Delhi High Court
Rohit Shekhar vs Shri Narayan Dutt Tiwari & Anr. on 23 September, 2011
Author: Gita Mittal

IN THE HIGH COURT OF DELHI

IA No.10394/2011 in CS(OS) No. 700/2008

Reserved on : August 2, 2011
Date of decision: September 23, 2011

ROHIT SHEKHAR ... Plaintiff
through: Mr. P.S. Patwalia, Sr. Adv. with Mr. Vedanata Verma and Mr. Manu Aggarwal, Adv.

VERSUS

SHRI NARAYAN DUTT TIWARI & ANR. ... Defendants
through: Mr. Bahar U. Barqi and Mr. Pramod Kr. Sharma, Adv. for D-1
Mr. Gaurav Mitra, Adv. for D-2

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

GITA MITTAL, J

1. The present application displays a blatant refusal by a party to the litigation to comply with the court direction made in accordance with law to furnish a blood sample for DNA testing which would enable authoritative adjudication on the real issue in the matter. For this purpose, the defendant no. 1 has filed IA No. 10394/2011 dated 30th May, 2011 seeking the following prayers :-

> "(a) direct the plaintiff or the learned Deputy Registrar of this court or any other authority or officer not to pressurize, coerce, compel or force the petitioner in any manner to involuntarily provide blood and/or tissue sample for DNA analysis.
> (b) Direct that till the abovementioned prayer is finally considered by this court, the order of the learned Deputy Registrar directing the applicant to deliver blood sample on 1.6.2011 may kindly be deferred or kept in abeyance."

2. Before considering the application on the merits of the submissions made before this court, it is necessary to consider certain essential facts which emerge from the record.

Factual Narration

3. The plaintiff has filed the suit inter alia seeking declaration that the plaintiff is the naturally born son of the defendants and that the defendant no.1 is the father of the plaintiff. It is asserted that, though he was born to Smt. Ujjwala Sharma, defendant no. 1 whilst her marriage to Sh. B. P. Sharma subsisted, the plaintiff was not born from their wedlock. Reliance in this behalf has been placed on the report of blood samples drawn from Shri B.P. Sharma and DNA profiling which have been compared with the DNA profiling of the plaintiff s blood sample which report reflects that Sh.B.P. Sharma cannot be his (the plaintiff s) biological father. Besides the report, the plaintiff also relies upon a joint affidavit by himself and Sh.B.P. Sharma stating that such blood samples were furnished voluntarily and the admission by Sh.B.P. Sharma in the divorce petition filed by him and Smt. Ujjawala Sharma-defendant no.2.

4. The plaintiff has categorically asserted that he was born from an extramarital relationship between the defendants. In this regard, he

places reliance on the proximity between the parties in the plaint and relies on photographs which according to the plaintiff manifest that the defendants as well as the plaintiff shared an intimate relationship. In her written statement the defendant no.2-the plaintiff s biological mother supports the plaintiff.

5. The defendant no. 1 does not dispute that the plaintiff is the biological son of the defendant no.2, but denies relationship or intimacy

with her as well as the plaintiff.

6. During the pendency of the suit, the plaintiff filed IA No. 4720/2008 on 11th April, 2008 seeking a direction to the defendant no. 1 to submit to DNA testing. This application though opposed by the defendant no.1, was allowed by the detailed judgment dated 23rd December, 2010 wherein the court inter alia rejected the pleas of the defendant no.1 that the birth of the plaintiff on 15th February, 1979 during the subsistence of the marriage of Dr. Ujjawala Sharma and Sh. B.P. Sharma invited an absolute presumption under Section 112 of the Evidence Act.

7. The following directions were issued by the judgment dated 23rd December, 2010 :-

> "45. In view of the above conclusions, the application has to succeed. The parties or their counsel are directed to appear before the Joint Registrar on 8th February, 2011. The Joint Registrar shall obtain particulars and details to facilitate the DNA testing of the first defendant; the said defendant is directed to furnish such sample on a date and time to be designated by the Joint Registrar, by taking or drawing appropriate samples after ascertaining the details
> IA No.10394/2011 in CS(OS) 700/2008 3
> from the concerned accredited agency i.e. Centre for Cellular & Molecular Biology (Constituent Laboratory of the Council of Scientific Industrial Research, Government of India, Habsiguda Uppal Road, Hyderabad - 500 007, Andhra Pradesh, India. The said institution shall furnish the report to this Court within six weeks of receiving the samples.

8. The defendant no.1 s challenge to the order dated 23rd December, 2010 by way of an appeal being FAO(OS) No. 44/2011 was dismissed by the judgment dated 7th February, 2011.

9. The defendant no. 1 has assailed the judgments dated 23rd December, 2010 and 7th February, 2011 before the Supreme Court of India by way of a special leave petition being SLP (Civil) No. 5756/2011. In the present application, the defendant no.1 admits that by the order

dated 18th March, 2011 notice has been issued in SLP(Civil) No. 5756/2011 filed before the Supreme Court, however the defendant no.1 s prayer for stay stands rejected.

10. The present application has been filed by the defendant no.1 on the submission "that the plaintiff had not placed any material which could in any manner indicate that the plaintiff was the son of the defendant herein". The defendant no. 1 has premised the application on a reproduction of section 4 and section 112 of the Evidence Act.

The defendant no. 1 has put forth the following reasons for the application :-

(i) no useful purpose would be served to subject defendant no.1 to the

test

(ii) final relief cannot be granted to the plaintiff because of Section 112 of the Evidence Act

(iii) no sample can be obtained from the defendant no. 1 per force without his express consent or else it would violate fundamental rights of the defendant no.1 protected under Article 21 of the Constitution.

(iv) for the above reasons, not to pressurise, coerce or force the defendant no. 1 to provide blood and/or tissue sample for DNA testing

11. The defendant no. 1 has also placed reliance on the judgment of the Supreme Court in (2001) 5 SCC 311 Kanti Devi vs. Poshi Ram on the provisions of section 112 of the Evidence Act. Sh. B.U. Barqi, Advocate appearing on behalf of defendant no.1 has further contended that despite the directions made by the court, the defendant no. 1 cannot be called upon to give his sample. He has sought to urge that the same is the correct reading of the law laid down by the Supreme Court in AIR 1993

SC 2295 Goutam Kundu vs. State of West Bengal and AIR 2003 SC 3450 Sharda vs. Dharmpal. Placing reliance on the observations of the Apex Court in para 18 of the judgment in Goutam Kundu (supra), it has been argued that not only could the defendant no.1 be not compelled to give samples but also no adverse inference could be drawn against him for not doing so.

Learned counsel categorically submits that in view of law laid down

in (2010) 7 SCC 263 Selvi vs. State of Karnataka, no sample could be obtained from the defendant no.1 per force without his express consent.

12. Mr. P.H. Patwalia, learned senior counsel appearing for the plaintiff has contended that no reply to this application was necessary. Consequently learned counsels were orally heard in the matter on this application. Learned senior counsel urges at great length that given the judicial pronouncements of the Supreme Court and the adjudication by this court in the judgment dated 23rd December, 2010, the defendant no.1 has no option in the matter.

13. Opposing this application, Mr. Patwalia, has further contended that the application is malafide and an abuse of the process of the court. It is vehemently urged that the order passed by this court has been sustained in appeal and even the Supreme Court has refused stay thereof to the defendant no.1. It is urged that directions having been made, the defendant no.1 has no option but to comply with the same unless the direction is modified or stayed by the court. It is urged that the defendant has to be forcibly confined and a sample compulsorily extracted from him.

14. Right at the outset it was pointed out to counsel for the defendant

no. 1 that the pleas on which the present application is premised have been heard, considered and rejected by the judgments dated 23rd December, 2010 and 7th February, 2011 and that it was not open for the

defendant no. 1 to re-agitate the issues which stand decided.

Mr. Burqi has insisted that he wishes to deal with three pronouncements of the Supreme Court which have not been placed or considered before this court for the purposes of the defendant no.1 s submission that he cannot be compelled to provide a sample for DNA testing.

