***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ MAT.APP.(F.C.) 17/2016 & CM No.5064/2016

% Reserved on : 5th July, 2016
Date of decision : 26th August, 2016

‘W’ ..... Appellant

Through: Mr. Sandeep Sethi and Mr. Sudhanshu Batra, Sr. Advs. with Mr. Vineet Malhotra, Mr. Apoorva Agarwal, Mr. Abhijat and Mr. Shubhendu Kaushik, Advs.

versus

‘H’ & ANR ..... Respondents

Through: Mr. V.K. Gupta, Sr. Adv. with Mr. Sanjeev Mahajan, Ms. Ruchira Gupta, Ms. Swati Jain, Ms. Mona Sinha and Mr. Anurag Sharma, Advs.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

GITA MITTAL, J

1. By way of the instant appeal under Section 19 of the Family Court Act, 1984, the appellant wife assails the order dated 28th January, 2016 passed by the Principal Judge, Family Courts, New Delhi in HMA No.223/2015 whereby the trial court allowed an application under Section 151 of the CPC moved by the respondent no.1 husband seeking a DNA test of the appellant and the minor

child.

2. Before examining the impugned order, we propose to notice the essential facts which emerge from the family court record and give rise to the present appeal. Marriage between the appellant and the respondent no.1 was solemnised on 3rd December, 2007 in accordance with Hindu rites and ceremonies at the Ashoka Hotel, Chanakyapuri, New Delhi.

3. At the time of the marriage, H- respondent no. 1 was serving as an officer of the *Indian Administrative Services (IAS)* in the Nagaland Cadre and was posted at District Mokokchung, Nagaland while the appellant was residing with her parents, continuing her studies, and preparing for the civil services examination. The appellant also qualified the IAS examination in the year 2009 and was allotted the U.P. Cadre of the Indian Administrative Services. On this basis, the respondent no.1 applied for change of cadre and, in the middle of June, 2011, was relieved of his charge in Nagaland and was posted as District Magistrate in Lakhimpur, Kheri District in U.P.

4. In July, 2012, the respondent was transferred as a District Magistrate, Bareilly while the appellant was appointed as a Chief Development Officer of District Lucknow. In February, 2013, the appellant was transferred as a District Magistrate, Pilibhit.

5. It appears that a decision was taken by the H & W to seek dissolution of their marriage. On the 1st of October 2014, a joint petition was filed by H-the respondent no.1 (as petitioner no.1) and W-the appellant (as petitioner no.2) under Section 13B(1) of the

Hindu Marriage Act, 1955 seeking dissolution of marriage of the parties by a decree of divorce by mutual consent which was registered as HMA No.1099/2014 at the court of the Principal Judge, Family Courts, Saket, New Delhi. We extract hereunder certain material averments made in this joint petition :

> "*6. However, while there have been, because of temperamental difference and incompatibility, reduced time of cohabitation and living together and also occupational placements, the parties, for the last one year, have been residing separately.*
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> *7.* ***That a child named (Baby X) was born on 6.10.2013 at Lucknow and the child is in custody of the mother at Sultanpur.***
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> *8. That the petitioner no.1 (sic. husband) is presently posted as District Magistrate in Aligarh and the petitioner no.2 (sic. wife) is posted as District Magistrate, Sultanpur. Both the petitioners are well settled in life.*
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> *9.* ***That due to temperamental differences, parties to the present petition have not been able to live in cordial atmosphere at the matrimonial home.***
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> *10.* ***That the parties are living separately from each other for more than a year and there has been no resumption of any cohabitation between them, nor there is any chance for the same.***
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> xxx xxx xxx
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> *13. That the parties have resolved their disputes and differences and it has been specifically agreed by the petitioner no.1 and petitioner no. 2 that petitioner no.2 or her relatives shall not claim anything from petitioner no.1 (or his relatives) in any court of law in India and outside India. Likewise, petitioner no.1 shall make no claim from petitioner no.2 (or her relatives).*
>
> *14. That it is agreed between both the parties that petitioner no.2 neither be entitled to any amount from petitioner no.1 (as she has voluntarily relinquished all*

her claims against petitioner no.1) nor shall claim any right in any of his assets, movable or immovable, in any manner whatsoever in India or outside India, past, present and future. Similarly, petitioner no.1 has relinquished all his claims, past, present and future against petitioner no.2.

15. ***Considering the welfare of the child, she would grow up exclusively in the custody of mother, i.e., petitioner no.2 (Baby X). <u>Petitioner no.1 gives up all claims to custody even access. He shall not be liable for maintenance and education of the child in present or future, which shall be borne by petitioner no.2 solely</u>.***

xxx xxx xxx

17. That the present petition is not being presented in collusion with each other.

xxx xxx xxx

20. That the parties to the present petition are not accessory to nor have connived with each other in presenting the present petition."

6. This petition was verified on solemn affirmation. It was supported by an affidavit of both the parties. In para 1 of his affidavit, the respondent no.1 husband clearly stated that the petition "*has been drafted by my counsel at my instructions. I have read and understood the contents thereof and hereby state that the same are true and correct*". The affidavit also contained unequivocal declarations of non-collusion; voluntariness of the mutual consent and that he was not an accessory to or have connived at with petitioner no.2 in presenting or prosecuting the present petition.

7. The above petition contains an absolute admission that a child named Baby 'X' was born to the parties on 6th of October

2013 who was in custody of the mother who was posted at Sultanpur. There is a further admission of fatherhood by the respondent no.1 in para 15 of the petition when he unequivocally gives up all claims to custody, even to access to the child, and abandons responsibility for her maintenance and education which was agreed to be borne by the mother alone. The parties clearly mentioned that the child would grow up exclusively in the "*custody of the mother*" endorsing the abandonment of custody rights by the other party.

8. In the joint statement recorded of the appellant and the respondent no.1 on the 1st of October 2014 by the Principal Judge (South-East), Family Courts, Saket, H-the respondent no.1 once again declared that "*a child named Baby X was born on 6.10.2013 at Lucknow and the child is in custody of the mother at Sultanpur*". In this statement on oath, H-the respondent no.1 again referred to the agreement that the "*permanent custody of the minor child baby shall remain with the petitioner no.2/wife*".

9. The Family Court had raised an objection with regard to the maintainability of the petition in the Family Court at Saket on account of territorial jurisdiction. In view of this objection, on the 22nd October, 2014, the parties agreed to withdraw the petition with opportunity to file a fresh petition before the court having competent jurisdiction. The Family Court recorded the statement of counsels for the parties and permitted the petition to be withdrawn with liberty to file a fresh petition before the court of competent jurisdiction.

10. On the 31st of October 2014, the appellant and respondent no.1 jointly filed a second petition before the Family Court, Patiala House under Section 13B(1) of the Hindu Marriage Act, 1955, registered as HMA No.783/2014, for dissolution of their marriage by way of decree of divorce by mutual consent which was containing the identical averments as paras 6 to 10 and 13 to 15 of the first petition, as extracted above. In para 25, the parties disclosed the filing of the previous petition being HMA No.1099/2014 in the Saket Family Courts. The petition was again supported by separate affidavits of the appellant as well as respondent no.1.

In para 13, the respondent no.1 had again declared that the parties have resolved their disputes and differences.

11. It appears that thereafter, the respondent no.1 filed an application for withdrawal of the above petition urging that there were certain unwritten conditions also, agreed upon between the parties, and that he would continue with a criminal complaint which stood filed by him against the appellant and the respondent no.2 on grounds of adultery and that he was not prepared to withdraw the said complaint. The respondent no.1 claimed that he had agreed to file a petition by mutual consent purely in the interest of the child involved in the case and to bring to an end the relationship of the parties which was non-existent on account of certain acts attributed to the appellant. In view thereof, the respondent no.1 stated that he was withdrawing from the joint petition and prayed for its dismissal. As a result, on 9th January,

2015, the Principal Judge, Patiala House, Delhi dismissed the joint petition as withdrawn with liberty to the respondent no.1 to file a fresh petition for dissolution of marriage under appropriate provisions of law. The learned Family Court noted the absence of the appellant wife.

12. It is only thereafter that on or about the 29th January, 2015, the respondent no.1 filed HMA No.3329/2014 before the Principal Judge, Family Court, Lucknow under Section 13(1)(i) of the Hindu Marriage Act for dissolution of marriage of the appellant and respondent no.1 by a decree of divorce. In this petition, H-the respondent no. 1 levelled allegations of adultery on the part of the appellant with a person who was impleaded as a respondent no.2 and for the first time denied paternity of the child of the parties born on 6th October, 2013.

13. This petition was transferred by the Supreme Court of India from Lucknow to Delhi vide order dated 23rd February, 2015 passed in Transfer Petition (Civil) No.1886/2014. The appellant filed a detailed written statement contesting allegations of the appellant and vehemently denying the allegations of adultery.

14. The appellant has set-up a case that she was subjected to grave torture and abuse, both mental and physical, at the hands of the respondent no.1; that the parties were cohabiting as husband and wife at their postings and that the respondent no.1 husband would come and stay at Lucknow or she would go and stay with him on leave or whenever visiting his place of posting. The appellant has asserted that she conceived from their wedlock and

cohabitation and in February, 2013 told the respondent no.1 that she was expecting their child.

The respondent no.1 urges that this information was received from her only in April, 2013.

15. On 6th of October 2013, the appellant gave birth to a girl child at Lucknow. On 18th October, 2013, a lunch and pooja ceremony was organized at the house of the appellant's parents which was attended by the parents of the respondent no.1 and large number of his guests. The priest who performed the pooja is stated to be an old acquaintance of the respondent no.1 and his parents from the time of his posting at Lakhimpur, Kheri District.

16. The appellant submits that between 9th and 29th November, 2013, the appellant visited Bareilly and stayed with the respondent. However, thereafter, the parties could not cohabit with each other.

17. Replication thereto was filed by the respondent husband disputing the allegations of the wife.

18. Issues were framed in the matter on 24th August, 2015 and the matter proceeded to evidence of the appellant.

19. The respondent no. 1 thereafter filed his list of witnesses. He also filed his examination in chief by way of affidavit dated 29th July, 2015 which was tendered in evidence and he was examined extensively on 14th; 24th; 28th; and 29th September, 2015 when his cross examination was concluded.

20. On the next date of hearing i.e. 16th October, 2015, the evidence of PW-2 Sh. Vikas Verma was recorded and he was discharged.

21. The matter was posted for the remaining evidence of the respondent no.1 on 29th October, 2015 and 9th November, 2015.

22. The next witness was Inspector Vijaymal Singh Yadav who was examined as PW-3 on 8th December, 2015 and discharged.

23. On the 14th of October 2015, the husband-respondent no.1 filed an application under Section 151 C.P.C. seeking a direction for conducting the DNA test of the respondent no.1 and the child to ascertain as to whether he was the biological father of the child and for a further direction to the appellant to produce the child either in court or elsewhere to enable her blood samples to be taken. This application was also listed on the above dates. The appellant had filed a note dated 4th of January 2016 opposing the application on merits and in law.

24. This application was allowed by the Family Court by the order dated 28th of January 2016 inter alia directing the appellant to bring the child to the office of the Director, CFSL in the CGO Complex, Lodhi Road when the respondent no.1 was also directed to remain present so that the blood samples could be taken in the presence of the parties.

This order has been assailed by way of the present appeal.

25. Before examining the rival contentions, we summarise the headings under which this matter has been considered :

I. ***<u>Direction for compelling a medical examination or a DNA test to establish any fact – when to be made?</u>***
(paras 26 to 33)

II. ***Displacement of the conclusive presumption under Section 112 of the Indian Evidence Act – Standard of proof to do so?*** *(paras 34 to 43)*

III. ***What is the meaning of "access" and "non-access"*** *(paras 44 to 54)*

IV. ***Summation of the principles laid down by judicial precedents on consideration of an application for an examination*** *(para 55)*

V. ***Prima facie case*** *(paras 56 to 59)*

VI. ***Whether the case of non-access was specifically pleaded by the respondent no.1*** *(paras 60 to 67)*

VII. ***Whether there is non-traverse by the wife of the husband's pleadings, and thereby, deemed admission thereof?*** *(paras 68 to 90)*

VIII. ***Is the court bound to pass orders premised on admissions of parties?*** *(paras 91 to 102)*

IX. ***Admissions of paternity by the husband on court records – impact on "prima facie case"*** *(paras 103 to 112)*

X. ***Conduct of the husband despite his allegations against his wife – impact thereof*** *(paras 113 to 134)*

Concealment and statement of wrong facts – whether impacts consideration of prima facie case?
(paras 135 to 141)

XI. ***DNA report dated 23rd April, 2015 – whether supports a prima facie case in favour of the respondent no.1 – husband?*** *(paras 142 to 153)*

XII. ***<u>In the facts of the present case, effect of the presumption under Section 112 of the Indian Evidence Act</u>***
(paras 154 to 168)

XIII. ***<u>Ensuring the Constitutional rights of the child</u>***
(paras 169 to 175)

XIV. ***<u>Impugned order</u>*** *(paras 176 to 182)*

XV. ***<u>Conclusion</u>*** *(paras 183 to 184)*

XVI. ***<u>Result</u>*** *(para 185)*

We now propose to discuss the above in *seriatim*.

I. ***<u>Direction for compelling a medical examination or a DNA test to establish any fact – when to be made?</u>***

26. In the present case, it is an admitted position that the prayer for the DNA examination is made qua a child born during the subsistence of a marriage. Such prayer has been judicially examined on principles which apply to a prayer for a medical examination of a party in a case. Directions for such examinations, which are akin to a DNA testing, may be made for a variety of reasons. Say for instance, it may be necessary for the court to satisfy itself as to whether a party before it suffers from mental illness or not either for the purposes of appointment of a guardian ad litem in terms of Order XXXII Rule 15 of the Code of Civil Procedure or Section 41 of the Mental Health Act,1987 as also for the determination under Section 118 of the Indian Evidence Act of a person's competency as a witness.

