench decision of this Court in Jothi Ammal v. K.Anjan), in which, a decision of the Supreme Court in Kanti Devi v. Poshi Ram³⁰⁶, has been referred and followed, in which, it is held that the expression "access" used in Section 112 of the Indian Evidence Act had been held by courts as "opportunities to reach" and that therefore, the court must have materials to come to the conclusion that during the period when wife conceived, husband had opportunities to approach her or vice-versa and only in this context, it is stressed on the need for definite pleading and proof from either side and if it is shown that the parties had no access to each other at the time when the child could have been begotten, as held by the Supreme Court in Kanti Devi's case referred to above, the presumption under Section 112 of the Indian Evidence Act stands rebutted.

Delhi High Court quashed the lower court's decision and accepted demand for DNA test. Justice Vipin Sanghi, while ordering for DNA test, observed that 'The parentage of the child can only be determined by a DNA test. The liability to pay maintenance under section 125 CrPC can be avoided by the petitioner with respect to this child only if it is established that he is not the biological son of the petitioner'.

Firstly, Justice Sri Vipin Sanghi has brought India into modern world of jurisprudence with one stroke of pen. We must hold this great judge in awe and respect he commands for his courage and dedication to the truth. he Delhi HC allowed DNA tests to establish paternity. This is a landmark judgment for victims of paternity fraud in India.

³⁰⁵ I (2007) DMC 756 (DB

³⁰⁶ in 2001 (5) SCC 311

60) V.K.Bhuvaneswari v. N.Venugopal³⁰⁷ and M.Karthika vs. R.Manohar³⁰⁸-

Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal order of the learned Principal Family Court, Chennai in I.A.No.2246 of 2007 in F.C.O.P.No.1981 of 2005, dated 10.01.2008.

The petitioner is the wife of the respondent. Their marriage was solemnized on 09.07.1995 at Trichy. Heartburns arose between them, broke their nuptial life. On 06.05.1997, a female child was born and named as Vyshali. The love lost between them, culminated in filing of F.C.O.P.No.1981 of 2005 by the respondent on the file of the Principal Family Court, Chennai, for dissolution of marriage. A male child was born on 28.08.2004 and this respondent disclaims paternity of the child. The petitioner filed her counter. Matter came up for enquiry and presently, it is in part-heard stage. The respondent filed I.A.No.2246 of 2007 under Section 10 of the Family Court Act, 1984 r/w. Order 26 Rule 10A CPC. Praying the Court to pass appropriate orders for DNA test to be conducted on the male child born on 28.08.2004.

To sum up, both the cases the conclusions are:

1. A matrimonial Court has the power to order a person to undergo medical test.
2. Passing of such an order by the Court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court

"If despite an order passed by the Court, a person refuse to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out. S.114 of the Indian Evidence Act also enables a Court to draw an adverse

³⁰⁷ dated: 15/12/2006, c.r.p.pd.no.776 of 2006

³⁰⁸ in the high court of judicature at madras, dated : 23.04.2009, coram, the honorable Mr. justice s.palaniveluc.r.p.(pd)no.1528 of 2008, m.p.no.1 of 2008

inference if the party does not produce the relevant evidence in his power and possession."

61) Ms. X V. Mr. Z And Others ³⁰⁹(Under divorce proceeding husband and wife alleging adultery against each other. DNA Test on fetus was directed by H.C.)

Constitution of India -Article 20(3), 21-Right to privacy. Section 3 of Indian evidence Act

In this case wife alleged adultery by husband. Husband alleged illicit relation of wife with another person. Pregnancy of wife was terminated. Slides of the tubular pregnancy were preserved. Husband asked for DNA test of the slides. Wife opposed on the grounds of Right to privacy.

Held, Right to privacy is not an absolute right. DNA test on slides was permitted.

A single Judge of Delhi High Court had allowed a similar application and had directed that at the cost of husband, the Pathology Department of All India Institute of Medical Sciences should conduct the DNA test. The DNA test was to be conducted of a fetus.

62) N D Tiwari paternity case, Supreme Court order, N D Tiwari DNA test³¹⁰

The Supreme Court has held that DNA test in a paternity suit cannot be ordered by courts in a routine manner but should be directed only in exceptional cases as it would otherwise be an invasion of a person's privacy.

"In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed.

³⁰⁹ AIR 2002 Delhi 217

³¹⁰See, The Indian Express, New Delhi, Mon Mar 14 2011 ,Available at,www.indianexpress.com/news/paternity-case-no-relief.../762146/

"DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner whenever such a request is made," a Bench of Justices Aftab Alam and R M Lodha said in a judgement.

The apex court passed the judgement while setting aside an Orissa High Court order which had upheld the direction of the Orissa State Women's Commission for conduct of a DNA test to determine the paternity dispute of a couple.

63) Nurse alleges rape, Supreme Court stays DNA test against doctor who claims innocence³¹¹

³¹¹ www.dnaindia.com