15. This application therefore raises the question as to whether a person can be physically compelled to give a blood sample for DNA profiling in compliance with a civil court order in a paternity action? If it were held that the same was permissible, how is the court to mould its order and what would be the modalities for drawing the involuntary sample? The justifiability of the refusal has to be tested against the plaintiff s rights which are involved. As a corollary, the impact of the affect of a refusal to comply with the court direction has to be answered. In case an adverse inference was to be drawn, what is the nature of the inference? The role of the court in discovering the truth having made the directions, and the parameters of exercise of jurisdiction by a civil court are also in issue.

Whether the judicial pronouncements in AIR 1993 SC 2295 Goutam Kundu vs. State of West Bengal; AIR 2003 SC 3450 Sharda vs. Dharmpal; (2001) 5 SCC 311 Kanti Devi & Anr. Vs. Poshi Ram have been overlooked

16. First and foremost, it is necessary to deal with the misconceived submissions of learned counsel for the applicant that prece4dents have

been overlooked in on the judgment dated 23rd December, 2010. Mr. Burqi has firstly submitted that this court had failed to consider the judgment of the Supreme Court reported at AIR 1993 SC 2295 Goutam Kundu vs. State of West Bengal. In this regard, I find that in the order dated 23rd December, 2010 my learned brother S. Ravindra Bhat, J, has observed as follows :-

> "6. The plaintiff submits that the Court has power under Section 75 (e) of the Code of Civil Procedure (CPC) read with Order-XXVI, Rule-10 (A) to issue a direction for holding a scientific technical or expert investigation. It is argued that the Supreme Court had in Goutam Kundu v. State of West Bengal & Anr., (1993) 3 SCC 418 even while sounding a note of caution with regard to a court's approach in deciding such applications, had summarized the legal position in the following manner: -
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> "26. From the above discussion it emerges:- (1) that courts in India cannot order blood test as matter of course;
> (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
> (3) There must be a strong 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."
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> 35. The Court would now examine if a third party (to a marriage, like the first defendant here) may be compelled to undergo scientific tests of the nature of giving blood samples for the purpose of DNA testing. The case of Goutam Kundu (supra) provides us with assistance here. In this case, the Court held that
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> "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
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> 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."

In the order dated 23rd December, 2010, the court has thus extensively relied on the principles laid down in Goutam Kundu (supra) by the Supreme Court.

17. The judgment dated 23rd December, 2010 has also considered the law laid down in Sharda (supra) in the following terms :-

> "7. The Plaintiff argues that the correct legal position was, however, restated and clarified by a subsequent larger - 3 Judges Bench ruling reported as Sharda v. Dharmpal AIR 2003 SC 3450. In the said judgment, the Court held as follows:
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> □39. Goutam Kundu (supra) is, therefore, not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regard mechanical passing of such order. In some other jurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child.
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> xxx xxx xxxx
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> 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 his spouse against the other spouses 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 respondent avoids such medical examination on the ground that it violates his/her right to privacy or for a matter right to personal liberty as enshrined under 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 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 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. xxx
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> 14. The decision in Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Anr. AIR 2010 SC 2851 was cited to say that the Court should never as a rule grant applications directing one party or the other to undergo DNA test. In that case, the Supreme Court considered the previous ruling in Sharda's case in the context of a submission that it conflicted with the reasoning in Goutam Kundu's case and held as follows:
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> □3. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science

gives 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 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 is eminently needed. DNA 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.

14. There is no conflict in the two decisions of this Court, namely, Goutam Kundu (AIR 1993 SC 2295: 1993 AIR SCW 2325) and Sharda (AIR 2003 SC 3450: 2003 AIR SCW 1950). In Goutam Kundu, it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test. In the case of Sharda while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA can be given by the court only if a strong prima facie case is made out for such a course. Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA.

18. So far as 2001 (5) SCC 311 Kanti Devi vs. Poshi Ram is concerned, the Apex Court had considered the scope of section 112 of the Evidence Act and in para 9 observed that it provided an outlet to the party wanting to escape from the rigours of its conclusiveness. It was held that if the party could show that the parties had no access to each other at the time when the child could have been begotten, the presumption could be rebutted. This pronouncement is part of the consideration in AIR 2009 SC 3115 Shyamd Lal vs. Sanjeev Kumar noticed in para 13 of the judgment dated 23rd December, 2010.

The submission of Mr. B.U. Burqi, learned counsel for the defendant no. 1 that the principles laid down in the pronouncement Goutam Kundu; Sharda vs. Dharmpal; Kanti Devi & Anr. Vs. Poshi Ram have been overlooked is thus completely without merit. Reliance on (2010) 7 SCC 263 Selvi vs. State of Karnataka

19. Mr. B. U. Burqi, learned counsel in support of the application has placed reliance on (2010) 7 SCC 263 Selvi vs. State of Karnataka. This judgment does not appear to have been placed before this court while dealing with IA No. 4720/2008 even by the defendant no.1. Mr. Burqi has placed reliance on the following observations of the Supreme Court in para 264 of the judgment:-

> "264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted in accordance with Section 27 of the Evidence Act, 1872. (Emphasis supplied)

20. So far as a judicial pronouncement is concerned, it is well settled that principle of law laid down by the Supreme Court has to be read in the context of the issues which were before the court. (Ref: JT 2002 (1) SC 482 Haryana Financial Corporation vs. Jagdamba Oil Mills & Anr.; (2006) 1 SCC 275 State of Orissa & Ors. vs. Md. Illiyas; (1996) 6 SCC 44 Union of India vs. Dhanwanti Devi).

21. The questions which were raised before the Supreme Court in Selvi (supra) are to be found in para 2 and 11 of the judgment and read as follows.

> "2. The legal questions in this batch of criminal appeals relate to the involuntary administration of certain scientific techniques, namely narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) test for the purpose of improving investigation efforts in criminal cases. .....However, the present case is not an ordinary dispute between private parties. It raises pertinent questions about the meaning and scope of fundamental rights which are available to all citizens. Therefore, we must examine the implications of permitting the use of the impugned techniques in a variety of settings.

5. The involuntary administration of the impugned techniques prompts questions about the protective scope of the `right against self-incrimination' which finds place in Article 20(3) of our Constitution. The questions answered by the court in Selvi set out in para 11 of the pronouncement categorically refer to only the aid "impugned techniques".

It is therefore apparent that the observations in para 264 relate to the tests which have been set out in para 2 of the judgment reproduced heretofore. Blood testing or DNA profiling were not an issue which was answered in para 264 of the judgment rendered by the Supreme Court in Selvi vs. State of Karnataka (supra). The same has thus no bearing on the instant case.

Whether the court order directing a blood sample for DNA profiling can be physically enforced?

22. It is important to note that the entire basis of the submission s of the defendant no.1 is that the court direction on 23rd December, 2010 to the defendant no.1 results in violation of his absolute rights under Article 21 of the Constitution.

23. As to what would constitute compulsion, the observations of the Supreme Court in para 17 of the judgment reported at AIR 1961 SC 1808 : 1962 (3) SCR 10 State of Bombay vs. Kathi Kalu Oghad while considering the legality and permissibility of taking of material samples as fingerprints for purposes of comparison and identification on the ground that the same violated the rights under Article 20(3) of the Constitution of India of the person concerned are relevant and read as follows:-

> "17. The compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted. Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. In other words, it will be a question of fact in each case to be determined by the Court on weighing the facts and circumstances disclosed in the evidence before it.
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> (Emphasis supplied)

24. Given the legal principles laid down by the Supreme Court in Goutam Kundu, Sharda & Selvi (supra) as well as the as detailed discussion on the issue by my learned brother Bhat, J; the judgment of the Division Bench dated 7th February, 2011, there can be no dispute at all, that upon being satisfied with the relevance of the evidence and reliability of the scientific technique in question, the civil court can issue an order to a person directing him to give a bodily sample for DNA profiling. It is well settled that compulsion of law is not even coercion. (Ref : AIR 2004 SC 4716 S.S. Sakhar Kharkhana Ltd. Vs. CIT Kolhapur; AIR 1968 SC 599 Andhra Sugar vs. State of Andhra Pradesh) Such a direction by the court on 23rd December, 2010 on well settled binding legal principles cannot constitute "compulsion" as to violate the constitutional rights of the person concerned (the defendant no.1 in this case) and is constitutionally and legally permissible.