27. DNA testing has come into existence by scientific evolution as yet another test utilised for establishing relationships in the nature of paternity or shared parentage between parties in litigation. Applications for directions to the other party to appear or produce off springs or siblings for DNA testing are made by parties seeking to establish, either, the factum of the relationship, or, their challenge to the relationship. It could be by a person claiming parentage or by a person challenging paternity of another.

28. So far as a challenge to paternity is concerned, it is well settled that a rebuttable presumption lies under Section 112 of the Indian Evidence Act, 1872 in favour of the paternity of the legitimacy of a child born during marriage. For expediency, we extract Section 112 which reads as follows :

> **"Section 112 in The Indian Evidence Act, 1872**
> 112. Birth during marriage, conclusive proof of legitimacy.—The fact that ***any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown*** that the parties to the marriage had ***no access*** to each other at any time when he could have been begotten."
>
> (Emphasis by us)

29. The question which has to be answered in the present case is as to the permissibility of a DNA test? On this issue, the observations in paras 82 to 85 of the pronouncement in the three Judge Bench decision of the Supreme Court in ***AIR 2003 SC 3450,***

Sharda v. Dharampal in the context of a medical examination are topical and read thus :

> "**80.** The matter may be considered from another angle. In all such ***matrimonial cases*** where ***divorce is sought***, say on the ***ground of impotency***, ***schizophrenia*** ***etc***. ***normally without there being medical examination, it would be difficult to arrive at a conclusion*** as to whether the allegation made by a spouse against the other spouse seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If the respondent avoids such medical examination on the ground that it violates his/her right to privacy or for that matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no ***right to privacy*** specifically conferred by ***Article 21*** of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as an absolute right. ***What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash. In matters of the aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent.*** Thus the court has to ***reconcile these competing interests by balancing the interests involved.***
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> xxx xxx xxx
>
> **82**.It is, however, axiomatic that a ***court shall not order a roving inquiry***. It must have ***sufficient materials*** before it to enable it to exercise its ***discretion***. Exercise of such discretion would be subjected to the supervisory jurisdiction of the High Court in terms of Section 115 of the Code of Civil Procedure and/or Article 227 of the

Constitution of India. Abuse of the discretionary power at the hands of a court is not expected. ***The court must arrive at a finding that the applicant has established a strong prima facie case before passing such an order.***

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

84. So viewed, the ***implicit power of a court to direct medical examination of a party to a matrimonial litigation*** in a case of this nature cannot be held to be violative of one's right of privacy.

85. To sum up, our ***conclusions*** are:

1. ***A matrimonial court has the power to order a person to undergo medical test.***

2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.

3. However, the court should ***exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him***."

(Emphasis supplied)

It is therefore, well settled that the court in an appropriate case, can direct medical examination of a party to matrimonial litigation as well provided that the applicant seeking such examination has a "*strong prima facie*" case and has placed "*substantial material*" on the court record in support of his/her case.

30. On the same aspect, we may usefully refer to the pronouncement of the Supreme Court reported at ***(2005) 4 SCC 449 Sh. Banarasi Dass v. Mrs. Teeku Datta.*** This case arose in the context of succession where a challenge was laid to the paternity of the petitioner who claimed to be the daughter of deceased who was alleged to have died intestate leaving behind five brothers. Originally, only four of the brothers were impleaded, out of which two passed away. The petition was filed only against two brothers and subsequently, the third brother was also impleaded. One of the brothers objected to the grant of the succession certificate disputing Mrs. Teeku Datta's claim of paternity. As both the objector's brother and his wife were dead, he sought a DNA examination of the petitioner with the DNA of the other respondents. We note hereunder the consideration and discussion by the courts in paras 10, 11, 12 and 13 which read thus:

> **"10.** In matters of this kind the court must have regard to Section 112 of the Evidence Act. This section is based on the well-known maxim *pater is est quem nuptiae demonstrant* (he is the father whom the marriage indicates). ***The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, it throws on the person who is interested in making out the illegitimacy, the whole burden of proving it***. The law presumes both that a marriage ceremony is valid, and that every person is legitimate. Marriage or filiation (parentage) may be presumed, the law in general presuming against vice and immorality.
>
> **11.** It is ***rebuttable presumption of law*** that a ***child born during lawful wedlock is legitimate***, ***and that*** access occurred between the parents. This presumption can

only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.

12. In ***Dukhtar Jahan v. Mohd. Farooq [(1987) 1 SCC 624*** : 1987 SCC (Cri) 237] this Court held: (SCC p. 629, para 12)

> "Section 112 lays down that if a person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. This rule of law based on the dictates of justice has always ***made the courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father.*** Courts have always ***desisted*** from lightly or hastily rendering a verdict and that too, ***on the basis of slender materials***, which will have the effect of branding a child as a bastard and its mother an unchaste woman."

The view has been reiterated by this Court in many later cases e.g. *Amarjit Kaur* v.*Harbhajan Singh* [(2003) 10 SCC 228]."

(Emphasis by us)

The presumption of legitimacy thus cannot be disturbed by "*slender*" materials under "*compulsive and clinching*" facts are brought to shake the presumption and call for a DNA examination. Proof of non-access was essential.

31. So far as the facts of the case were concerned, in para 14, the

court observed thus :

> "**14.** .... In order to succeed in the succession application the applicant has to adduce cogent and credible evidence in support of the application. The respondents, if they so choose, can also adduce evidence to oppose grant of succession certificate. The ***trial court erroneously held that the documents produced by the respondents were not sufficient or relevant for the purpose of adjudication and DNA test was conclusive***. This is not a correct view. It is for the ***parties to place evidence in support of their respective claims and establish their stands. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given***, as was noted in *Goutam Kundu case* [(1993) 3 SCC 418 : 1993 SCC (Cri) 928] . Present case does not fall in that category. The High Court's judgment does not suffer from any infirmity. We, therefore, uphold it. It is made clear that we have not expressed any opinion on the merits of the case relating to succession application."
>
> (Emphasis supplied)

32. The observations of the court in paras 12 and 13 of the judgment reported at ***AIR 2010 SC 2851, Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women & Anr.*** shed valuable light on the issue under consideration and are therefore set down in extenso :

> "**12.** Recently, in *Ramkanya Bai v. Bharatram [(2010) 1 SCC 85]* decided by the Bench of which one of us, R.M. Lodha, J. was the member, the order of the High Court directing DNA test of the child at the instance of the husband was set aside and it was held that the High Court was not justified in allowing the application for grant of DNA test of the child on the ground that there will be possibility of reunion of the parties if such DNA test was conducted and if it was found from the outcome of the

DNA test that the son was born from the wedlock of the parties.

13. In a matter ***where paternity of a child is in issue*** before the court, the ***use of DNA test is an extremely delicate and sensitive aspect***. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. 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. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test.***"

(Emphasis supplied)

33. The conclusiveness of the presumption under Section 112 of the Indian Evidence Act, therefore, cannot be disturbed lightly.

These principles bound the Family Court in the present case while considering the application which was filed by the present

respondent no.1.

II. Displacement of the conclusive presumption under Section 112 of the Indian Evidence Act – Standard of proof to do so?

34. Given the weight attached to the presumption of paternity of a child born during the subsistence of a marriage under Section 112, what would be the standards on which such a presumption under Section 112 would be rebutted? This issue is also no longer *res integra* and has been discussed by the Supreme Court in the judgments reported at ***AIR 2001 SC 2226 Kamti Devi v. Poshi Ram*** as well as ***(2009) 12 SCC 454 : AIR 2009 SC 3115 Sham Lal alias Kuldeep v. Sanjeev Kumar & Ors.*** We borrow the words of the Supreme Court on this very important aspect.

35. In ***AIR 2001 SC 2226 Kamti Devi (Smt.) & Anr. v. Poshi Ram***, the husband filed a civil suit for decree declaring that he is not the father of a child born on 4th September, 1996 i.e. 15 years after the marriage of the parties (in 1975) on the ground that he had no access to the appellant during the period when the child would have been begotten. The trial court relied on the conclusive presumption in Section 112 of the Indian Evidence Act and holding that the husband had failed to prove that he had no access to his wife during the relevant period, dismissed the suit. The first appellate court, however, re-evaluated the entire evidence and held that the husband had succeeded in discharging the burden of rebutting the presumption by proving that he had no access to the

mother of the child during a very long stretch of time covering the relevant period and consequently allowed the appeal and decreed the suit. The High Court also refused to interfere with this finding on the ground that it was pure question of fact calling for no interference by the court in the second appeal under Section 100 of the Code of Civil Procedure. Kamti Devi filed a special leave petition before the Supreme Court assailing the orders against her.

36. In its judgment, the Supreme Court has authoritatively laid down the impact of presumption of Section 112 of the Indian Evidence Act and the manner in which the same can be rebutted in paras 9 to 12 of the pronouncement which read in ***Kamti Devi*** as follows :

> "**9.** When the legislature chose to employ the expression that a certain fact "***shall be conclusive proof***" of another fact, normally the parties are disabled from disrupting such proof. This can be discerned from the definition of the expression "conclusive proof" in ***Section 4*** of the Act:
>
> > "4. '*Conclusive proof*'.—When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."
>
> **10.** But ***Section 112*** itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the ***presumption could be rebutted***. In other words, ***the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time***. Normally, the ***rule of evidence*** in

other instances is that the ***burden is on the party who asserts the positive***, but ***in this instance the burden is cast on the party who pleads the negative***. The ***raison d'être is the legislative concern against illegitimatizing a child***. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents."

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

12. Whether the burden on the husband is as hard as the prosecution to prove the guilt of the accused in a trial deserves consideration in the above background. ***The standard of proof of prosecution to prove the guilt beyond any reasonable doubt belongs to criminal jurisprudence whereas the test of preponderance of probabilities belongs to civil cases.*** The reason for insisting on proof beyond reasonable doubt in criminal cases is to guard against the innocent being convicted and sent to jail if not to extreme penalty of death. ***It would be too hard if that standard is***

imported in a civil case for a husband to prove non-access as the very concept of non-access is negative in nature. But at the same time the test of preponderance of probability is too light as that might expose many children to the peril of being illegitimatized. If a court declares that the husband is not the father of his wife's child, without tracing out its real father the fallout on the child is ruinous apart from all the ignominy visiting his mother. The bastardised child, when grows up would be socially ostracised and can easily fall into wayward life. ***Hence, by way of abundant caution and as a matter of public policy, law cannot afford to allow such consequence befalling an innocent child on the strength of a mere tilting of probability. Its corollary is that the burden of the plaintiff husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff husband.***"

(Emphasis supplied)

37. In para 11, the Supreme Court has clearly laid down that if the husband and wife were living together during the time of conception but the DNA test stated that the child was not born to the husband, the conclusiveness in law by virtue of Section 112 of the Indian Evidence Act would remain irrebuttable.

38. Some indication of the nature and extent of the scrutiny to be conducted by the court, is to be found in paras 14 and 15 of ***Kamti Devi v. Poshi Ram*** which read thus :

"**14**. In the present case the first appellate court, which is the final fact-finding court, ***after evaluating the entire evidence,*** came to the following conclusion:

"In the present case the ***plaintiff has examined all the evidence*** which he possibly could do in the

> circumstances. He has ***proved by convincing evidence***, that ***he did not visit his village or house where the defendant was allotted one room***. He has further proved that the defendant also never visited him at Mandi where he had been living for more than 2 years before the child was born to Kamti Devi. In other words ***he has proved that he had no access or opportunity for sexual intercourse*** with Defendant 1 for more than 280 days before Roshan Lal (Defendant 2) was begotten by Defendant 1.
>
> **15.**The said conclusion was reached on the strength of the evidence adduced by both sides and the first appellate court was satisfied in full measure that the plaintiff husband had no opportunity whatsoever to have liaison with the defendant mother. The finding thus reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding."
>
> (Emphasis by us)

The reference is to "*convincing evidence*"; "*proved that he had no access or opportunity*" and the entirety of evidence stood placed before the court.

39. The above principles were reiterated by the Supreme Court in *Banarsi Dass* in the following terms *:*

> **13.** We may remember that ***Section 112 of the Evidence Act*** was enacted at a time ***when the modern scientific advancements with deoxyribonucleic acid (DNA)*** as well as ribonucleic acid (RNA) tests ***were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate***. ***But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the***

child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the ***husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child*** from being bastardised if his mother and her spouse were living together during the time of conception. ***Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.*** (See *Kamti Devi* v. *Poshi Ram* [(2001) 5 SCC 311 : 2001 SCC (Cri) 892] .)"

40. In this judgment, the court had reiterated that even the result of a genuine DNA test (which revealed that the child was not born to the husband) said to be scientifically accurate, is not sufficient to displace the conclusiveness of Section 112, if a husband and wife were living together at the time of the conception.

41. We may also advert to the pronouncement of the Supreme Court reported at ***(2009) 12 SCC 454 : AIR 2009 SC 3115 Sham Lal alias Kuldeep v. Sanjeev Kumar & Ors.,*** *"....once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from that wedlock....."*. In para 22 of the precedent, the Supreme Court has observed that "*the* ***presumption of legitimacy arises from birth in wedlock and not from conception***".

It was observed that there was no evidence on record in this case that Balak Ram at any point of time did not have access to Smt. Durgi (mother of the plaintiff and defendant no.4).

42. The further observations of the Supreme Court in paras 39, 40 and 42 of the pronouncement, on the manner in which the presumption under Section 112 can be reubutted, are important and read as follows :

> "**39**.The findings of the High Court on the interpretation of Section 112 of the Evidence Act are based on correct analysis of Indian and English cases for the last more than a century. ***According to the legislative intention and spirit behind Section 112 of the Evidence Act it is abundantly clear that once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt.***
>
> **40**. In the instant case, admittedly the plaintiff and Defendant 4 were ***born*** to Smt Durgi during the ***continuance of her valid marriage*** with the deceased Balak Ram. Their marriage was in fact never dissolved. There is ***no evidence*** on record that the deceased Balak Ram ***at any point of time did not have access*** to Smt Durgi. ***According to the clear interpretation of Section 112 of the Evidence Act, there is strong presumption about the legitimacy of children born out of continuation of the valid marriage.***
>
> xxx xxx xxx
>
> **42**. It is well-settled principle of law that *odiosa et inhonesta non sunt in lege praesumenda* (nothing odious or dishonourable will be presumed by the law). The law presumes against vice and immorality. ***In a civilised society it is imperative to presume the legitimacy of a child born during continuation of a valid marriage and whose parents had "access" to each other. It is undesirable to enquire into the paternity of a child whose parents "have access" to each other***. Section

112 of the Evidence Act is based on presumption of public morality and public policy."