25. Before this court, learned counsels for the parties however completely missed the important discussion on the permissibility and relevance of the DNA profiling by the Supreme Court in Selvi's case (supra).

26. In this context, even though the issue of intimate testing as blood testing for the purposes of DNA profiling was not specifically before the court in Selvi, however observations on the same have been extensively made in paras 220 and 224, which have a material bearing on the question and read as follows:-

> "220. In the present case, written submissions made on behalf of the respondents have tried to liken the compulsory administration of the impugned techniques with the DNA profiling technique. In light of this attempted analogy, we must stress that the DNA profiling technique has been expressly included among the various forms of medical examination in the amended explanation to Sections 53, 53A and 54 of the CrPC. It must also be clarified that a `DNA profile' is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with existing profiles that are already in the possession of law-enforcement agencies. The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts.
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> 224. Moreover, a distinction must be made between the character of restraints placed on the right to privacy. While the ordinary exercise of police powers contemplates restraints of a physical nature such as the extraction of bodily substances and the use of reasonable force for subjecting a person to a medical examination, it is not viable to extend these police powers to the forcible extraction of testimonial responses. In conceptualising the `right to privacy' we must highlight the distinction between privacy in a physical sense and the privacy of one's mental processes.

(Emphasis supplied) The findings of the Supreme Court in para 264 of Selvi (supra) reproduced above are with regard to violation of the privilege against self in crimination and the right to privacy of a person by subjecting him/her to forcible extraction of testimonial responses which results on the involuntary administration of the narcoanalysis, polygraph examination and the Brain Electrical Activation Profile Test, as distinct from the statutorily permissible "restraints of a physical nature such as the extraction of bodily substances and use of reasonable force for subjecting a person to a medical examination" in exercise of police powers under sections 53, 54 of the CrPC.

27. The brief examination of the jurisprudence where compulsory testing or the permissibility of involuntary drawing of samples has been accepted or statutorily permitted which was possible shows that judicial precedents on this area largely arise in cases relating to criminal prosecutions in serious offences including those involving narcotic substances; murder; manslaughter by drunken driving and sexual offences. In each case, the court weighed the interest of justice in the context of public policy while examining the permissibility of compulsory testing.

28. The plaintiff makes a grievance that in the instant case, the determination is necessary as his biological parents were living separately and he has complained of rejection, abuse and neglect by his alleged father-the defendant no.1.

29. The statutory regime so far as medical examinations are concerned, shows that sections 53 and 54 of the Code of Criminal Procedure were amended with effect from 31st December, 2009 to authorize a "registered medical practitioner, acting, at the request of a police officer not below the rank of sub-inspector, and for- any person acting in good faith in his aid and -under his direction, to make such all examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose". The explanation to section 531 clarifies that „examination of the arrestee includes examination of blood and blood stains.

30. On the issue of use of compulsion for drawing blood and urine samples and tissue for DNA testing, the Supreme Court in Selvi has also referred to the jurisprudence from the ECHR2; made reference to 37th Explanation to section 53 Cr.P.C. states broadly that "examination" shall include "examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling."

In Saunders v. United Kingdom (1997) 23 ECHR 313, the European Court of Human Rights observed that right not to incriminate oneself is concerned with the will of an accused to remain silent. Use of compulsory powers in criminal procedure to obtain materials including blood samples for DNA testing from the accused, and 41st Reports of the Law Commission of India and an article by Emerson G. Spies printed in 38 Australian Law Journal 223, 231 (1964) on this issue.

The discussion in Selvi clearly suggests that in criminal proceedings, use of material obtained from the accused through use of compulsory powers but which has an existence independent of the person including blood samples can be used for DNA testing which would not violate the privilege against self incrimination and is legally permissible.

In para 169 of the pronouncement in Selvi (supra), the court held that the amendment to CrPC provisions was informed by a rational distinction between examination of physical subsistence and testimonial acts and the statutory provision enables use of "reasonable force" for the purpose.

31. Reference can be usefully made to also the statutory position and the jurisprudence from other jurisdictions where statutory provisions are in place and law on this issue has extensively developed.

32. The taking of blood sample for the purposes of criminal investigation has long been a sanctioned procedure in other jurisdictions. The taking of bodily samples have been opposed in criminal jurisdictions primarily on account of two main reasons, the first being the protection against unreasonable searches and seizures enshrined in Charters of which has an existence independent of the will of the suspect ,is not included in the right against self- incrimination (which is concerned with respecting the will of the accused person to remain silent). Citizens Rights in several

jurisdictions. The second ground of opposition is premised on the common law principle of privilege against self- incrimination. (Ref : Schmerber v. California 384 US 757 (1966)3 ; State vs. Chase, 2001 ME 68, 785 A.2d 702 (Me. 2001)4 ; R v. Stillman (1997) 1 S.C.R. 6075 ; R. v. S.A.B. (2003) 2 S.C.R. 678, 2003 SCC 60 ; (1987) 33 C.C.C. (3d) 1 R.V. Collins)

33. In R. v. S.A.B. (2003) 2 S.C.R. 678; 2003 SCC 606, the challenge to the constitutionality of the DNA warrant provisions SS.487.04 to 487.09 of Criminal Code, R.S.C. 1985, C-46 was rejected by the Supreme Court of Canada. The court was also called upon to consider the issue of weight to be attached to the evidence of the DNA expert.

34. In R. V. Collins (1987) 33 C.C.C. (3d) 17 the Supreme Court of Candada was concerned on the reasonableness of a seizure in regard to the breathalyser testing in relation to section 8. It has been observed In Schmerber v. California, taking of blood sample without the consent of the accused was upheld. Admittedly blood test requires a warrant but Fourth Amendment would not be violated in otherwise cases if police has a probable cause. [State v. Chase] In R. v. Stillman the majority of the Supreme Court of Canada held that though unauthorised use of a person's body or bodily substances is a "compelled testimony" but if it is demonstrated on a balance of probabilities that the evidence would have been discovered by alternative non-constrictive means its admission will generally not render the trial unfair. Major, J., (consenting) further observed that no consent is anyway required where the evidence is abandoned even when the accused is in custody. McLachlin, J., (dissenting) however held that since no emergency was alleged in this case and the searches were not necessary to protect the immediate safety of the police or public, taking of the bodily samples is outside the scope of lawful search incidental to arrest. However, taking of the tissue abandoned by the accused in the accused had lost privacy interest, was not a search and no consent was required. The right not to incriminate himself was not violated since the privilege did not apply to "real evidence". In R. v. S.A.B., the Supreme Court of Canada upheld the constitutionality of DNA warrant legislature and discussed the issue of weight to be attached to the evidence of DNA expert.

In R. v. Collins, the Supreme Court of Canada observed that while dealing with the reasonableness of a seizure in regard to the breathlyser testing the first requirement would be a legal authorization and then to consider whether the drug testing measure itself was reasonable.

that the first requirement for reasonableness would be some form of legal authorisation and then it would be necessary to consider whether the drug testing measure itself was reasonable.

35. In South Africa, applications for compelling accused persons to give blood samples for the purposes of DNA profiling in criminal jurisdiction have been opposed on the ground that it will infringe their fundamental constitutional rights to dignity, to freedom and security of the person; the right to bodily integrity; the right to privacy; and the right to be presumed innocent and not to have to assist the prosecution in proving this case.

36. This issue arose in an appeal before the High Court of South Africa (Cape of Good Hope Provincial Division) in Case No. SS 32/03 The State v. Mogamat Phadiel Orrie & Anr. In the judgment pronounced on 21st November, 2003, an application for taking fresh blood samples was

in issue. The accused had initially submitted to taking of blood samples without demur. There were some difficulty about the integrity of the samples taken resulting in the prosecution making the application which was under consideration. The court placed reliance on jurisprudence from not only the South African Courts but also of the Supreme Court of United States of America and of Canada. On the issue of nature of the test, in para 18, the court observed as follows :-

> "18. DNA (the abbreviation for Deoxyribonucleic Acid) is a relatively new type of testing which may be performed on a wide range of bodily samples, including blood, with a view to proving guilt, establishing innocence or proving relationships. The test, a complex one, is based upon the scientific thesis that all individuals, save for identical twins, possess a unique genetic code held in the 46 chromosomes which are made up of the complex chemical which is DNA.

37. Placing reliance on the statutory provisions and the "reasonableness of the procedure", it was observed that "the inconvenience and infringement of personal liberties which the accused will suffer through the taking of fresh blood samples is, in my view, very limited and is justified and sanctioned by law. Although I can envisage circumstances in which a court might hold that the taking of a further set of blood samples from an accused would be unreasonable or unnecessary, this, however, is not such a case."

38. The above narrations would show that even in criminal jurisprudence, the courts have ruled that unauthorised use of physical evidence in certain circumstance would be treated as compelled testimony which could render the trial unfair.

39. The position qua criminal law, the powers of the investigators and the criminal court thus is clear. However, a difficulty arises on the issue in the context of civil jurisdiction (including matrimonial jurisdiction) where there is no specific legislation. Certainly there are no statutory guidelines on the manner in which the court direction would be implemented.

40. Scientific techniques have also seen developments which were never envisaged fifteen years ago.

41. In Selvi (supra), the Supreme Court considered the admissibility of scientific evidence at great length and the responsibility on the court. Reference has been made to the pronouncement of the US Supreme Court in Daubert vs. Merrel Dow Pharmaceutical 125 L Ed 2d 469 : 509 US 579 (1993). In this case the Supreme Court of the USA dealing with testimony of experts, observed that the standard of "general acceptance of the particular field" changed the rules with regard to the admissibility of scientific evidence for several decades. In para 26 of Selvi8, the Supreme Court of India has quoted from the majority opinion in Daubert, the Supreme Court of India has quoted from the majority opinion in Daubert s case 125 L Ed 2d 469 : 509 US 579 (1993) on the manner in which the trial court should evaluate scientific evidence ; the relevance as well as reliability of the scientific technique in question.

The inquiry has been recommended to be a flexible one with its focus solely on principles and methodology, not on the conclusions which were generated, with the trial judge performing a

"gatekeeping" role to decide on the admission of expert testimony based on scientific techniques. These observations have relevance in as much as there is no Trial Judge's first step should be a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid; whether it properly applies to the facts in issue; whether the theory/technique stands tested; stands subjected to peer review and publication; its known or potential error rate; existence and maintenance of standards controlling its operation and; whether it has attracted widespread acceptance within the scientific community. specific legislation governing DNA profiling or guiding a civil court on its permissibility, evaluation, application or methodology.

It is this legislative vacuum which has enabled learned senior counsel for the plaintiff to contend that in exercise of inherent power, this court must confine the defendant no.1 to furnish a blood sample for DNA profiling.

42. Despite a court order to do so, the applicant-defendant no.1 a well known public figure, is refusing to give a blood sample voluntarily for the purposes of DNA profiling so as to ascertain as to whether he has fathered the plaintiff from an alleged extra-marital relationship with the defendant no.2. He further argues that he cannot be compelled to do so.

43. The plaintiff before this court insists that the defendant no.1 must be physically confined and a sample forcibly drawn.

44. In this regard, it is important to notice the valuable dissents in judicial pronouncements even in jurisdictions where mandatory or involuntary testing has been held to be constitutionally, valid and statutorily permissible. It is not possible to notice all opinions herein but reference to some of these judicial opinions is necessary.

45. The Supreme Court of United States in the case titled Breithaupt v. Abram 352 U.S. 432 (1957) had occasion to consider the constitutionality of a blood sample of the petitioner who was driving a pickup truck which was involved in a collision with a passenger car and was as a result injured. In hospital, the smell of liquor has been detected on his breath and a blood sample was drawn by the attending physician while he was lying unconscious in the emergency room. The petitioner had challenged the legality of his conviction and the constitutionality of the blood test.

The court distinguished the case from the previous judgment rendered in Rochin v. California, 342 U.S. 165 (1952) when the state officers forced open the mouth of the petitioner after a considerable struggle in an unsuccessful attempt to retrieve what had been placed by the petitioner in his mouth. Later, a stomach pump was forcibly used to extract from his stomach what were found to be narcotic pills. The conviction in Rochin based on this search and seizure was set aside because such conduct "shocked the conscience" and was so "brutal" and "offensive", that it did not comport with traditional ideas of fair play and decency.

The majority opinion in Breithaupt held that there was nothing "brutal" or "offensive" in the taking of a sample of blood when done as in this case under the protective eye of a physician ; the absence of conscious consent without more, does not necessarily render the taking of the sample as a

violation of a constitutional right.

46. In the dissenting opinion, (in Breithaupt v. Abram) Chief Justice Warren rejected the legality of the involuntary testing. It was observed thus:-

"In reaching its conclusion that in this case, unlike Rochin, there is nothing "brutal" or "offensive" the Court has not kept separate the component parts of the problem. Essentially there are two: the character of the invasion of the body and the expression of the victim's will; the latter may be manifested by physical resistance. Of course, one may consent to having his blood extracted or his stomach pumped and thereby waive any due process objection. In that limited sense the expression of the will is significant. But where there is no affirmative consent, I cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest. The Court, however, states that "the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right." This implies that a different result might follow if petitioner had been conscious and had voiced his objection. I reject the distinction.

Since there clearly was no consent to the blood test, it is the nature of the invasion of the body that should be determinative of the due process question here presented. The Court's opinion suggests that an invasion is "brutal" or "offensive" only if the police use force to overcome a suspect's resistance. By its recital of the facts in Rochin--the references to a "considerable struggle" and the fact that the stomach pump was "forcibly used" - the Court finds Rochin distinguishable from this case. I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights.

Apart from the irrelevant factor of physical resistance, the techniques used in this case and in Rochin are comparable. In each the operation was performed by a doctor in a hospital. In each there was an extraction of body fluids. Neither operation normally causes any lasting ill effects. The Court denominates a blood test as a scientific method for detecting crime and cites the frequency of such tests in our everyday life. The stomach pump too is a common and accepted way of making tests and relieving distress. But it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. Would the taking of spinal fluid from an unconscious person be condoned because such tests are commonly made and might be used as a scientific aid to law enforcement? Only personal reaction to the stomach pump and the blood test can distinguish them. To base the restriction which the Due Process Clause imposes on state criminal procedures upon such reactions is to build on shifting sands. We should, in my opinion, hold that due process means at least that law- enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth. (Emphasis supplied)

47. In the other dissenting opinion (in Breithaupt v. Abram) rendered by Justice Douglas and Justice Black, it was observed thus :

> "The court seems to sanction in the name of law enforcement the assault made by the police on this unconscious man..... xxx And if the decencies of a civilized state are the test, it is repulsive to me for the police to insert needles into an unconscious person in order to get the evidence necessary to convict him, whether they find the person unconscious, give him a pill which puts him to sleep, or use force to subdue him. The indignity to the individual is the same in one case as in the other, for in each is his body invaded and assaulted by the police who are supposed to be the citizen's protector.