(Emphasis by us)

43. The presumption under Section 112 of the Indian Evidence Act can be displaced only by such evidence which meets a standard higher than preponderance of probabilities, and not by a mere preponderance of probabilities. The strong presumption under Section 112 of the Indian Evidence Act of legitimacy of a child born during marriage therefore can only be rebutted by "*strong, clear, satisfying and conclusive*" evidence of "non access".

III. What is the meaning of "access"and "non-access"

44. The present case raises issues which are really first principles and fundamentals for consideration of an application seeking DNA examination of a sample of a child wherein issue of his or her paternity is raised. It is trite that the party seeking the test, has to first and foremost make out a prima facie case that the alleged father had no access to the mother of the child at the time when the child could reasonably have been conceived.

45. Before examining any other aspect, it becomes necessary to examine what would be the meaning of "*access*" in the context of examination of the paternity of the child.

46. Earlier, the High Courts had held that "***access***" in an examination of a paternity action means actual sexual intercourse between the parties. This controversy came to a rest by three Judge Bench pronouncement of the Privy Council reported at ***AIR 1934***

PC 49, Karapaya Servai v. Mayandi wherein it was held that the word "*access*" means "*no more than opportunity of intercourse*".

47. The factual matrix deemed sufficient by the Privy Council to presume legitimacy of birth sheds valuable light on the facts before us. The same reads thus :

> "The materiality of these facts, however, is that in December 1911, the parties were ***admittedly in touch with each other, were residing at all events for a short period in reasonable proximity, the wife being in the house of a relative of the husband***, and that there is ***nothing in the agreement to suggest that she was unfaithful or that the parties were on terms of personal hostility***, though no doubt the presence of the second wife would make an open reconciliation difficult. ***If, therefore, the respondent could have been begotton during this period his legitimacy was undeniable.***"
>
> (Emphasis by us)

48. The above legal principle was approved by a three Judge Bench of the Supreme Court in the decision reported at ***AIR 1954 SC 176 : 1954 SCR 424 Chilukuri Venkateswarlu v. Chilukuri Venkatanarayan.*** In this case, a suit was filed by Chilukuri Venkateswarlu, an infant represented by his maternal uncle as his next friend for recovery of possession, on partition of ½ share of certain properties, on the allegation that they were joint family properties of his father, the defendant nos. 1 and himself. The plaintiff was admittedly the son of defendant no.2, a legally wedded wife of defendant no.1. The defence put forward by defendant no.1 to the plaintiff's claim, was a denial of his paternity. The Supreme Court observed thus :

"On the admitted facts of the case, there could be no question that the operation of Section 112 of the Indian Evidence Act would be attracted and the plaintiff being born during the continuance of a lawful wedlock between his mother and his alleged father, a conclusive presumption of legitimacy would arise, unless it was proved that the parties to the marriage had no access to each other at any time when he could have been begotten. The point for determination, therefore, was whether on the evidence adduced-in the case Defendant 1, upon whom the burden of proving non-access admittedly lay, had succeeded in discharging that burden**.** xxxx

It may be stated at the outset that the ***presumption which Section 112 of the Indian Evidence Act contemplates is a conclusive presumption of law which can be displaced only by proof of the particular fact mentioned in the section, namely, non-access between the parties to the marriage at a time*** when ***according to the ordinary course of nature the husband could have been the father of the child***. Access and ***non-access again connote***, as has been held by the Privy Council [Vide Karapaya v. Mayandy, 12 Rang 243] , ***existence and non-existence of opportunities for marital intercourse***.

xxx xxx xxx

There is ***no evidence of any unnatural conduct on the part of Defendant 1 towards the plaintiff's mother at about the time when the plaintiff was conceived***.

Apparently for some reason or other, the husband took up an unnatural attitude, but this was a subsequent event and whether he had really any grievance against his wife, or his unnatural behaviour was due to the instigation of his third wife, it is not necessary for us to investigate. On the ***evidence***, as it stands, we are clearly of opinion that ***Defendant 1 did not succeed in proving that there was no opportunity for intercourse between him and Defendant 2 at the time*** when the plaintiff was conceived. ***He rested his whole case upon the allegation of unchastity*** of the

plaintiff's mother and of the plaintiff being born as the result of fornication.

While rejecting that story, the High Court, in our opinion, erred in holding that there was no opportunity for access between the parties at the material period, relying mainly upon what the husband himself said and did much after the estrangement of feelings took place between the parties, no matter whatever that was due to."

(Emphasis supplied)

49. Mr. Gupta, learned senior counsel for the respondent no.1 has submitted that this aspect of the matter has also been considered by the Supreme Court in two later judicial precedents relied upon by the other side. Our attention is drawn also to the pronouncement of the Supreme Court reported at ***(1993) 3 SCC 418:AIR 1993 SC 2295 Goutam Kundu v. State of West Bengal & Anr***. We extract hereunder the observations of the Supreme Court which bind the present consideration :

> **"24.** This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "***Access" and "non-access***" mean the ***existence or non-existence of opportunities for sexual intercourse***; ***it does not mean actual "cohabitation***".

50. After detailed discussion, the court concluded thus :

> "26. From the above discussion it emerges—
> (1) that ***courts*** in India ***cannot order blood test as a matter of course***;
> (2) wherever ***applications*** are made ***for such prayers*** in order ***to have roving inquiry***, the ***prayer for blood test cannot be entertained***.

(3) There must be a ***strong prima facie*** case in that ***the husband must establish non-access*** in order to dispel the presumption arising under Section 112 of the Evidence Act.
(4) The ***court*** must ***carefully examine*** as to what would be the ***consequence of ordering the blood test***; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
(5) No one can be compelled to give sample of blood for analysis."

(Emphasis by us)

51. This aspect and the effect of the evidence of access have been considered in some detail in another pronouncement of the Supreme Court reported at ***AIR 2001 SC 2226:(2001) 5 SCC 311, Kamti Devi (Smt.) & Anr. v. Poshi Ram***, relevant portion whereof is extracted hereunder :

"8. Earlier there was a controversy as to ***what is the true import of the word "access" in Section 112*** of the Act. Some High Courts held that access means actual sexual intercourse between the spouses. However, the controversy came to a rest when the Privy Council held in ***Karapaya Servai v. Mayandi [AIR 1934 PC 49 : 1934 All LJ 250***] that the word ***"access" connotes only existence of opportunity for marital intercourse***. The said legal principle gained approval of this Court when a three-Judge Bench held in ***Chilukuri Venkateswarlu v. Chilukuri Venkatanarayana [AIR 1954 SC 176 : 1954 SCR 424***] that the law has been correctly laid down therein."

(Emphasis by us)

52. It is therefore, settled law that cohabitation of the parties is not an essential or only concomitant to establish "*access*"; that "*unnatural conduct*" of the party or the conduct at the time the child was conceived, personal hostility would be pertinent

circumstances. Parties being "*in touch with each other*", "*residing for a short period in reasonable proximity*" during the period when the child was conceived are also material circumstances.

In fact, at the final consideration, the husband has to conclusively establish that there was no access or opportunity at all for a liaison with or sexual intercourse between the parties. As delineated in ***Kamti Devi,*** the husband who challenges paternity of a child born during the subsistence of the marriage, has to establish with convincing evidence "*not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time*".

53. Mr. V.K. Gupta, Senior Advocate for the respondent no.1 herein has also urged that "*access*" therefore, actually refers to merely opportunity to engage in sexual intercourse.

54. Let us examine the circumstances on record before the Family Court, simply put, "*whether there was any opportunity available to them for coitus*" or had access to each other, as required by law.

*IV. **Summation of the principles laid down by judicial precedents on consideration of an application for an examination***

55. So far as the court's discretion to direct a DNA test is concerned, the following principles can be summed out from the above enunciation of law placed by both sides which have to guide the court's consideration :

*(i) A rebuttable presumption of legitimacy is attached to a child born of a married woman during a subsistence of marriage or within 280 days of its severance (Ref.: **Section 112 of the Indian Evidence Act**; **AIR 2001 SC 2226, Kamti Devi v. Poshi Ram – para 11; (2005) 4 SCC 449, Banarsi Dass v. Teeku Datta – para 10; AIR 2009 SC 3115, Sham Lal alias Kuldeep v. Sanjeev Kumar & Ors. – para 10**)*

*(ii) The DNA test is not to be directed as a matter of routine. Such direction can be given only in deserving cases **(**Ref.: **(2005) 4 SCC 449, Banarsi Dass v. Teeku Datta – para 14).***

*(iii) 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. (Ref.: **AIR 2003 SC 3450, Sharda v. Dharampal – para 80 ; AIR 2010 SC 2851, Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women & Anr. - Para 13**)*

*(iv)(a) 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. (Ref.: **(1993) 3 SCC 418:AIR 1993 SC 2295 Goutam Kundu v. State of West Bengal & Anr**.)*

(iv)(b) The court would exercise discretion, only after balancing the interests of the parties and on consideration as to whether for a just decision in the matter the DNA test is imminently needed i.e. as to whether it is not possible for the court to reach the truth without use of such test. For so concluding, the court has to consider materials placed by both parties and the test shall not be ordered in routine for a roving enquiry.

*(v) "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual "cohabitation" (Ref.: **AIR 1934 PC 49,***

Karapaya Servai v. Mayandi ; (1993) 3 SCC 418:AIR 1993 SC 2295 Goutam Kundu v. State of West Bengal & Anr. – para 24)

(vi) *In a civilised society it is imperative to presume the legitimacy of a child born during continuation of a valid marriage and whose parents had "access" to each other* ***(****Ref.:* ***(2009) 12 SCC 454 : AIR 2009 SC 3115 Sham Lal alias Kuldeep v. Sanjeev Kumar & Ors. – para 42)***

(vii) *Burden of proving illegitimacy is on the person who makes such allegation (Ref. :* ***para 10 of (2005) 4 SCC 449 Sh. Banarasi Dass v. Mrs. Teeku Datta****)*

(viii) *The party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time.* ***(****Ref.:* ***AIR 2001 SC 2226, Kamti Devi v. Poshi Ram – para 10)***

(ix) *The presumption under Section 112 of the Indian Evidence Act can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities or on the basis of slender material. The standard of proof in such cases must be of a degree in between the preponderance of probability and proof beyond reasonable doubt by way of abundant caution and has a matter of public policy (Ref.:* ***AIR 2001 SC 2226, Kamti Devi v. Poshi Ram – para 11 & 12****)*

(x) *The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt (Ref.:* ***(2009) 12 SCC 454 : AIR 2009 SC 3115 Sham Lal alias Kuldeep v. Sanjeev Kumar & Ors. – para 39)***

(xi) *The verdict of displacement of the presumption shall not be rendered on the basis of slender materials. 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* ***(****Ref.:* ***(2001) 5 SCC 311, Kamti Devi v. Poshi Ram – Para 11; (2005) 4 SCC 449, Banarsi Dass v. Teeku Datta – para 13)*****.**

(xii) *The courts must be inclined towards upholding the legitimacy of the child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father (Ref.:* ***Dukhtar Jahan v. Mohd. Farooq [(1987) 1 SCC 624****).*

We consider at a later stage in this judgment the precedents considering the effect of result of a DNA examination.

V. ***Prima facie case***

56. From the above enunciation of law by the Supreme Court, it is crystal clear that the Family Court had to be satisfied that the husband had established a strong prima facie case of non-access to dispel the presumption of legitimacy of the child under Section 112 of the Indian Evidence Act and only when such strong prima facie case had been established, could the court consider the direction for the DNA examination. So what constitutes a strong prima facie case?

57. So far as the expression "*prima facie case*" is concerned, in the judgment reported at ***AIR 1958 SC 79, Martin Burn Ltd. v.***

R.N. Banerjee, the Supreme Court had observed thus :

> **"27.** …A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record. (See *Buckingham & Carnatic Co., Ltd.* [(1952) Labour Appeal Cases 490] .

This interpretation was reiterated by the Supreme Court in its later pronouncements reported at ***Bangalore Woollen, Cotton and Silk Mills Co. Ltd. V. B Dasappa : AIR 1960 SC 1352 : (1960) 2 LLJ 39; Nirmala J. Jhala v. State of Gujarat : (2013) 4 SCC 301*** and ***Cholan Roadways Ltd. v. G. Thirugnanasambandam : (2005) 3 SCC 241.***

58. So what is the prima facie case made out by the husband on record as on 16th October, 2015 when he filed the application u/s 151 of the CPC for direction to conduct the DNA examination of the child?

59. By that date, the learned Family Court Judge also had the pleadings of the parties as well as substantial evidence of the respondent no.1 available before him which ought to have formed part of the "*prima facie*" consideration.

VI. Whether the case of non-access was specifically pleaded by the respondent no.1

60. To justify the order for a DNA examination, before anything else, the foremost requirement in the present case for establishing illegitimacy even prima facie, is a specific pleading of "*non-access*", that is to say a plea of no opportunity for cohabiting as husband and wife and an opportunity of establishing marital relations. It therefore, becomes necessary to scrutinize the petition filed by the appellant to examine as to whether he had pleaded non-access at the relevant time.

61. Let us see what the respondent no.1 has to say about access to his wife in his divorce petition. In para 6 of the divorce petition, the respondent no.1 has pointed out that the parties were posted at different places; that there was change in her behaviour towards him and that she started to avoid him without any rhyme or reasons due to which the matrimonial life of the parties "*started to fall within the periphery of strained relationship and the cohabitation between the petitioner and respondent no.1 started to become a rare event*".

In para 7, respondent no.1 states that they resided as husband and wife together "*as a last occasion at Lucknow*".

In para 8, the respondent no.1 states that "*to save his matrimonial life, he made all efforts from his side but the conduct of the respondent no.1 (wife) towards the petitioner was pathetic*

during this period".

62. In para 10, the respondent no.1 has set out his postings admitting that from 2011, the parties were posted at different places. The respondent no.1 has moved from District Lakhimpuri, Kheri District, U.P. in 2011; remained as District Magistrate, Bareilly from 2011 to 8th June, 2014 and thereafter as District Magistrate, Aligarh when he filed the petition.

However, he does admit that the appellant joined his company at his places of postings, though it was a "*rare entity*".

The respondent no.1 has attributed neglect to the appellant wife who, admittedly, was posted at different places.

63. It is most important to note that in para 11, the husband has stated that from the "*period 2011 to December 2013*", the appellant and the respondent no.1 "*hardly cohabited*".

64. At the same time, a backhanded statement is made that "*from the start of the year 2013, even the access to cohabit was denied*" to him by the appellant. How is "*the start of the year 2013*" to be computed? Clearly an indefinite position shows that the respondent is not sure of his own case. In fact, it reflects that even in the start of the year 2013, the parties were cohabiting and having a normal relationship.

65. From the above pleadings, there can be no manner of doubt that the respondent no.1 has not stated that he had no access to the appellant wife at the relevant time. On the contrary, he has submitted that they were cohabiting from the period 2011 to December, 2013 albeit "*hardly*".

66. It needs no elaborate detailing or consideration of pleadings that *"rare entity", "pathetic", "hardly cohabited",* "*hardly*" cannot be equated to the categorical assertion of no access which is required by law to displace the presumption under Section 112 of the Indian Evidence Act. Consequently it was not even the husband's clear and unequivocal case in the divorce petition that he had no access to his wife at the time when the child of the parties could have been conceived.

67. Baby 'X' was born on 6th of October 2013. The relevant period of 280 days i.e. 9 months 7 days prior thereto would take us to start of the end of December, 2012/first week January, 2013 (covering the "*start of the year 2013*" as well. The possible period of Baby 'X' conception would be around 31st December, 2012.

It is also the appellant's case that the parties "*hardly cohabited*" from 2011 to December, 2013. 'H' has thus admitted "*access*" at the relevant time.

VII. Whether there is non-traverse by the wife of the husband's pleadings, and thereby, deemed admission thereof?

68. It is argued by Mr. V.K. Gupta, learned Senior Counsel for the respondent no.1 that in her written statement/reply to the petition under Section 13(1)(i) of the Hindu Marriage Act, 1955, the appellant wife has not specifically denied the averments of the appellant. The submission is that there is no averment by her in either the reply or the counter claim that there was no denial of access during the "*relevant time*" or that there was physical access

provided to the respondent no.1. In this regard, reference is made to the appellant wife's response to paras 6, 8, 10, 11, 13, 15, 16 and 36 of the divorce petition.

It is submitted that therefore she is deemed to have admitted the husband's case. Mr. V.K. Gupta, ld. Senior Counsel for the respondent no.1 has submitted that as a result, nothing further is to be examined by the court so far as paternity of the child is concerned.

69. Placing reliance on Rules 3 to 5 of Order VIII of the Code of Civil Procedure, Mr. V.K. Gupta, ld. Senior Counsel for the respondent no.1 has vehemently urged that the denial by the appellant had to be specific; that every allegation in the petition which is not denied specifically or by necessary implication, has to be taken to be admitted. It is submitted that the appellant wife in the present case has failed to specifically deny each and every assertion made by the respondent no.1 husband which by necessary implication have to be taken to be admitted by her and as a result, the wife is deemed to have admitted that the respondent no.1 husband had no access to her at the relevant time.

70. Reliance is also placed on Section 58 of the Indian Evidence Act, 1872 to contend that such facts which by any rule of pleading are deemed to have been admitted, need not be proved.

71. Mr. Gupta has requested this court to refrain from making any comment on the plea of the respondent no.1 – husband regarding access to his wife as it is the subject matter of trial before the Trial Court and further that no observation should be made on

the conduct of the respondent no.1 husband for the same reason. This submission, however, fails to consider the requirement of law which mandates that the court has to be satisfied that a person seeking DNA examination has to establish a "*strong prima facie case*" as well as inter alia the iminent need for ordering the same, in the justice of the case while also evaluating the equity or assessing the interest of justice. Admissions, if any, have to be examined from this perspective. It needs no elaboration that admissions of both sides have to be examined and their effect on "*prima* facie" case evaluated.

Therefore, during this consideration, the court would need to examine the pleadings of the parties in order to ascertain as to whether there was a failure to non-traverse of the assertions of the plaintiff by the appellant wife and which are the facts which could be deemed to have been admitted by her.

72. In order to avoid prolixity, we extract hereunder some of the material assertions in the reply of the appellant wife to the divorce petition :

> "4. That the ***contents of Para 6 to Para 11*** of the Petition are denied since the same are ***based on incorrect and wrong facts which is nothing but figment of imagination of the Petitioner and has been raised only to malign the reputation of the Answering Respondent and create frivolous and fabricated grounds for seeking divorce from the Answering Respondent on the ground of adultery which itself is totally false and malicious.***
>
> 5. That the contents of Para 12 of the Petition is

denied to the extent that the pregnancy of the Answering Respondent was known to the Petitioner ever since the Answering Respondent became aware of the same through medical examination which was conducted sometimes in the month of February 2013, and therefore, the averments contrary to the same are not accepted as they are false and frivolous.

6. That the contents of ***Para 13 to Para 16 of the Petition are vehemently denied and it is submitted that the Petitioner is not only creating a false and malicious ground but is stooping so low that he is trying to allege that he is not the biological father of his own child which is not only unfortunate but also shows the dirty and scheming mentality of the Petitioner. In fact, it is very painful for the Answering Respondent to make this submission before the*** Hon'ble Court that ***the Petitioner was always eager to have a male child and was therefore, pressurizing the Answering Respondent to get a sex determination test ever since the news of conception had reached him***. However, the Answering Respondent never agreed to this illegitimate demand and always insisted that she was happy to have a healthy child, be it a boy or a girl but the petitioner always got upset whenever, he was told that even a girl child was as precious as a male child. As the Petitioner always stressed on the fact that in his family tradition the first child has always been a male child throughout and therefore, he did not want to break this tradition under any circumstances. The purpose told by him to the Answering Respondent for getting sex determination test was only to ensure that it is a male child ***otherwise his intention was to get the child aborted in case of a female child to which the Answering Respondent never succumbed.***

7. That the contents of ***Para 17 to Para 24 of the Petition are vehemently denied by the Answering***

Respondent for the reason that the entire averments made in these paragraphs are not only false and fabricated but have also been done only with a view to malign the reputation of the Answering Respondent as well as her family and ***to extract a huge amount of money from them as a black mailing tactics so that the Answering Respondent and her family*** may succumb to such pressure as their family is one of the most reputed and prestigious family of the State of Uttar Pradesh. ***In fact, the perusal of the contents of the aforesaid paragraphs also shows the sick mentality of the Petitioner who has no hesitation in knowingly making such false and wild allegations against his own child and wife only with a purpose to convert the said allegations into monetary benefits. xxx xxx xxx***

8. That the contents of Para 25 to Para 26 of the Petition are vehemently denied. It is submitted that the averments made therein are not only false and fabricated but also shows the sick and dirty mentality of the Petitioner who is not only making wild allegations but is also putting words into the mouth of the Answering Respondent without substantiating anything on record with a view to mentally harass and torture the Answering Respondent. ***It is submitted that there is not an iota of truth in the allegations made by the Petitioner and he is only trying to create a strong ground as well as sympathy for himself***. Such conduct of the Petitioner should be strongly ***condemned and the ground of adultery raised by him be rejected at the outset by this Hon'ble Court.***

xxx xxx xxx

11. That the contents of Para 40 to Para 46 of the Petition are vehemently denied. ***It is submitted that a perusal of the entire Petition would clearly show that the Petitioner has only tried to repeat the false and fabricated facts related to this case in one way or the other only with a view to malign and harass the Answering Respondent and her family***. The main

purpose of the Petitioner is to extract a huge amount of money from the Answering Respondent and her family as she is the only child of her parents and therefore, the Petitioner is well aware that they would do everything to ensure the happiness of their only child and grand child. ***Therefore, in the light of the aforesaid facts and circumstances, the ground of adultery taken by the Petitioner should not only rejected but also a heavy cost should be imposed on the Petitioner for making false and fabricated averments*** and wasting the precious time of this Hon'ble Court. However, the ***Answering Respondent prays for grant of divorce from the petitioner on the ground of cruelty meted out to her by the Petitioner as she will, under no circumstances, like to stay with such a person who has such sick, pervert and dirty mentality and is a threat to her life and her daughter's life. Further, in view of the manner in which the Plaintiff has vilified the Answering Respondent and the innocent child, the Answering Respondent seeks full and sole custody of the child and no legal rights or visitation rights be given to the Plaintiff now or in future so that he does not further endanger the child's life and jeopardize her in the presence or future."***

(Emphasis by us)

73. Before proceeding with the discussion, we may refer to the two judgments placed by Mr. V.K. Gupta, learned Senior Counsel for the respondent no.1 in support of the submission that this court must deem the allegations in the divorce petition having been admitted by the wife. Mr. Gupta has placed reliance on para 11 of the judicial pronouncement reported at ***AIR 1964 SC 538, Badat & Co. Bombay v. East India Trading Co.*** which reads thus :

> "**11**. Order 7 of the Code of Civil Procedure prescribes, among others, that the plaintiff shall give in the plaint

the facts constituting the cause of action and when it arose, and the facts showing that the court has jurisdiction. The object is to enable the defendant to ascertain from the plaint the necessary facts so that he may admit or deny them. ***Order 8 provides for the filling of a written statement, the particulars to be contained therein and the manner of doing so; Rules 3, 4 and 5 thereof are relevant to the present enquiry and they reads***:

> "*Order 8 Rule 3.* It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.
>
> *Rule 4*. Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.
>
> *Rule 5*. ***Every allegation of fact in the plaint, if not denied specifically, or by necessary implication or stated to be not admitted the pleading of the defendant***, shall be taken to be admitted except as against a person under disability.

Provided that the court may in its discreation require any fact so admitted to be proved otherwise than by such admission."

These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences

flowing from its non-compliance. The written statement must deal specifically with each allegation of fact in the plaint and ***when a defendant denies any such fact, he must not do so evasively, but answer the point of substance***. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary. The first para of Rule 5 is a reproduction of Order 19, Rule 13 of the English rules made under the Judicature Acts. But in mofussil Courts in India, where pleadings were not precisely drawn, it was found in practice that if they were strictly construed in terms of the said provisions, grave injustice would be done to parties with genuine claims. ***To do justice between those parties, for which Courts are intended, the rigor of Rule 5 has been modified by the introduction of the proviso thereto. Under that proviso the court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. In the matter of mofussil pleadings, Courts, presumably replying upon the said proviso, tolerated more laxity in the pleadings in the interest of justice.*** But on the original side of the Bombay High Court, we are told, the pleadings are drafted by trained lawyers bestowing serious thought and with precision. In construing such pleadings the proviso can be invoked only in exceptional circumstances to prevent obvious injustice to a party or to relieve him from the results of an accidental slip or omission, but not to help a party who designedly made vague denials and thereafter sought to rely upon them for non-suiting the plaintiff. ***The discretion under the proviso must be exercised by a court having regard to the justice of a cause with particular reference to the nature of the parties, the standard of drafting obtaining in a locality, and the traditions and conventions of a court wherein such pleadings are filed. In this context the decision this context the decision in Tildesley v. Harper [(1878) LR***

7 Ch D 403] will be useful. There, in an action against a lessee to set aside the lease granted under a power, the statement of claim stated that the donee of the power had received from the lessee a certain sum as a bribe, and stated the circumstances; the statement of defence denied that that sum had been given, and denied each circumstance, but contained no general denial of a bribe having been given. The court held, under rules corresponding to the aforesaid rules of the Code of Civil Procedure, that the giving of the bribe was not sufficiently denied and therefore it must be deemed to have been admitted. Fry., J. posed the question thus: ***What is the point of substance in the allegations in the statement of claim***? and answered it as follows:

"The point of substance is undoubtedly that a bribe was given by Anderson to Tildesley, and that point of substance is nowhere met … no fair and substantial answer is, in my opinion, given to the allegation of substance, namely, that there was a bribe. In my opinion it is of the highest importance that this rule of pleading should be adhered to strictly, and that the court should require the defendant, when putting in his statement of defence, and the plaintiff, when replying to the allegations of the defendant, to state the point of substance, and not to give formal denials of the allegations contained in the previous pleadings without stating the circumstances. As far as I am concerned, I mean to give the fullest effect to that rule. I am convinced that it is one of the highest benefit to suitors in the court. xxx"

(Emphasis supplied)

74. Mr. Gupta, learned Senior Counsel for the respondent no.1 has sought to urge that the instant case was being conducted in Delhi, a metropolis. However, as has been noted above, professionally the same efficiency and standards which counsels in

this city may exhibit so far as civil matters (as was before the Supreme Court in ***Badat & Co. Bombay***), may not apply when it comes to matters involving close details of sexual relations between a husband and wife as in the present case. We examine this aspect a little later. And, in any case, the pleadings of the wife have to be tested on the same standards as those of the husband.

75. The second judgment relied upon by Mr. V.K. Gupta reported at ***(2003) 8 SCC 673, Sushil Kumar v. Rakesh Kumar*** relates to an election dispute wherein the Supreme Court was considering the question of disqualification of a candidate on grounds of age to contest election to the State Legislative Assembly. Specific assertions of facts relating to the date of birth, names, date of birth of the petitioner and the respondent and his elder brother; schooling were made which had not been specifically traversed. In this context, the Supreme Court making reference to Section 58 of the Indian Evidence Act observed that a fact admitted need not be proved. There can be no dispute at all with this well settled legal proposition. However, the standards which would apply to the pleadings in the election petition cannot apply to the pleadings in a matrimonial case. This would be more so as in a case as the present one.