48. In the pronouncement dated 28th of November, 2002 in Case No. 403/2000 entitled Hamilton Caesar Levack & Ors. vs. Regional Magistrate, WYNBERG, the Supreme Court of Appeal of South Africa was concerned with an order under Section 37 of the Criminal Procedure Act, 51 of 1997 directing that the arrested persons supply voice samples. On the issue of the blood sample, in para 20 of the pronouncement, the court observed as follows :-

> "20. It is of course true that to take a palm-or fingerprint, or to draw blood from an accused, or to require him to supply a voice sample, goes further than merely observing his features or complexion when he appears in court. Our legal system recognizes the distinction. It is for this reason that Ackermann J held in S v. Binta 1993 (2) SACR 553(C) that a person who refuses a request to submit to the taking of a blood sample under S 37 cannot, by the mere refusal, be guilty of obstructing the course of justice or of attempting to defeat the ends of justice. The additional means of compulsion that the provision licenses may have to be employed. In the present case, it was no doubt awareness of Binta that induced the DPP to seek the order. Eventual defiance of it would found a charge of contempt of court.
>
> 21. Despite this added feature, there is no difference in principle between the visibly discernible physical traits and features of an accused and those that under law can be extracted from him through syringe and vial or through the compelled provision of a voice sample. In neither case is the accused required to provide evidence of a testimonial or communicative nature, and in neither case is any constitutional right violated. (Emphasis supplied)

49. It is also important to note that in criminal investigations and prosecutions, the medical examination is undertaken by state entities.

Mandatory medical examinations are also undertaken by non-state entities including individuals. For instance, it is required by insurance companies which effectuate their strong interest in obtaining personal health information for the reason that the insurance company takes a financial risk by entering into a contractual relationship with the person concerned. The same concerns may also arise if an employee was rendered unfit to perform his or her work or lays a claim for alternate employment or benefits on account of his incapacity or disability thereby placing financial burdens on the employers. There may be concerns of the health of colleagues which may also be a concern for an employer who enforces mandatory medical examinations prior to employment.

Issues of compulsory testing have also arisen in the context of prisoner incarceration; mandatory drug testing in employment contracts or under service rules and conditions; issuance of driving licenses; pre- school admission testing ; sports; crime detection; in educational institutions and disease eradication.

A lot of debate on the subject is also available in concerns of public health findings of epidemics; identification of disease or infections to control spread of disease may be involved. Medical examinations may be in the context of epidemiological research.

50. The stringent standards as applied in the context of criminal law application are not so stringently applied when dealing with the administrative or regulatory context. The degree of privacy that an individual can reasonably expect may vary depending on the nature of the rights and concerns involved.

51. In 1986 1 SCR 103 R. v. Oakes, it was held that constitutional rights are subject to reasonable limits prescribed by law. Such limits are required to be justified in a free and democratic society. Objectives of mandatory testing have to relate to important personal and substantial concerns and the means chosen have to be proportional or appropriate to the ends. Simply put, the mandatory testing would have to be rationally connected to the objective sought to be achieved and further, impair constitutional rights as little as possible.

52. In 109 S. Ct. 1384 (1989) National Treasury Employees Union v. Von Raab, the majority of the US Supreme Court upheld the constitutionality of the mandatory testing for promotions to specified positions imposed by the US Customs Service in a drug interdiction program, except for testing of employees applying for positions involving handling of classified material. It was noted that in an administrative context, the requirement of "probable cause" (i.e. circumstances suggesting that a person to be searched has violated the law) might be unhelpful and that, given the government s compelling need to deter drug use in the Customs Service, the requirement of "individual suspicion" could also be dispensed with. It was held that the need to prevent future occurrences of drug abuse by custom employees was ample justification for the testing programme. The employee s right to privacy thus could be reduced in the context of the workplace, particularly in the case of front- line drug prohibition/enforcement government employees given the Governments compelling need to prevent drug abuse.

53. In the judgment reported at Veronia School District v. Acton 515 U.S. 646 (1995), the Supreme Court of USA upheld the reasonableness and the constitutionality of random urinalysis drug testing of high school athletes. The court observed that there was "decreased expectation of privacy" among student athletes; the "relative unobstrusiveness" of the search at issue and the "severity of the drug problem" in the school district. It was observed that children in school are in the "temporary custody of the state".

54. In R v. McKinlay Transport (1990) 68 D.L.R. (4th) 568 the Supreme Court of Canada held that random monitoring may be the only way to maintain the integrity of the tax system.

55. In R. v. M. (M.R.), (1998) 3 S.C.R. 393, it was held that the reasonable expectation of protection is lower for students attending school than for others, because students know that teachers and school authorities are responsible for maintaining order and discipline and thereby ensuring a safe school environment. It was concluded that this reduced expectation of privacy, coupled with the need to protect students and provide a positive atmosphere for learning, clearly suggested that there should be a more lenient and flexible approach to searches conducted by teachers and principles than to searches conducted by the police.

56. On paternity, the courts in South Africa have ruled that blood tests are a reliable test to discerning the truth and the court has the power to compel an adult to submit to blood test where it is in the best interests that clarity is obtained on the issue. (Ref: M v. R 1989 (1) SA 416 (O) 420; O v O 1992 (4) SA 137 © 139 H-1; 139 H-140 A; YD v. LB 2009 (5) SA 479).

57. In 2009 5 SA 463 (T) LB v. YD, Murphy J rejected Mulyn J s discussion in S v. L (1992 3 SA 713 (E) and expressed the view that the legitimacy of the administration of justice would be harmed if reliable scientific evidence were to be excluded simply because it involved a relatively minor infringement of privacy and upheld the court s right to order a person within their jurisdiction to furnish a few drops of blood to materially assist in the administration of justice. It was held that the court had the inherent power and authority as guardian to order scientific test for discovery and doing justice to all parties in the suit, on the basis of that it will generally be in the best interest of the child to have any doubts about the paternity resolved by the best available evidence. It was also held that the rights of privacy and bodily integrity may also be infringed when it is reasonably justifiable to do so. It may be noted that the judgment was rendered before DNA profiling was recognized as a scientific method of testing and identification of the natural father with any degree of probability.

58. In the said judgment, Murphy J was of the view that given the refusal of the mother to submit herself or the child to the scientific test, reliance on the presumption would have had the effect of recognizing the respondent s husband as the father of the child and thereby burdening the person who was not regarded as father by either party to the proceedings as the father of the child. Murphy J had stated the position thus :-

> "Given the extended rights and obligations of unmarried fathers, it seems only right that the truth be established, as it can be, in the interests of justice, before burdening a party with responsibilities that might not be his to bear. In this background, primacy was given to the value associated with administration of justice and it was held that the court would order blood test on the minor child despite the objection of the parent, both as guardian of the child and "in the interest of effectiveness of its procedures". It was also directed that in the circumstances and even reasonable limits, the non-consenting adult too could be compelled to submit to blood test in order to discover the truth and serve the best interest of the administration of justice. As leave to appeal was not granted in this case, there remains legal uncertainty on this area of law in the South African jurisdiction.

59. In South Africa, section 37 of the Children Act (Act 38 of 2005) creates a presumption of paternity in instances where, inter alia, the person had intercourse with the mother at any time when the child might have been conceived. Section 37 further states that an adverse inference may be drawn if, in instances where paternity is in issue, one party refuses to submit him or herself and or the child to blood tests in order to scientifically prove paternity.

60. In the current law regime in New Zealand, one way of establishing paternity is by applying to the family court under Section 4 of the Family Proceedings Act, 1980. Akin to section 112 of the Evidence Act, 1872 in India, a person married to the mother is assumed to be the father (Section 47(2). There are certain limitations under this legislation. Only a mother can apply to a court for a paternity order. The court can merely recommend a DNA test for establishing paternity (Section 54 (1)(a). The court cannot order a DNA test. Under Section 52(2), if the respondent refuses a DNA test, the court will rule without this evidence and the court can "draw such inference (if any) from the fact of refusal as appear to it to be proper in the circumstances".

61. Another remedy for establishing paternity is also available by applying to the family court or the high court for a declaration of paternity under section 10 of the Status of Children Act, 1969 whereunder a similar power exists.

62. A recent court of appeal decision confirmed that the court can order DNA testing on the application of a person claiming to be a natural parent when the sole guardian of the child (the other parent) refuses to consent to their child having a DNA test (Ref: T v. S and Anor (17/12/2004) Court of Appeal CA 249/2002 Anderson P, Hammond, J and William, J. In this case, the court assigned guardianship of the child to the court for a few hours under section 10B of the Guardian Act, 1968 while DNA samples were taken so that the child s guardian could give consent to the taking of the DNA then transferred back to the custodial parents. Reliance was placed on the United Nations Convention on the Rights of the Child as well as the best interest of the child principle to have the child s DNA tested.