76. Even otherwise, learned Senior Counsel for the appellant places reliance on the observations of the Supreme Court in the judgment reported at ***AIR 1976 SC 461, Madan Gopal Kanodia v. Mamraj Maniram & Ors.*** to submit that the scrutiny by the court should be meaningful and should not be in such a manner as to

defeat a genuine claim. We extract hereunder the observations of the Supreme Court in para 26 of this pronouncement which are relied upon by the appellant :

> **"26.** In the written statement filed by the plaintiff under Order 6, Rule 4 of the Code of Civil Procedure, the particulars and essential details of the 21 bales of cloth were clearly mentioned in para 1(*b*). Further more, counsel for the plaintiff gave a statement before the trial court on September 5, 1952 where also all the essential details regarding the 200 bales of cloth were given. In the statement the counsel for the plaintiff admitted that the plaintiff had received the sale proceeds of 179 bales of cloth and that 21 bales of cloth remained unaccounted for. In the evidence also the plaintiff has sought to prove the very case set up in the plaint as also in the written statement filed later under orders of the Court. We are unable to see any substantial variation between the pleadings of the plaintiff and the evidence led by him at the trial. ***It is well settled that pleadings are loosely drafted in the courts, and the courts should not scrutinise the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial grounds. In our opinion, the finding of the High Court that there was wide gap between the pleadings and the proof is not at all borne out from the record of the present case.***"
>
> (Emphasis by us)

77. We may also advert to the following observation of the Supreme Court in para 51 of the pronouncement reported at ***AIR 1952 SC 47, Kedar Lal Seal & Anr. V. Hari Lal Seal*** with regard to the pleadings which were clumsily or inartistically worded :

> "**51.** I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side,

> however clumsily or inartistically the plaint may be worded. In any event, it is always open to a court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs."

78. On the aspect of the technical view being pressed on behalf of the respondent no.1-husband, we are compelled to note the observation in para 6 of the judgment reported at ***(1975) 1 SCC 774, Sushil Kumar Sen v. State of Bihar*** of Krishna Iyer J while concurring with the majority opinion, had written that *"Justice is the goal of jurisprudence – processual, as much as substantive"*. Krishna Iyer, J had noted that "*the processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable. xxx. Parliament, I hope, will consider the wisdom of making the Judge the ultimate guardian of justice by a comprehensive, though guardedly worded, provision where the hindrance to rightful relief relates to infirmities, even serious, sounding in procedural law. Justice is the goal of jurisprudence — processual, as much as substantive. While this appeal has to be allowed, for reasons set out impeccably by my learned brother, I must sound a pessimistic note that it is too puritanical for a legal system to sacrifice the end product of equity and good conscience at the altar of processual*

punctiliousness and it is not too radical to avert a breakdown of obvious justice by bending sharply, if need be, the prescriptions of procedure. The wages of procedural sin should never be the death of rights."

Krishna Iyer, J had also noted that *"the mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer."*

79. It is trite that courts are required to meaningfully construe the entire gamut of pleadings before arising at the conclusions and outcomes of cases.

80. There can be no dispute with these authoritative pronouncements especially in the context of pleadings in matrimonial cases which have to guide our consideration of the pleadings of the parties.

81. There is one more aspect of this matter which over burdened courts overlook. Courts get several opportunities to examine pleadings, evidence as well as enter into discussions involving sexual references. The same could arise in cases as the present involving birth of a child during the subsistence of a marriage or allegations of impotency or cases involving sexual offences including rape, incest, etc; allegations of impotency against a spouse in any matrimonial case amongst others. In each of these cases, parties are required to plead and disclose what is most internal/confidential/intimate to them.

82. One of us (Gita Mittal, J.) has had the opportunity to examine an appeal against a person convicted for offence of rape

under Section 376 of the IPC. In the judgment dated 29th September, 2009 entitled ***Virender v. The State of NCT of Delhi, Crl. App.No.121/2008***, it was noticed that the conviction rested on statements attributed to the child victim. The first was the statement recorded by the investigating officer under Section 161 of the CrPC; the second recorded by the Metropolitan Magistrate under Section 164 of the CrPC and the third to the sessions court during the trial. The persons recording the statements of the victim in ***Virender*** were personnel trained to do so, one being a police official recording the statement under Section 161 during investigation, two of them being judges of experience and expertise, namely, the Metropolitan Magistrate who recorded the statement under Section 164 Cr.P.C. and lastly, the Additional Sessions Judge who recorded the statement during trial who while recording the statement of the accused under Section 313 of the Cr.P.C. referred to the evidence of his having misbehaved with the prosecutrix.

83. The statements attributed as having made by the victim at these three stages, while referring to the acts of the offender, note that he had done "*gandi harkatein*"*;* "*galat kaam*" and indulged in misbehaviour. These statements hopelessly failed to bring out the ingredients of the offence. From this failure to bring out the bare ingredients of the offence, one glaring factor had shone through which was noted in the following terms :

"79. In the instant case, the ***evidence recorded by the learned Metropolitan Magistrate under section 164*** of the CrPC and ***by the court appears to suggest embarrassment of the court to put questions of any kind to the prosecutrix and witness so as to elucidate the complete truth from her resulting in***, not contradictory but incoherent testimony of the child victim who has ***concealed the essential ingredients of the offence***. Use of appropriate language would enable the necessary decency to be maintained in the proceedings and the record.

A judge is require to be mindful that the edifice on which the entire structure of the evidence of the prosecution stands is the trustworthiness of the testimony of the witness. Therefore, the manner and the language in which the evidence is recorded is of extreme importance.

xxx xxx xxx

84. The issue with regard to ***teaching*** of offences regarding ***sexual assault and rape itself*** has been a source of much discussion. I am informed that there are instances of even legal educators being ***bashful and embarrassed about teaching such subjects. Judges and counsels are products of the legal education.*** The multi-faceted problem and concerns noticed above are not confined to ensuring gender justice in courts alone. In this background, it is absolutely imperative that these areas of law and the issues which have been raised herein are taken up with all seriousness. Perhaps the programme of continuing legal education needs to take a look on these questions."

(Emphasis by us)

84. We have made a detailed reference to the above for the sole reason that, when it comes to matters of deepest intimacy involved

in a sexual encounter even in a matter of pain (sexual violence), most individuals as victims are hesitant to disclose the details or as professionals/experts (lawyers, police, judges) to discuss them in public space. Hence, the nature of pleadings in cases involving disclosure of intimate details of the sexual life of even partners of a marriage.

85. The same is apparent from the expressions used by the husband in the present divorce petition as well. He has made bald statements. Whereas, if specific detail was to be insisted upon, he was required to state the exact dates and places when he had sought to engage in the sexual intimacies with his wife, dates and particulars of which attempt or invitation or effort by him was spurned or refused by her. He does not do so. The failure to reflect in more detail on the parties intimate relationship is a reflection of his natural embarrassment to describe close details of the parties intimate sexual life and of what must be the most private to them.

86. We have extracted above the husband's petition wherein also he refers to the alleged extra marital relationship also in extremely general terms. No specific details or instances are cited by him.

Mr. Sethi, learned Senior Counsel would submit that the respondent no.1 was himself not sure of his case and has set-up contrary pleas in almost every paragraph of his divorce petition with regard to access. These varied assertions of access (ranging from "*hardly*") are spread all over the petition.

87. Reading of the above would also show that as mandated by Rule 4 of Order VIII, the answering party must answer "*point of*

substance" in the pleadings of the other side. In the case in hand, the point of substance, as pressed in the divorce petition is whether the appellant wife has committed adultery with the person cited as respondent no.2 and whether the child born on 6th October, 2013 is a result of such act of adultery. Put more simply, the appellant wife has to deal with matters relating to intimate details of her matrimonial life with the respondent no.1 husband and alleged extra marital affair with the respondent no.2.

88. Mr. Sandeep Sethi, learned Senior Counsel for the appellant wife has submitted that the appellant has categorically stated in the written statement that the child to whom she had given birth on 6th October, 2013 was the respondent no.1 husband's. It is submitted that she has clearly stated that the allegations of the husband were demeaning, defaming, vilifying and false allegations which amounted to cruelty. She has categorically denied the adultery attributed to her and specifically adverted to "*his child*". The submission is that the pleadings have to be read as a composite whole and not as if each sentence was disjointed.

89. The scrutiny of the above extract of the written statement would show that the wife has categorically denied that she has committed any act of adultery, that she has no association at all with the respondent no.2. She has repeatedly asserted that "*incorrect and wrongfacts"*; "*figment of imagination of the petitioner*"; "*frivolous and fabricated ...ground of adultery*" (para 4); that the child born on 6th of October 2013 is "*his own child*", "*false and malicious...trying to allege that he is <u>not the biological</u>*

father of his own child" (para 6); "*false and wild allegations against his own child and wife*" (para 7); "*there is not an iota of truth in the allegations made by the petitioner*" (para 8); "*ground of adultery taken by the petitioner should not only be rejected but also heavy costs*" (para 11).

In para 6 of the written statement, the anguish of the wife is expressed when she has asserted how "*painful*" it was for her to make the submissions. In para 11 of her written statement, the wife states that "*perusal of the entire petition would show that the petitioner has only tried to repeat the false and fabricated facts related to this case in one way or other ...*".

90. In this background, can it be held that the appellant has failed to answer the point of substance? The answer has to be in the negative. The wife has effectively denied the substantive case of the husband and also generally denied each and every assertion made by the husband each time he has repeated the allegation.

The wife's categorical denial of the allegation of adultery and insistence that the child was the biological child of the respondent no.1 even at one place coupled with her general denials elsewhere in the written statement is sufficient denial in law, more so when she asserts pain in having to deal with such allegations in the pleadings. There is no requirement in law for the wife to go on repeating the same pleas. Clearly even if the appellant has so declared in one place, it was sufficient denial of the repetitive plea of the respondent no.1.

VIII. Is the court bound to pass orders premised on admissions of parties?

91. Without expressing any opinion at this stage of the impact of the wife's pleadings on the bald statements by the husband, the proposition pressed by Mr. Gupta, learned senior counsel for the husband that the wife has failed to deny the allegations of the husband entitling him to the relief, can be tested from yet another angle.

92. Even if the submissions of Mr. V.K. Gupta, learned Senior Counsel for the respondent no.1 that the respondent no.1- husband had specifically asserted no access, that such fact as well as the fact that the child born on 6th October, 2013 was not born from the wedlock and cohabitation of these two parties, was actually admitted by the appellant wife, was the family court bound to accept this position as admitted and to pass an order based on such admission alone? The position in law is clearly to the contrary.

93. We find that the proviso to Rule 5 of Order VIII itself grants discretion to the court to "*require any fact so admitted to be proved otherwise than by such admission*". A similar discretion is reserved to the court even in Section 58 of the Indian Evidence Act, 1872 wherein the proviso confers such discretion on the court to require facts admitted to be proved "*otherwise than by such admissions*". The reason for such discretion, in a case like the present one, is obvious.

94. Let us assume a case where the husband's pleadings qua denial or lack of access to the wife to enable her to conceive their

child was specific. In her response/reply/written statement, instead of denying the husband's plea of "*no* access", the wife actually admitted the assertions of the husband.

95. The parties may have entered into a conspiracy to establish that the child was not theirs for any malafide reasons, say for instance, reasons of any tangible benefits arising out of inheritance; estate benefits; immigration and citizenship etc.; or to claim any benefit provided by law. They could collude to deny paternity or relationship. Say, where a government scheme operates to confer immovable property benefit on individuals who are not related/siblings and it may be financially beneficial for establishing that they are not related. In the case of contested matrimonial litigation and child custody battles also, parties could falsely agree to paternity issues to ensure denial of custody to the husband.

96. It needs no elaboration that it is the rights of the child which are affected by any order accepting such pleadings of the parents. Such child is not before the court. In the face of the admissions, was the court bound to return a finding that the child was not his? The answer has to be an emphatic no. Such finding of the court could wreak havoc in the life of Baby 'X' who is the innocent party not before the court. It could adversely affect, even disentitle, such child to rights in immoveable property.

The court has therefore, to independently ascertain the correctness and genuineness of the allegation by one party, irrespective of the admission in the pleadings of the other in as much as it is the rights of the child involved.

97. In the present case, even if the wife's pleadings could be treated as an admission of the husband's case, the court is bound to scrutinize the same with circumspection and require corroboration of the admission, if any, by independent evidence to premise a court order thereon.

98. In any event, looked at from any angle, we find that even if it could be held that the husband's pleadings had not been traversed, we have noted above that the respondent wife was called upon by the husband not to traverse the case of complete non-access but of "*hardly cohabited*" between "2011 to December, 2013".

99. We find that in his cross-examination on the 24th of September 2015, the respondent no.1 husband has admitted that during official meetings, the appellant wife used to come to his residence for lunch or breakfast. The husband has also admitted that his mother used to go to stay with the appellant wife during her visits to Pilibhit.

100. In the present case also, the parties though posted in different places, were coming together in reasonable proximity with opportunity of intercourse.

101. The petition itself mentions that the parties were posted at different places. Hence the statement by the husband that the parties from 2011 to December, 2013 "*hardly cohabited*" i.e. reduced opportunity relatable to official postings. But there is no averment by the husband that there was no opportunity at all or that the wife had no access to him (*Ref.:* ***Kamti Devi (Smt.) & Anr. v. Poshi Ram***)

102. Prima facie, the respondent no.1 is unable to support a case of no access and instead of supporting the propounded allegations of adultery, the circumstances on record and the evidence of the respondent no.1 also lean in favour of the presumption under Section 112 of the Indian Evidence Act. Even if it could be held that the wife has admitted such case, it could not be held that the wife had stated that the parties had no cohabitation as husband and wife during the relevant time. It is not possible to agree with the respondent no.1 that there was deemed admission of "*no cohabitation*" or "*non-access*" by the wife.

IX. Admissions of paternity by the husband on court records – impact on "prima facie case"

103. An examination as to whether the respondent no.1-husband had made out a prima facie case for grant of the prayer for the DNA examination, cannot be completed without examining the material in the present case in the form of admissions on the part of the husband on the record.