63. It is important to note that in the face of refusal by a person having care and control of a child to give consent to the child giving a bodily sample, in [1998] 2 WLR 796 Re R (A Minor) (Blood Tests; Constraint), Hale J had decided that there was nothing in principle against obliging a child to provide a blood sample and ordered delivery of the child to the care and control of the official solicitor at a particular time and place for that purpose, making it plain that the official solicitor is permitted to consent to the child.

64. A contrary view was taken in [2002] 2 WLR 1284 Re O (A Minor) (Blood Tests: Constraint).

65. Section 21(3) of the Family Law Reform Act was thereafter amended in the U.K. so that it permits the taking of a bodily sample from a child either with the consent of the person who has "care and control" of the child, or, if the court considers that it would be in the best interest of the child for the same to be taken.

66. It is important to note that in these cases it was the guardianship of the child incapable of giving consent which was under consideration and transfer of temporary custody for sampling. No issue regarding confinement of an adult (capable of giving his consent) was involved.

67. In parentage cases, the court would also interdict testing for complying with requests which would not be in the best interest of justice including in the best interest of a child. An instance would be where the child is very unwell or where there were credible threats of violence, if the results disclosed a particular outcome.

68. It is important to note, however, that having regard to the current ambiguous situation in New Zealand, on the scientific testing, the New Zealand Law Commission in its 88th report titled as New Issues in Legal Patterns submitted in April, 2005 has recommended that the "persistent refusal of some people to comply in good faith with court direction can have serious consequences for children and other parties involved". The Law commission has further suggested that the court has the option of issuing a warrant for enforcement of the order by a named person (i.e. the prospective father, a social worker or the police). Once the warrant was issued, the named person would have the legal right to remove the child or and take him or her to be tested without impediment. A penalty has been prescribed for intentional obstruction. The statutory authority being proposed to be given to the court to order DNA testing is urged to be in accordance with the approach taken by the court of appeal in T v. S [Guardianship] as well as in accordance with New Zealand s responsibility to discharge international obligations.

69. So far as the position in India is concerned, the validity of a civil court's direction for conducting a medical examination as discussed by the Supreme Court in Sharda vs. Dharmpal has been cited in para 164 of Selvi (supra) as well in the following terms :-

> "164. We were also alerted to some High Court decisions which have relied on Kathi Kalu Oghad (supra) to approve the taking of physical evidence such as blood and hair samples in the course of investigation. Following the overhaul of the Code of Criminal Procedure in 1973, the position became amply clear. In recent years, the judicial power to order a medical examination, albeit in a different context, has been discussed by this Court in Sharda v. Dharampal, (2003) 4 SCC 493. In that case, the contention related to the validity of a civil court's direction for conducting a medical examination to ascertain the mental state of a party in a divorce proceeding. Needless to say, the mental state of a party was a relevant issue before the trial court, since insanity is a statutory ground for obtaining divorce under the Hindu Marriage Act, 1955. S.B. Sinha, J held that Article 20(3) was anyway not applicable in a civil proceeding and that the civil court could direct the medical examination in exercise of its inherent powers under Section 151 of the Code of Civil Procedure, since there was no ordinary statutory basis for the same. It was observed, at p. 508:
>
> 32. Yet again the primary duty of a court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to constitutional protections under Article 20 of the Constitution of India. Thus, the civil court although may not have

> any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.
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> 33. Discretionary power under Section 151 of the Code of Civil Procedure, it is trite, can be exercised also on an application filed by the party.
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> 34. In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms.
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> 35. Having regard to development in medicinal technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so.
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> 36. In matrimonial disputes, the court also has a conciliatory role to play - even for the said purpose it may require expert advice.
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> 37. Under Section 75(e) of the Code of Civil Procedure and Order 26, Rule 10-A the civil court has the requisite power to issue a direction to hold a scientific, technical or expert investigation. The decision had also cited some foreign precedents dealing with the authority of investigators and courts to require the collection of DNA samples for the purpose of comparison. In that case the discussion centered on the `right to privacy'. So far, the authority of investigators and courts to compel the production of DNA samples has been approved by the Orissa High Court in Thogorani v. State of Orissa, 2004 Cri L J 4003 (Ori).

70. The arguments by Mr. Burqi, learned counsel for the defendant no.1 that the direction to submit to DNA testing was violative of the rights of a defendant no. 1 have been pressed largely on the ground of violation of Article 21 of the Constitution of India placing reliance on the judgment of the Supreme Court. Placing reliance on the discussion in Sharda, the same stand rejected by this court on 23rd December, 2010 and by the Division Bench on 7th February, 2011. The above discussion would show that such argument has also been rejected in the discussion on this very issue by the Supreme Court in Selvi (supra).

This very contention is now raised against compulsive testing in implementation of the order.

71. A Full Bench of the Andhra Pradesh High Court in the judgment reported at AIR 2001 AP 502 M. Vijaya vs. Chairman and Managing Director Singareni Collieries Co. Ltd. has had occasion to consider the question in the context of whether compelling a person to take the HIV test amounts to denying the right to privacy? The court held as follows :-

> "52. There is an apparent conflict between the right to privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the State to identify HIV infected persons for the purpose of stopping further

transmission of the virus. In the interests of the general public, it is necessary for the State to identify HIV positive cases and any action taken in that regard cannot be termed as unconstitutional as under Article 47 of the Constitution, the State was under an obligation to take all steps for the improvement of the public health. A law designed to achieve this object, if fair and reasonable, in our opinion will not be in breach of Article 21 of the Constitution (Underlining supplied) This judgment has been referred to by the Supreme Court in para 63 and 64 of Sharda vs. Dharmpal (supra).

72. The court also noticed there are several legislations which envisage mandatory medical tests. It was also noticed that there are legislations which permit divorce on grounds as impotency, schizophrenia etc on which authoritative and binding conclusions cannot normally be arrived at without medical examination to ascertain existence of the condition. On these issues in paras 61, 62, 64 and 65 of Sharda vs. Dharmpal (supra), the court discussed the legal position thus :-

"61. Having outlined the law relating to right to privacy in India, it is relevant in this context to notice that certain laws have been enacted by the Indian Parliament where the accused may be subjected to certain medical or other tests.

62. By way of example, we may refer to Section 185, 202, 203, 204 of the Motor Vehicles Act, Section 53 and 54 of the of the Code of Criminal Procedure and Section 3 of the Identification of Prisoners Act, 1920. Reference in this connection may also be made to Sections 269 and 270 of the Indian Penal Code. Constitutionality of these laws, if challenge is thrown, may be upheld.

xxxx

64. It was observed:

"Yet another aspect of the matter is whether compelling a person to take HIV test amounts to denying the right to privacy? In Kharak Singh v. State of U.P., Govind v. State of M.P. and Ors. cases, the Supreme Court held that right to privacy is one of the penumbral rights of Article 21 of the Constitution. In all situations, a person can be asked to undergo HIV test with informed consent. If a person declines to take a test, is it permissible to compel such person to take the test? The question is whether right to privacy is violated if a person is subjected to such test by force without his consent? By the end of 1991, 36 federal states in USA enacted legislations regarding informed consent for HIV test. These legislations intended to promote voluntary test and risk reduction counselling. In USA, law also applies for involuntary tests and disclosure of information about the people in prisons, mental hospital, juvenile facilities and residential homes for mentally disabled persons. (See AIDS Law Today - Scott Burry and others published by Yale University - 1993).

In India there is no general law as such compelling a person to undergo HIV/AIDS test. Indeed, Article 20 of the Constitution states that no person accused of any offence shall be compelled to be a witness against himself. Be that as it may, under Prison Laws, as soon as a prisoner is admitted to prison, he is required to be examined medically and the record of prisoner's health is to be maintained in a register. Women prisoners can only be examined by the matron under the general or special powers of the Medical Officer. As per Section 37 of the Prisons Act, any prisoner wanting to be medically examined or appearing to be sick has to be reported before the Jailor who in turn is liable to call the attention of the Medical Officer in that behalf and all the directions issued by the Medical officer are to be recorded.

65. It was also noticed:

"Under the ITP Act, the sex workers can also be compelled to undergo HIV/AIDS test. When sex workers are detained in corrective institutions or welfare homes either under Section 10A or under section 17(4) or 19(2) of the Act, there are adequate provisions for medical examination. There are also provisions in segregating rescued women who are suffering from venereal diseases. We may also notice that Section 2 of Dissolution of Muslim Marriage Act, 1939, Section 32 of Parsi Marriage and Divorce Act, 1936, Section 10 of Indian Divorce Act, 1869, Section 13 of Hindu Marriage Act, 1956 and Section 27 of the Special Marriage Act, 1954 make incurable venereal diseases of either of spouses a ground for divorce. Further under Sections 269 and 270 of the Indian Penal Code, 1860, a person can be punished for negligent act of spreading infectious diseases.

In cases of divorce on the ground that the other spouse in suffering from HIV/AIDS or in case under sections 269 and 270 I.P.C., can the person be compelled to give blood specimen for HIV test. The immunity under Article 20 does not extend to compulsion of giving of blood specimens."

(Emphasis supplied)

73. The Supreme Court of India in Sharda (supra) has held that "..... when there is no right to privacy subsequently 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". It was further held that if there were a conflict between fundamental rights of two parties, that right which advances public morality would prevail as would apply in civil litigation. The Supreme Court summed up its conclusions in para 80 noticed above.

74. Article 8 of the European Convention on Human Rights defines right to privacy as follows :-

"(1) Every one has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the

> exercise of this right except such as is in accordance with the law and is necessary in democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

Therefore, the right to privacy would be subject to such action as may be lawfully taken for the prevention of crime or protection of health or rights and freedoms of others.

75. Reverting to the jurisdiction of the court to compel a blood sample, reference may usefully be made to observations of the Allahabad High Court in 1976 Cri.L.J. 1680 Jamshed vs. State of UP in the context of criminal law jurisdiction :-

> "It is true that Section 53 refers only to examination on the request of a police officer, but if such a power is given to a police officer, the Court should have a wider power for the purposes of doing justice in criminal cases. The other relevant provision in the Criminal Procedure Code is Section 367, sub- section (1), which runs as under:
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> ☐If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.
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> This special provision has been made in cases where death sentences have been awarded. In other cases, an appellate court has the power to take additional evidence, but it seems that, so far as cases of death sentences are concerned, the Legislature intended to confer a wider power on the High Court, namely that it may not only take additional evidence but can also make a further enquiry into any point bearing upon the guilt or innocence of the convicted person. If the law gives an authority to make further enquiry, it can also be deemed to have given ancillary powers to the High Court to make such directions and take such steps as may be necessary for the purposes of such further inquiry. Section 482 of the Criminal Procedure Code provides for inherent powers of the High Court to make such orders as may be necessary to secure the ends of justice, We, therefore, feel that these provisions of law as embodied in the Criminal Procedure Code, fully cover such a procedure and although there is no specific provision, yet we think that the taking of blood for the aforesaid purpose is warranted by these provisions of law. The second contention of the learned Counsel for the appellant, therefore, also fails.

76. As noticed above, there is no specific statutory regime in India under civil law which empowers the court to direct the medical examination including the blood test for DNA profiling of the parties or any third party to a case where paternity of a child is in issue. Such a position subsisted before the courts in England prior to the amendment to the Family Reforms Act. In the judgment pronounced on 14th March, 1963 reported at [1963] 2 All E.R. 386, W. v. W. The question before the court was whether the wife can be compelled against her will to undergo such a test. Cairns, J, it was observed

that "no such application as this has ever been made in this country before". The court rejected the argument of the counsel for the petitioner expanding the definition of the said statutory provision regarding samples which could be taken or appointment of experts. In this pronouncement, it was ruled that medical inspections have, in some circumstances, been authorised by statute. For instance under the Old Workman s Compensation Act, 1275. So far as the probate, divorce and admirality division was concerned, medical inspections were provided for in rule 24 of the Matrimonial Causes Rules, 1957. It was held that these inspections were not to which a party was under any compulsion to submit holding as follows :-

> "If this argument is right, it would mean that in the case of a plaintiff alleging that he had suffered some internal injury by the defendant's negligence, it would be open to the court to direct that an extensive exploratory operation should be made by a surgeon on the plaintiff's body against his will. I cannot for a moment suppose that the rules have any such effect. It was observed "far more precise wording of the statute" would be needed to authorise such interference with a person s body. On the issue of the submission of the husband s counsel for the operation of taking a sample of blood being of trivial character, involving no danger or discomfort and that the interference with the person of the wife therefore be deminimus, the court held as follows :-
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> If I considered this to be a sustainable contention I should have wished to have medical evidence to support counsel's statement, but it is conceded that the operation involves puncturing the skin and extracting some small quantity of blood. Obviously to do this to an unwilling person would be an assault unless authorised by law and I can find no such authority. Absent statutory provision, the court rejected the application for compelling the wife or the child to submit to a blood test.
>
> 77. Important case law on this issue including dissents and reservations expressed even in jurisdictions where statutory provisions exist on the issue has been noticed above.

78. The level of privacy protection thus may also depend upon the context in which the established standards are applied and the manner in which the right to privacy is challenged. Instances of mandatory testing which has been considered reasonable are available depending on the context in which mandatory testing was involved, and upon application of the doctrine of "probable cause"; "compelling need", "public interest" "decreased expectation of privacy", "maintenance of law and order"; "public health", "public safety" provided that the testing was performed in a scientific and accurate manner bearing in mind the privacy concerns of the individual;

79. It is therefore evident that it is only in exceptional cases, that human rights law has justified carrying out of compulsory or mandatory medical examinations which may be bodily invasive and interfered with a person s physical integrity. Such forced interventions with an individual s privacy under human rights law in certain contingencies has been found justifiable when the same is founded on a legal provision ; serves a legitimate aim ; is proportional ; fulfils a pressing social need

; and, most importantly, on the basis that there is no alternative, less intrusive, means available to get a comparable result.

80. It is trite that right to privacy and confidentiality is not an absolute right and could be reasonably curtailed. In case of conflict between the two fundamental rights, it is the right which would advance public interest and public morality would be enforceable.

It is important to note that in all these circumstances; concerns of not only permissibility of the testing, but also of the proportionality or the limits of the testing as well as the confidentiality attached to the disclosure/preservation of the result are required to be addressed.

81. In para 79 of Sharda vs. Dharmpal (supra), the Supreme Court after considering the jurisprudence from other countries on the issue of taking a sample without consent of a person observed as follows :-

> 79. At this stage we may observe that taking of a genetic sample without consent may in some countries e.g. Canada be viewed as a violation of the person's physical integrity although the law allows such forced taking of sample. But even this practice was held to be valid when the sample is collected by a health care professional. Collecting samples from the suspects for DNA tests in some countries have not been found to be violative of right of privacy.

82. Parentage testing has been considered by the Australian Law Reforms commission recently when it published the results of the inquiry conducted jointly with the NHMRC s Australian Health Ethics Committee titled "Essentially Yours-The Protection of Human Genetic Information in Australia", a two volume, 12000 page report, containing 144 recommendations about how to deal with legal, ethical and social implications of the "New Genetics". The report covers a vide range of areas including human genetic research and genetic databases, genetic privacy and discrimination as well as regulation of the use of genetic testing and information in employment, insurance, immigration, parentage testing, sports etc. One of the main recommendation on the issue under consideration in the final report is to the following effect :-

> (ix) DNA parentage testing should be conducted only with the consent of each person sampled, or pursuant to a court order. Where a child is unable to make an informed decision, testing should proceed only with the consent of both parents, or a court order.

83. A person may express willingness and consent to undergo a medical examination and treatment in instances requiring mandatory medical examination and thereby accept the intrusion or breach of privacy and physical integrity and autonomy.