104. It is the admitted case of the husband on 1st October, 2014 a joint petition being HMA No. 1099/2014, was filed in the court of Principal Judge, Saket, New Delhi under Section 13B(1) of the Hindu Marriage Act. We have extracted above para 7 of this petition, wherein the respondent no.1 had unequivocally and unconditionally declared that Baby 'X' was born to them on 6th October, 2013 who was in custody of the mother at Sultanpur. The respondent no. 1 had also referred to the agreement that the

permanent custody of this child would remain with the wife.

A joint statement was made in support of the petition reiterating and declaring that there was one female child born on 6th October, 2013. This petition came to be withdrawn on account of the objection with regard to its maintainability on account of territorial jurisdiction of the court.

105. On 31st October, 2014, the parties had jointly filed a second petition under Section 13B(1) of the Hindu Marriage Act which was registered as HMA No. 783/2014 before the Family Court, Patiala House, New Delhi for the relief of dissolution of their marriage by a decree of divorce by mutual consent. This petition also contained an identical admission of the birth of the child on 6th October, 2013 in para 7 as well as the agreement with regard to her permanent custody.

106. Both the petitions were supported with affidavits of the husband clearly stating that the consent was voluntary and that there was no collusion between the parties in the submissions made in the petition.

107. We find that so far as drafting and filing of the petitions under the Hindu Marriage Act are concerned, Rules have been notified by the Delhi High Court which are captioned as ***Rules to Regulate Proceedings under the Hindu Marriage Act, 1955***. The proceedings are required to be initiated by petitions in the format detailed in Rule 5 thereof. So far as contents of the petition are concerned, Rule 7 stipulates the particulars required to be given.

108. We extract hereunder the relevant portion of these rules :

"7. Contents of petition – In addition to the particulars required to be given under Order VII, Rule 1 of the Code and Section 20(1)of the Act, all petitions under Secs. 9 to 13 shall state-

(a) the place and date of marriage.

(b) whether the petitioner and the respondent were Hindu by religion at the time of the marriage and whether they continue to be so up to the date of filing of the petition;

(c) the name, status and domicile of the wife and the husband before the marriage and at the time of filing the petition;

(d) the address where the parties of the marriage reside at the time of the presentation of the petition and last resided, together;

(e) ***the names of children, if any, of the marriage, their sex and their dates of birth or ages***;

(f) if prior to the date of the petition there has been any proceeding under the Act between the parties to the petition, full particulars thereof.

(g) the matrimonial office or offences alleged or other ground, upon which the relief is sought, setting out with sufficient particularity the time and places of the acts alleged and other facts relied upon, but not the evidence by which they are intended to be proved, e.g.-

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(iv) in the case of alleged desertion, the date and the circumstances in which it began, in the case of cruelty the specific acts of cruelty and the occasion when and the place where such acts were committed."

(Emphasis supplied)

109. It is an admitted position that the divorce petitions which were filed, were in compliance with the Rules. In both these

petitions, the husband had clearly stated that a child born on the 6th October, 2013. Clearly, as per Rule 7(e), the parties had given details of the child "*of the marriage*". This is a material admission by the husband, not once but twice, on affidavit on judicial record as well as on oath in his oral statement dated 1st of October, 2014 in HMA No.1099/2014.

110. When queried about the impact of this admission, Mr. V.K. Gupta, learned senior counsel for the respondent no.1 has asserted that it was not open for this court to go into this question and that the same was irrelevant for the purposes of adjudicating on the prayer for a DNA examination of the child.

Regrettably we are unable to agree with this submission.

111. The principles of law governing adjudication on an application for DNA examination of a child are well settled. The respondent no.1 – husband was bound to have made out a prima facie case for grant of such a relief. Admissions of fact by a husband are an important part of prima facie consideration of the case. In the face of the above admissions, which negate his challenge to paternity, the respondent was bound to have rendered an explanation for the admissions. No such explanation has been tendered before the Family Court. There is not a whit of an explanation in the entire divorce petition, or in the application seeking the DNA examination. The same has been refused to be given before us.

112. These admissions on judicial record, clearly operate against a finding of a prima facie case in favour of the husband.

X. Conduct of the husband despite his allegations against his wife – impact thereof

113. In a case like the present once, conduct of the parties would throw valuable light upon the prima facie consideration. We have discussed above that the husband is himself not sure of the case which he wants to make out. He himself has doubts about his plea of illegitimacy. This is amply borne out from his pleadings about his conduct and emotions after learning about the pregnancy of the appellant.

114. The parties are at variance with regard to the date on which the respondent no.1-husband learnt about the pregnancy. While the respondent no.1 would want the court to believe that he learnt of the same only in April, 2013, the appellant-wife has submitted that he learnt of the same in February, 2013 after her medical examination confirmed the same.

115. In para 13 of the divorce petition, the respondent no.1 has stated that this news "*brought a mix bag of emotions*" as "*on one hand he was happy to hear the news of a child coming in his life which any normal male would have cherished but on the other hand raised a strong level of suspicion in his intriguing mind about the paternity of the child*". In para 14, the respondent no.1-husband refers to "*such a whirlpool blowing in the mind of the petitioner(husband) about the paternity of the child which has raised a very strong doubt*". Later in para 14, the husband has referred to the fury of the wife when he doubted her character.

116. In para 15, reference is made to "*doubt*" or "*suspicion*" or

"*more strong level of suspicion*". In para 17, the husband refers to removal of his "*doubts*". If there had been no access or cohabitation, the husband would not have nursed merely a "*doubt*" but would have had a firm belief that the child was not his. There would be no question of "*a mix bag of emotions*" nor any occasion to be "*happy to hear the news of a child coming in his life*". If he had no access to his wife and had no relations with her, there would also be no "*whirlpool*" in the husband's mind about the paternity of the child but the husband would be absolutely sure that the child was not his.

117. Even in his examination-in-chief on affidavit dated 29th July, 2015, the respondent no.1 husband has reiterated the above pleadings.

118. These statements are to be tested against his admitted silence with regard to his even nursing a suspicion through the entire period of the pregnancy of nine months (and thereafter) when the parties not even continued living as they were in the past, but also celebrated the pregnancy of the appellant with all normal ceremonies in the family of the respondent no.1-husband.

119. It is stated in her written statement (and admitted by the husband in his evidence) that in March, 2013, the religious ceremony relating to the pregnancy of the appellant was performed at Bareilly in which parents of both the parties had participated. His parents had come from Bihar for this purpose while her parents had joined them as well!

120. One more material event inexplicably concealed by the

husband is also brought on record of the case by the wife. It is on record that the birth of the child was celebrated by the parties and their families and a proper *namkaran* ceremony was hosted. The respondent no.1 husband has claimed in his evidence that he came to know the name of the child "Baby X" in the *namkaran sanskar* ceremony which was held in the October end or beginning of November, 2015 and that his parents, relatives and he himself had participated in the ceremony. The respondent no.1 had denied the suggestion that he had invited 150 guests to attend the ceremony.

121. In his cross-examination, respondent no.1 was confronted with seven photographs from the *namkaran* ceremony which have been exhibited on record as PW-1/R-3 to PW-1/R-9. It includes five photographs which feature just the respondent no.1-husband and his wife (the appellant) with the child. In Ex.PW1/R-3 and Ex.PW-1/R-5, featuring the appellant, respondent no.1 and the child, the respondent no.1 husband appears extremely happy and is holding the child in his arms in an intimate gesture as part of a loving family. Ex.PW-1/R-4 appears to be a family photograph which includes the couple with their child in the arms of the husband and immediate family members of the parties.

122. Ex.PW-1/R-6 and Ex.PW-1/R-7 feature the appellant with two of his friends (including the alleged adulterer). The photographs display his comfort and, in fact, his bearing reflects happiness on the occasion. He has displayed complete comfort with the appellant as well as the child and friendship with even the alleged adulterer.

123. The photograph Ex.PW-1/R-9 shows the respondent no.1 with his mother and their Pandit performing the *pooja* (prayer) relating to the *namkaran* ceremony. In his cross-examination, the respondent no.1 has prevaricated suggesting that "*one person probably*" looks like him!

None of these photographs displays any tension or anger or revulsion as would be the normal reaction of any man, if, the situation was as has been portrayed.

124. Let us note two more instances of the reaction of the respondent no.1 to the arrival of the child and thereafter. In the hearing before us, on the 23rd of May 2016, a further affidavit was sought to be filed by the appellant along with enclosures. The same was taken on the record of the present case with the consent of the respondent no.1 husband.

125. On 5th of July 2016, we were informed by Mr. V.K. Gupta, learned Senior Counsel for the respondent no.1 – husband, that though there was no objection to the affidavit being taken on record, the respondent no.1 was not filing any reply thereto for the reason that "*the facts stated in the affidavit are irrelevant for the purposes of the present appeal*" as well as "*for the purposes of deciding the main divorce petition for the reason that it was premised on the allegations of adultery on the part of the appellant*". So the appellant's affidavit and its annexures remain undisputed before us.

126. For the purposes of the present appeal, we are only concerned with the question as to whether the respondent no.1 had

established a strong prima facie case in consonance with the requirements laid down by the Supreme Court for directing a DNA examination of the child born on 6th October, 2013. The affidavit and enclosures stand taken on record with the consent of the husband. We are within our jurisdiction to scrutinise the additional affidavit and enclosed documents from this perspective alone.

127. The first document so brought on record is the birth certificate dated 22nd November, 2013 of the child issued by the Lucknow Municipal Corporation which contains the name of the parents of the child. We find that the birth certificate reflects the father's name as "*H*" i.e. the respondent no.1 – husband and the appellant as the mother of the girl child born on 6th October, 2013.

128. The other document placed before us is the passbook issued on 2nd November, 2013 of an Account bearing No.33423970043 which was opened in the State Bank of India, Civil Lines, Near Kacheri, Bareilly. This passbook is of a saving bank account of the child which was opened by the respondent no.1 - husband while he was posted as District Magistrate, Bareilly. In the account, against the column for name of the child, as it was a minor account, after her name, it is mentioned "*UNG 'H' IAS*". We are informed that this means that the child was "*under natural guardian 'H' IAS*". Legally the father of the child is recognised as the natural guardian.

129. As per the wife's affidavit, during the *namkaran* ceremony of the child, cash gifts had been received, which totalled ₹1,61,000/-. The respondent no.1 - husband had deposited this amount in this saving bank account on the 2nd of November 2013.

Photographs of the parents were also furnished to the bank by the respondent no.1 which includes his own photograph as the child's father.

130. Further subsequently, on the 20th of November 2013, the respondent no.1 had got the name of the appellant – wife also added as a joint guardian of the child to continuously make deposit for the benefit of the child.

131. Prima facie, there is substance in the appellant's contention that each of these documents again contain admissions by the appellant of his having fathered the child born on 6th October, 2013.

132. Considering the vehemence with which the respondent husband is now agitating the plea of adultery, it is inconceivable that the husband, an experienced bureaucrat of considerable experience, having control over a huge administrative establishment and paraphernalia, would not only tolerate the deviations of an errant wife, support her through a pregnancy (allegedly extra marital) and also celebrate the same by performing customary *puja* upon a wife's conception as well as the birth of the child by a huge celebration. Or to permit his name to feature as such child's birth certificate or to create and operate a bank account for her!

These are behaviour which militates against a "*prima facie*" case in his favour on the plea that he was not the father of the child.

133. It is important to note that the respondent husband has not even remotely suggested any unnatural conduct on the part of his

wife during their marriage. He has made no allegation that she had spurned him or found him abhorrent. On the contrary, normal civility and relations are reflected and the parties appear to have been meeting normally as husband and wife as well as professionally in their official residences and official commitments.

134. In the discussion by the Supreme Court in para 10 of the judgment reported at ***AIR 2001 SC 2226:(2001) 5 SCC 311, Kamti Devi (Smt.) & Anr. v. Poshi Ram***, what is material is whether there was a denial to the wife of access to the husband. No such material is on record.

Concealment and statement of wrong facts – whether impacts consideration of prima facie case?

135. Mr. Sandeep Sethi, learned Senior Counsel for the appellant wife has drawn our attention to para 16 of the divorce petition. Here, in an effort to support a plea of non-access, the respondent no.1-husband has pleaded that "*the denial of access"* and *"cruel conduct"* of the wife towards him *"continued during the entire period of pregnancy also…*".

136. In the written statement, the appellant-wife has stated that in May, 2013, the respondent no.1-husband invited her to visit Udaipur where he had made all arrangements for stay etc. in Udaipur Vilas Palace Hotel which is a well-known wedding and honeymoon destination and that, for the first time, all expenses were borne by him. The appellant wife has also asserted that he had arranged this Udaipur outing with the intention to persuade her

for a sex determination of the child to which she could not reconcile nor accept. The appellant-wife has further pleaded that for the first time he spent money lavishly on this outing, that the parties came from Bareilly by road to Delhi and from Delhi, caught a flight to Udaipur.

137. The fact that the parties went to Udaipur for holiday from 9th May, 2013 to 13th May, 2013 has not even been mentioned in the divorce petition by the husband. However, in his cross examination on 24th September, 2015, this fact has been admitted by him. When questioned that the stay of Udaipur must have cost him ₹40,000/- to ₹50,000/- per day and that he had paid over ₹2 to 2.5 lakhs for the entire trip, the husband replied that he does not know the tariff, nor does he recollect who had borne the expenses. The appellant would suggest prevarication on his part, but this aspect does not need to detain us here for a prima facie consideration, except to the extent that the husband has concealed this trip. The trip is conduct incompatible with that of a husband whose wife is pregnant with an outsider's child. It is urged that on the contrary, the trip supports the appellant's case of a normal relationship between the parties.

During the Udaipur visit, the appellant wife was already around three months into her pregnancy. Any reasonable person who knew that the child was not his or that his wife was carrying on an adulterous relationship would never vacation with her.

The plea of the husband that he had no access to the wife during the duration of the pregnancy is therefore, clearly false.

138. The appellant-wife has further asserted that the parties continued to visit each other and that even thereafter, they both had access to each other on all material time. It is the wife's assertion that on 15th August, 2013, he specifically came to stay with her at her place of posting so that she would not be alone on her birthday which happened to fall on 16th August, 2013.

139. Mr. Sandeep Sethi, learned Senior Counsel points out that the entire case of the respondent no.1 of appellant wife having an adulterous relationship with the respondent no.2, hinges on his solitary allegation that one of his friend namely, Shri Vikas Verma had seen the respondents in "*intimate gesture*" in the company of each other on at least four to five occasions in public places. It is stated that "*Shri Vikas Verma has himself seen respondent nos.1 and 2 at Hotel Manor, Faizabad, P.S. Chinhath, District Lucknow and their gestures fully corroborates.....the fact that respondent nos.1 and 2 behind back of the petitioner were having an extramarital relationship.....*".

140. Mr. Sethi has drawn our attention to the record and pointed out that Shri Vikas Verma was examined as a witness on 16th of October 2015 when he tendered his evidence by way of affidavit which was exhibited as Ex.PW2/A. This witness gave an address of Lucknow as his address. However, in his cross-examination, this witness revealed that his residential address was "*241/A, Raiganj, South Sarafa Katra, P.S. Rajgath, Gorakhpur*" and that he even has a jewellery shop situated in Hindi Bazar, Gorakhpur. He also disclosed that he had mentioned his father-in-law Shri Rajinder

Verma's address of Lucknow in his affidavit of evidence. It is urged that this witness has clearly given a wrong address to falsely justify his presence at Lucknow to support the husband.

141. In his cross-examination further, Shri Vikas Verma has completely disclaimed that he had seen the appellant and the respondent no.2 going inside Hotel Mannar! So far as the alleged intimacy is concerned, in his cross-examination on 16th October, 2015. Shri Verma baldly claimed that he had seen these two persons "*going inside Hotel Charan*".

This witness thus not only completely disclaimed the contents of his own vague affidavit but also gave no specific date. It lends support by the criticism that the respondent no.1 is therefore, relying on bald and vague innuendo and suggestion in support of his plea of adultery, without any material in support. The evidence of Shri Vikas Verma was on the record of the Family Court on 28th January, 2016 for examining whether there was a prima facie case in favour of the husband when the application was considered and the impugned order passed.

XI. DNA report dated 23rd April, 2015 – whether supports a prima facie case in favour of the respondent no.1 – husband?

142. The application dated 16th October, 2015 on which the impugned order was passed, in para 3 claims that the divorce petition was filed on the act of adultery, "*confirmed by the DNA report of umbilical cord (dried) belonging to the child delivered by*

the respondent no.1" and his blood samples, sent to DNA Lab India Genetics Research and Development Centre for DNA test. In para 4, the respondent no.1 referred to a DNA test purported to be conducted by the Central Forensic Science Laboratory, Directorate of Forensic Science Services, Ministry of Home Affairs, Hyderabad, Andhra Pradesh under orders of the Additional Chief Judicial Magistrate, Lucknow in a criminal complaint filed by the respondent no.1 under Section 497 of the IPC. The certified copy of this report was filed by the appellant on the court record.

143. Before the Family Court, the respondent husband has relied on a DNA test report dated 23rd April, 2015. The respondent no.1 claims that this is a report of testing of a sample from the husband with a sample claimed by the husband to be that of the umbilical cord of the child.

144. The respondent husband has claimed that he first got a private DNA test conducted wherein a report dated 21st November, 2013 was obtained, but the respondent husband has not placed reliance on the report, either before the Family Court or in the present appeal.

145. Before we deal with the report, it is necessary to understand the requirements of law for its acceptance. In order to lend veracity to a DNA report, even prima facie, first and foremost, the person relying on the same has to prove the sources of the samples; their confirmed identity, authenticity as well as purity thereof. Additionally, the person relying on a scientific report has to make out the chain of custody of these samples and to support that it was

only such confirmed samples which were actually tested and that the scientific report relates to only the claimed samples, without there being any possibility of mistake or tampering or soiling thereof. Thus the first and foremost fact which had to be indicated was that the report dated 23rd April, 2015 actually related to samples extracted/obtained from the minor child; that it was such sample which had actually been sent to the test laboratory; that the laboratory had conducted the test on that very sample vis-a-vis pure sample from the respondent husband and that the report was actually a result of DNA test conducted on the human samples obtained from the minor child and the respondent husband.

We hasten to repeat here that we are at this stage again assessing the material which was before the learned Trial Judge at the time of passing of the impugned order from a prima facie aspect alone.

146. The respondent no.1's evidence stood completed on 29th September, 2015 and was before the Family Court when the application was considered. In his cross-examination, the appellant wife has challenged every facet of the husband's claim with regard to the DNA testing. From the very acquisition of the sample to the result have been subjected to a cross-examination.

147. The respondent no.1 husband nowhere gives any particular date on which the alleged sample i.e. the umbilical cord became available to him, except to say that it was collected in the hospital. He is unable to give definite size of the umbilical cord. So far as its preservation was concerned, the respondent no.1 has claimed

that he "*collected it through a piece of paper, wrapped the same in the paper and put it in my pocket at that time. Thereafter, I put the same in an air tight glass jar which I purchased later on, after leaving the hospital*". The respondent no.1 claimed that "*umbilical cord was kept in the same glass jar duly wrapped in a paper for more than 1½ years (one and a half years)*". He states that he did not inform his parents or in-laws about having taken the cord for testing.

148. Medical texts advise that the umbilical cord falls off after 7 to 10 days of birth, sometimes after 5 days. The respondent no.1 does not explain that the mother and child remained admitted in hospital for such period.

149. Before us, additional material is pointed out from the trial court record which was called for. In order to prove the DNA test report, the respondent no.1 examined on 4th March, 2016 as his witness, Shri S. Sathyan, Senior Scientific Officer, Central Forensic Science Laboratory, Hyderabad as PW-4. This witness refers to a letter dated 25th February, 2015 received by the CFSL from the CMO, Lucknow (Ex.PW-4/1). While requesting the Director of the CFSL to get the DNA test done as per the court order, the CMO, Lucknow has referred to "*the blood sample of "H" and the so called umbilical cord of Baby .....*". The Director does not confirm the source of the sample.

150. In his evidence also, PW-4 Shri Sathyan refers to the ***so called*** umbilical cord. In his cross-examination, the witness clearly stated that he was not sure as to whether the tested sample was that

of umbilical cord or not. Prima facie, there is thus, nothing at all to connect the sample subjected to the testing, to the child concerned.

151. Mr. Sethi would urge that even if the husband had actually collected the cord of the child, he has wrapped it in paper and stored it in an ordinary bottle acquired by him, not a sanitised sample bottle. The submission is that for an effective testing sample had to be scientifically collected and preserved. It was so kept for a long period of one and half years, clearly exposed to continuous contamination. Ld. Senior Counsel would submit that no reliance can be placed on the DNA report premised on such sample for this reason as well. Unfortunately, the question as to whether the alleged sample could have got contaminated, if maintained or preserved in the manner as has been claimed by the respondent no.1 husband, was disallowed. It is urged that even if the sample was actually the child's, there is doubt about its purity or effect of impurities on the testing.

152. Before us it is urged by Mr. Sandeep Sethi, learned Senior Counsel for the appellant wife, that the DNA report does not indicate that it relates to a sample of Baby 'X'. Therefore, assuming without admitting that the report could be accepted as having been proved, it is certainly no proof of the fact that the laboratory had conducted a test on a sample which actually belonged to the child. At best, the DNA report relied upon by the respondent husband had only suggested that a DNA test had been conducted on a sample of some tissue which did not match the respondent no.1 husband. Simply put, the respondent – husband is

unable to connect the DNA report to the child in question.

153. In the face of the above, the DNA test report, prima facie does not support the husband's claim that the report establishes that it actually relates to a sample of the child.

XII. In the facts of the present case, effect of the presumption under Section 112 of the Indian Evidence Act

154. The appellant before us has vehemently urged that in the instant case, the presumption of legitimacy of the child is irrebuttable and conclusive of the fact. This is for the reason that the respondent has failed to make out a case of non-access during the relevant period when the child could have been conceived. There is no dispute that the child was borne to the parties who were married to each other and had access to each other during the period of possible conception.

155. This principle stands reiterated by the Supreme Court in its judgment reported at ***AIR 2010 SC 2851, Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women & Anr.*** In the following para 19 of the judgment, the Supreme Court extracted para 13 of ***(2005) 4 SCC 449, Banarasi Das v. Mrs. Teeku Datta & Anr.,*** and again cautioned that the DNA test was not to be directed as a matter of routine and that only in deserving cases, such a direction should be given :

> **"19.** In ***Banarsi Dass v. Teeku Dutta [(2005) 4 SCC 449]*** this Court was concerned with a ***case arising out*** of a ***succession certificate***. The allegation was that Teeku Dutta was not the daughter of the deceased. An application was

made to subject Teeku Dutta to DNA test. The High Court held that the trial court being a testamentary court, the ***parties should be left to prove their respective cases on the basis of the evidence produced during trial, rather than creating evidence by directing DNA test.*** When the matter reached this Court, few decisions of this Court, particularly, *Goutam Kundu* [(1993) 3 SCC 418 : 1993 SCC (Cri) 928] were noticed and ***it was held that even the result of a genuine DNA test may not be enough to escape from the conclusiveness of Section 112 of the Evidence Act like a case where a husband and wife were living together during the time of conception.*** This is what this Court said: (***Banarsi Dass case [(2005) 4 SCC 449] , SCC*** pp. 454-55, ***para 13***)

xxx xxx xxx

It was emphasised that DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given."

(Emphasis by us)

156. Ld. Senior Counsel for the appellant has also placed the pronouncement of the Supreme Court reported at ***AIR 2015 SC 418 Dipanwita Roy v. Ronobroto Roy.*** In this case, categorical assertions that the parties never lived together, that is of "*no access*" were made. The wife was clearly stated to be living in an adulterous relationship at another address with another person. In para 2 of the judgment, the pleadings of the party were extracted which reads thus :

"2. One of the grounds for seeking divorce was based on the alleged adulterous lifestyle of the petitioner wife. For his above assertion, the respondent husband made the following allegations in Paras 23 to 25 of his petition:

"23. *That since 22-9-2007 the petitioner* ***never lived with the respondent and did not share bed at all.*** On a

very few occasions since then the ***respondent came to the petitioner's place of residence to collect her things and lived there against the will of all to avoid public scandal. The petitioner did not turn (sicaway) the respondent from house on those occasions***.

24. *That by her extravagant lifestyle the respondent has incurred heavy debts.* ***Since she has not disclosed her present address*** *to bank and has only given the address of the petitioner, the men and collection agents of different banks are frequently visiting the petitioner's house and harassing the petitioner. They are looking for the respondent for recovery of their dues*. Notice from attorney firms for recovery of dues from the respondent and her credit card statements showing heavy debts are being sent to the petitioner's address. The respondent purchased one car in 2007 with the petitioner's uncle, Shri Subrata Roy Chowdhary, as the guarantor. The respondent has failed to pay the instalments regularly.

25. *That the petitioner states that the respondent has gone astray. She is leading a fast life and has lived in extra-marital relationship with the said Mr Deven Shah, a well-to-do person who too is a career oriented gentleman and has given birth to a child as a result of her cohabitation with Shri Deven Shah. It is reported that the respondent has given birth to a baby very recently*. The respondent is presently living at the address as mentioned in the cause-title of the plaint."(emphasis supplied)"

(Emphasis by us)

There can be no dispute with the above proposition.

157. It appears from the narration of facts that the petitioner had never lived with or shared a bed with her at all (or in any case since 22-9-07). The husband had made "*clear and categorical assertions*". In paras 10, 11 and 12, the Supreme Court held as

follows :

"**10**.It is borne from the decisions rendered by this Court in ***Bhabani Prasad Jena[Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633 : (2010) 3 SCC (Civ) 501*** : (2010) 3 SCC (Cri) 1053] and ***Nandlal Wasudeo Badwaik[Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576*** : (2014) 2 SCC (Civ) 145 : (2014) 4 SCC (Cri) 65] that ***depending on the facts and circumstances of the case, it would be permissible*** for a court to ***direct the holding of a DNA examination*** to determine the veracity of the allegation(s) which constitute one of the grounds, on which the party concerned would either succeed or lose. ***There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril***.

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

to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant wife is right, she shall be proved to be so.

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

> "114.Court may presume existence of certain facts.— The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

"Illustration (h)—that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;"

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

(Emphasis supplied)

158. We may note the submissions of Mr. V.K. Gupta, ld. Senior Counsel for the respondent insisting that the Supreme Court has authoritatively laid down that the DNA test is the only manner of establishing a plea of infidelity by one spouse against the other. It is urged that, therefore, in a case where a spouse alleges infidelity on the part of his wife, medical examination has to be ordered. We are unable to agree with this submission. In paras 11 and 12, the Supreme Court is concerned with the facts of that particular case. The Supreme Court has in fact in para 10 reiterated the same caution as was mandated in prior judicial precedents.

159. The absolute submission and proposition pressed by Mr. Gupta may be tested from another angle. What if there were no child from the alleged infidelity or the extra marital affair of the wife? What about a case where the wife alleges infidelity against the husband, with or without there being a child from such relationship? The husband (or the wife) has to stand on his own feet and establish the allegedly infidelity as per law.

Accepting the proposition urged by Mr. Gupta would in effect, tantamount to laying down the principle that a spouse had to merely make an allegation of infidelity (or mental illness or impotency), without anything more, and courts would have to mandatorily direct scientific (or medical) examination.

160. It is a first principle of procedural law that a party alleging a fact, must prove it. Binding judicial precedents noted above have laid down that a party must establish a strong prima facie case

before a court would make an order for the scientific (or medical) examination, especially of the intrusive kind as a DNA examination. The court cannot conduct a fishing or roving inquiry for a party and a DNA test cannot be ordered to gather evidence on behalf of a party who has made a bald allegation, without anything more.

161. For this reason, even in ***Diwanwita Roy***, while approving the order for the DNA test in the facts of the case, the court has clearly declared that the presumption under Section 112 of the Evidence Act would not be lightly disturbed. In para 10, the court has noted that the order depends "*on the facts and circumstances of the case*". In para 11, the Supreme Court has noted "*the question to be answered in this case*".

162. Mr. V.K. Gupta, learned Senior Counsel for the respondent has placed the observations in the judgment of the Supreme Court reported at ***(2014) 2 SCC 576 Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr.*** Reliance has been placed on the following by ld. Senior Counsel :

> **"13.** Before we proceed to consider the rival submissions, we deem it necessary to understand what exactly DNA test is and ultimately its accuracy. All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillions of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pairs in 46 duplex threads of DNA.

DNA consists of four nitrogenous bases — adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is about 5 billion, this test shall have accurate result. It has been recognised by this Court in *Kamti Devi*[*Kamti Devi* v. *Poshi Ram*, (2001) 5 SCC 311 : 2001 SCC (Cri) 892] that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl child.

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15. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had or had not any access to his wife at the time when the child could have been begotten.

16. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act

conclusively prove that Respondent 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us."

163. It is noteworthy that the Supreme Court has further reiterated the conclusiveness of the presumption under Section 112 of the Indian Evidence Act in para 14 of the pronouncement in the following terms :

"**14**. Now ***we have to consider as to whether the DNA test would be sufficient to hold that the appellant is not the biological father of Respondent 2, in the face of what has been provided under Section 112 of the Evidence Act, which reads as follows***:

xxx xxx xxx

From a plain reading of the aforesaid, it is evident that a child born during the continuance of a valid marriage shall be a conclusive proof that the child is a legitimate child of the man to whom the lady giving birth is married. The provision makes the legitimacy of the child to be a conclusive proof, if the conditions aforesaid are satisfied. It can be denied only if it is shown that the parties to the marriage had no access to each other at any time when the child could have been begotten."

(Emphasis supplied)

164. In ***Nandlal Wasudeo Badwaik***, the husband had led evidence that after his wife left the matrimonial home, she did not return and that he had no access to her when the child could have been begotten. The courts below had not given any finding with regard to this plea. It is also noteworthy that in this case, the DNA testing was done under orders of the court which had not been

opposed by the wife. The DNA test report suggested that the appellant was not the biological father. In these circumstances, the court held in para 17 that where there was evidence to the contrary, the presumption under Section 112 of the Indian Evidence Act, being rebuttable, would yield to conclusive proof. In para 19, the court noted that the husband's plea, that he had no access to the wife when the child was begotten, stood proved by the DNA test report.

165. Principles laid down in prior judgments including ***AIR 1934 PC 49, Karapaya Servai v. Mayandi; AIR 1954 SC 176, Chilukuri Venkateswarlu v. Chilukuri Venkatanarayan; AIR 1993 SC 2295, Goutam Kundu v. State of West Bengal & Anr.; AIR 2001 SC 2226, Kamti Devi v. Poshi Ram; AIR 2003 SC 3450, Sharda v. Dharmpal*** and ***AIR 2010 SC 2851, Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women & Anr.*** have not been overturned and bind the present consideration. No absolute proposition as is contended by Mr. Gupta has been laid down in the judicial precedents.

166. Mr. V.K. Gupta, learned Senior Counsel for the appellant has placed reliance on the Single Bench pronouncement in this court reported at ***(2011) 121 DRJ 563, Rohit Shekhar v. Narayan Dutt Tiwari*** in support of his submissions. The consideration in this case has to be read in the light of the facts situation in which the judgment was rendered. Mr. Rohit Shekhar claimed to be the biological son of the defendant no.1 and born out of the relationship of defendant no.1 with the defendant no.2. It is an

admitted position that the defendant no.2 was married to a third person which marriage was subsisting at the time of birth of the plaintiff. The husband of the defendant no.2 had claimed no access to the defendant no.2 at the time on which the plaintiff would have been conceived. The defendant no.2 - mother was supporting the plea of the plaintiff that he was the biological son of the defendant no.1.

167. The application seeking the DNA examination was filed not by the father - defendant no.1, but by the plaintiff and sought directions to the defendant no.1 to furnish blood samples for a DNA comparison with his own samples to establish that the defendant no.1 was his father. The court had considered the plaintiff's right to know his roots and noted that the application had been filed by an adult person who had moved the court for a declaration to determine his or her paternity. The court had recognized the well settled position of the jurisdiction to order a DNA examination and ordered accordingly.

This case has no parity with the case in hand.

168. We have discussed above the pleadings of the husband in the present case and concluded their insufficiency from the factual matrix brought out before us, the judgments relied upon by the appellant would not apply to the present case.

XIII. Ensuring the Constitutional rights of the child

169. Our consideration cannot end here. The inevitable victim of an order in a paternity challenge in matrimonial litigation is the child who is not before the court. We have noted above that for a wide variety reasons (paras 95 to 97) parties may attempt to obtain collusive orders on this issue. Any consideration and adjudication on this aspect directly impacts the right to life of the child guaranteed under Article 21 of the Constitution of India. It is a first principle of legal procedure and natural justice, that a person affected has a right to be heard.

170. So far as children are concerned, it is trite that the courts are *parens patriae* and it is the responsibility of the court to ensure the welfare and best interest of the child in every proceeding where the rights and interest of the child are impacted. Such interest of the child has to be ensured independent of the rights and claims of the parties to the *lis*.

171. As *parens patriae*, the court is bound to ensure the rights of the child which has to include independent and fair representation as well as hearing to the child, before passing such order.

172. Para 81 of the three judge bench pronouncement of the Supreme Court reported at ***AIR 2003 SC 3450 Sharda v. Dharmpal*** sheds some light on the consideration by the court in a case involving any issue of the paternity of the child which reads thus:

> "**81.** If for arriving at the satisfaction of the court and to ***protect the right of a party to the lis who may***

> ***otherwise be found to be incapable of protecting his own interest,*** the court passes an appropriate order, the question of such action being violative of Article 21 of the Constitution of India would not arise. The court ***having regard to Article 21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected.***"
>
> (Emphasis by us)

173. How can, say, as in a case as the present, the court protect the rights of the child in question? This can only be done by ensuring independent representation to the child at all stages of the case where the aspect of paternity is being considered or is involved.

174. Valuable insight is shed on the standards and parameters within which the courts are bound to ensure the rights of the child in the ***"Guidelines of the Committee of Ministers of the Council of Europe on child – friendly justice".*** The Guidelines were adopted by the Committee of Ministers of the Council of Europe on the 17th of November 2010. These Guidelines, though not binding on the courts in India, but lend valuable guidance to the manner in which the rights of the child, if and when in conflict with parents, or otherwise in judicial precedents can be adequately protected. Reference may usefully be made to Chapter IV captioned "***Child-friendly justice before, during and after judicial proceedings***". Sub-Chapter A of this Chapter deals with *"Child-friendly justice during judicial proceedings"*. We are concerned with Section 2 thereof which reads *"Legal counsel and representation*". The relevant extract thereof reads thus:

"Guidelines of the Committee of Ministers of the Council of Europe on child – friendly justice

xxx *xxx* *xxx*

IV. Child-friendly justice before, during and after judicial proceedings

A. General elements of child-friendly justice.

xxx *xxx* *xxx*

2. Legal counsel and representation

xxx *xxx* *xxx*

"42. In cases where there are ***conflicting interests*** *between* ***parents and children****, the competent authority should* ***appoint either a guardian ad litem*** *or* ***another independent representative to represent the views and interests of the child.***

43. ***Adequate representation*** *and the* ***right to be represented independently from the parents*** *should be guaranteed, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders.*

xxx *xxx* *xxx"*

(Emphasis by us)

We are of the view that these are the rights which must be ensured to every child in all judicial proceedings independently from the parents especially in cases involving parentage and identity issues.

175. Keeping in view the facts and circumstances of such case, the court would be bound to appropriately appoint a *guardian ad litem* or an *amicus curiae* to ensure the interest of the child which has to include effective representation to him/her, depending on the facts and circumstances of the case.

XIV. Impugned order

176. It was imperative for the trial judge who was seized of the application for a DNA examination of the minor child in the present case on the 28th of January 2016 to consider the same, on the binding parameters set out hereinabove. On that date the court had almost the entire case of the respondent no.1 husband before it inasmuch as the substantive evidence of the respondent no.1 and his main witness also stood recorded. Mr. Sandeep Sethi, learned Senior Counsel for the appellant has carefully taken us through the impugned order dated 28th of January 2016 passed by the learned Trial Judge whereby the appellant's application was allowed and the directions were issued to the appellant to produce Baby 'X' to the office of the Director, CFSL, CGO Complex, Lodhi Road, New Delhi at 10:30 am on 10th February, 2016 when the respondent no.1would also be present so that samples of the child and the respondent no.1 would be obtained by the laboratory in the presence of both parties for conducting the DNA test at the expense of the husband. Additionally the directions were made that prior thereto, the respondent no.1 shall deposit an amount of ₹1,00,000/- by way of demand draft/banker's cheque in the name of the court which would stand forfeited and made over to the appellant in the event that the paternity test on the basis of the DNA results shows the husband to be the father of the child. In case, the result reveals that the respondent no.1 is not the father of the child, the amount would be refunded to the respondent no.1. It was further directed

that the parties to the petition, their agents, representative or any other person acting on their behalf or any entity in print, electronic media or internet will not print, publish or telecast any matter relating to the case, in any manner without the permission of the court.

177. So far as the reasoning for the order is concerned, we find that the trial court has merely noted the bald contention of the appellant; the provisions of the Section 112 of the Indian Evidence Act.

The trial court has noted the reliance placed by the appellant on the pronouncements in *Goutam Kundu v. State of W.B. in (1993) 3 SC; Miss Renuka Vs. Tammanna AIR 2007 Kant 133; Sunil Eknath Trambake Vs. Leelavati Sunil Trambake AIR 2006 Bom 140; Shri Banarsi Dass Vs. Teeku Datta (2005) 4 SCC 449; Smt. Kanti Devi Vs. Poshi Ram (2001) 5 SCC 311 and*; *Dukhtar Jahan Vs. Mohammad Farooq 187 Cr.L.J. 849.*

Reliance has been placed on the extract of the 185th Report of the Law Commission of India and that of the Supreme Court in *Dipanwita Roy v. Ronobroto Roy*.

178. We find that the appellant had also objected to the DNA test report relied upon by the respondent no.1 pointing out that the appellant was never joined in the testing and furthermore that the child was the third party to the consideration. The plea of cohabitation of the appellant and the respondent no.1 is also noted as also the denial of the respondent no.1. Without at all recording any prima facie conclusions in accordance with law, as noted by us

above, simply observing that "*keeping in view the facts and circumstances of this case and in view of the discussions made herein above*", the court recorded its satisfaction that there was a need for conducting the DNA test of the petitioner. In our view, the Family Court has completely failed to consider the matter, as was required in law. The impugned order dated 28th January, 2016 is clearly contrary to the well settled principles noticed by us in the above judgments, devoid of reasoning to support the order, fails to consider or return a finding that the respondent no.1 had a prima facie case in his favour and is legally not sustainable.

179. The instant case has to be examined from yet another perspective. In ***Bhabani Prasad Jena*** the Supreme Court has held that the court must see whether the justice of the case requires a DNA testing and whether there is imminent need to do so. The respondent no.1 before us is interested only in dissolution of his marriage by decree of divorce. For this purpose, he has on two prior occasions filed the petitions for dissolution of marriage by a decree of divorce by mutual consent *(HMA No. 1099/2014 at Saket Courts & HMA No. 783/2014 at Patiala House Courts).*

180. It is to be noted that even the joint statement of the parties stood recorded by the Family Court, Saket on 1st of October, 2014 in HMA No. 1099/2014. If it was not for want of territorial jurisdiction, these proceedings would have been completed.

181. In the divorce proceedings before the Family Court, the appellant has also filed a counter claim seeking dissolution of marriage of the parties by decree of divorce on grounds of cruelty,

inter alia on the ground that the pleadings of the respondent no.1 in his divorce petition apart from other assertions work cruelty upon her.

So far as the substantive relief which the respondent no.1 seeks, there is no imminent need for the directions of a DNA test.

182. In view of the above, it has to be held that there is no imminent need for the DNA test for grant of the substantive relief as prayed for by the respondent no.1.

XV. <u>Conclusion</u>

183. 'H' – respondent no.1 husband has not pleaded "*non-access*" to the appellant wife or "*no opportunity*" at the time when Baby 'X' could have been conceived. On the contrary, he has admitted "*access*". 'W' - the appellant wife has effectively denied the pleas of adultery.

184. 'H' has failed to make out a prima facie case justifying an order for compelling Baby 'X' to give a sample for a DNA examination. The repeated admissions of paternity by 'H' in his pleadings, affidavit and his statement on oath in support on judicial record militate against a prima facie case in favour of 'H' for making the order prayed for. The husband 'H' has made admissions of paternity in public records of the Registrar of Births as well as bank record. No explanation was tendered before the ld. Family Court Judge or before us. The respondent no.1 has concealed material facts; is guilty of mis-statement before the Family Court and his conduct post-conception of the child do not

support a prima facie case in his favour justifying the impugned order. The respondent no.1 has also not established imminent need for the order or that such order was at all necessary for a just decision of the case. The impugned order is unreasoned, contrary to law and unsustainable.

XVI. Result

185. As a result, the order dated 28th January, 2016 is hereby set aside and quashed. The appeal is allowed.

186. We make it clear that nothing herein contained is a final expression of opinion on the merits of the controversy. We have only taken a prima facie view. The ld. Family Court Judge shall proceed in the matter in accordance with law, uninfluenced by any observation contained herein.

187. In view of the order passed in the main appeal, CM No.5064/2016 does not survive for adjudication and is hereby dismissed.

Lower Court Record be sent back forthwith.

GITA MITTAL, J

I.S.MEHTA, J

AUGUST 26, 2016
aj