Consent however is not the mere acceptance of medical intervention but must be a voluntary and sufficiently informed position, protecting the right of the patient to be involved in medical decision making and assigning associated duties and obligations to health care providers. It has been

described as an ethical and legal normative decision to submit from promotion of patient autonomy, self- determination, bodily integrity and well being. The important components of informed consent require respect for legal incapacity; respect for personal autonomy; and completeness of the information furnished to the patient.

84. So far as consent by a person to a medical examination including providing a bodily sample is concerned, it envisages such "informed consent" which would incorporate the agreement of the testee to be examined by a particular specialist as well as consent to all the medical examinations he would be subjected to. The testee would also indicate what the examiner is allowed to do with the disclosure of the result of the examination and test. The understanding should be clear and the consent unrestricted and free as per a report of the Special Rapporteur on the "Right of Everyone to Enjoyment of the Highest Attainable Standards of Physical and Medical Health" which was considered by the United Nations General Assembly in its 64th Session as item no. 71b on 10th August, 2009 in the discussion on "Promotion and Protection of Human Rights : Human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms."

85. From the above discussion, it is evident that wheresoever the legislature intended the medical examination to be mandatory, it is so prescribed. This is borne out from the statutory provisions in Sections 53, 53A and 54 of the Criminal Procedure Code, Sections 6(2)A and 15(5)A of Immoral Traffic (Prevention) Act, 1956; Sections 185, 202, 203, 204 of the Motor Vehicles Act; Sections 5 and 6 of the Identification of Prisoners Act; Section 11 of the Workmen Compensation Act; Section 19 of the Mental Health Act, amongst others.

Such being the legislative intent, it is necessary to consider the authority of the court to compel a medical examination pursuant to a civil court s direction to facilitate adjudication.

86. The reluctance of the civil courts in the aforenoticed judicial precedents to hold that a party could be compelled to give a blood test for DNA profiling is to be found in the lack of specific statutory provisions permitting the same.

87. In civil litigation involving parentage claims and denials, there is hardly any legislation or jurisprudence permitting use of force on an adult capable of giving informed consent for drawing a bodily sample for DNA profiling. The plaintiff before me, could not point out even a single instance of compelling non-intrusive sample. In the research which was possible in the little time available, I could not come across any instance where an adult including an alleged father who has refused to give the sample, has been forcibly confined for the purpose.

88. In 1972 Cri.L.J. 1392 Sulabai vs. Jagannath & Anr., the trial court was executing an order of maintenance made in favour of the petitioner which was being resisted by the other side on the ground that she had committed adultery and given birth also to a child subsequent to the maintenance order. The magistrate directed the petitioner to remain present before the medical officer and, without ascertaining whether the petitioner was willing or not and without obtaining her consent, passed the order compelling her to submit herself to medical examination. The High court

was of the view that "in the absence of any valid law providing for it, the order contravenes the fundamental right guaranteed by Article 21 of the Constitution of India". The court placed reliance on the judgment of the Andhra Pradesh High Court reported at AIR 1950 AP 207 Pulavarthi Sreeramamurthi vs. Pulavarthi Lakshmikantham and of the Gujarat High Court in Bipinchandra vs. Madhuriben AIR 1963 Guj 250 wherein it was held that the court had no power to compel an unwilling party to be medically examined.

89. In Goutam Kundu (supra), the court has also referred to the pronouncement in AIR 1986 MP 57 Hargovind Soni vs. Ramdulari. It was held by Madhya Pradesh High Court as follows :-

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

90. A single Bench decision of the Karnataka High Court in the judgment reported at AIR 2000 Kant 50 Smt. Ningamma & Anr. Vs. Chikkaiah & Anr. on the issue can be usefully referred. The court was concerned with the issue as to whether the trial court could direct the parties to undergo the blood grouping test in exercise of powers under section 151 of the CPC where the defendant had opposed the grant of maintenance to the plaintiff denying that he was the father of the second plaintiff. The court placed reliance on the observations in para 18 of Goutam Kundu (supra) of Ningamma. In para 23 of Ningamma (supra) the Karnataka High Court held that the trial court directions to the parties to appear for blood grouping test and upon failure to appear, an adverse inference would be drawn is nothing but an act of the court which was in excess of the jurisdiction, as which the court had no jurisdiction to direct; that the impugned order was against the law.

91. In para 16 of Goutam Kundu, the Supreme Court approved the findings of the Kerala High Court in Vasu vs. Santha, 1975 Ker.LT 533 wherein it had held that "before a blood test of a person is ordered, his consent is required. The reason is that this test is a constraint on his personal liberty and cannot be carried out without his consent. Whether even a legislature can compel a blood test is doubtful....." The Supreme Court also held that the learned Judge was also correct in holding that there was no illegality in refusing the blood test.

92. On the question being considered, the following caution by Justice Brandeis in Olmstead v. United States (1928) 48 S.Ct.564 comes to mind:-

> "Experience should teach us to be on our guard to protect liberty when..... purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

93. The Civil Procedure Code does not contain any provision which is pari materia to Section 53 of the Criminal Procedure Code whereby the police officer is specifically empowered to do the several acts which have been considered heretofore. The authority or source of the power of the civil court

to direct a medical examination has been found by the Supreme Court in the inherent power of the court under Section 151 of the CPC and the general provisions regarding inspections in Section 75(e) and order 26 rule 10A of the CPC, the above discussion would suggests that a direction to provide a bodily sample for DNA profiling in the facts and circumstances of a case may be within the parameters of permissible intrusion on bodily integrity.

94. The CPC permits securing the presence witness who does not comply with the court summons, by issuance of a warrant of arrest. Lawful and deliberate non-compliance with a court order results in initiation of contempt of court proceedings which may result in the incarceration of a person. However, physical confinement for forcible drawing of a blood sample or sample of any other bodily substances is not envisaged in any statutory provision governing civil litigation or under any tenet of justice.

95. It is noteworthy that this issue in the judgment dated 23rd December, 2010, my learned brother, Bhat, J had observed as follows :-

> 37. The Court notes that the above Law Commission proposal does not allow a third party to be compelled to undergo such tests against his liberty and is confined in its applicability to the husband of the mother. However, as the Court in Sharda and Jena (Supra) observed, there is no violation of the right to life, or privacy, or such third party, in directing a DNA test, to be undergone by him. The three Judge Bench in Sharda (supra) stated in no uncertain terms that a direction, (after taking into consideration all relevant facts), to the person, to undergo such a test is not an invasion of his right to life. Bhabani Prasad Jena(supra), after noticing all the previous judgments, including Goutam Kundu and Sharda, on the point, affirmed the power of the Court to direct a DNA test by one of the parties, and stated that it must be exercised with caution, after weighing all "pros and cons", the evidence, and satisfying itself if the "test of `eminent need'" for such an order, is fulfilled. This Court is therefore, bound by those principles.

96. In the case in hand, this court in the judgment dated 23rd December, 2010 has interpreted the existing statutory provisions, extrapolated therefrom and relied on judicial pronouncements to issue a direction to the defendant no. 1 to furnish the sample.

97. In AIR 1993 SC 2295 Goutam Kundu vs. State of West Bengal, the Supreme Court was concerned with an issue with regard to the blood grouping test to establish paternity and maternity of the child was involved in a petition under section 125 of the CrPC. The court did not have occasion to consider the more developed DNA profiling now available which is the only scientific tool to ascertain paternity issues.

98. The issue is compulsorily drawing of the blood sample of the defendant no. 1 to establish the plaintiff s parentage pursuant to this court direction in his civil paternity declaration suit.

99. Mandatory testing in a case raising parentage issues would involve important concerns of its application in discriminatory manner and/or with disregard for the privileges associated with a person s physical integrity as well as privacy concerns. The adverse impact of such testing upon an unwilling person, the element of violence which may be entailed, the extreme nature of the intrusion and violation of a person s physical person may leave irreparable scars. The possibility of misuse, however plausible or remote it be, cannot be overlooked by the courts. Absent any legislatively prescribed implementing agency, the court may be compelled to take assistance of the police authorities for the purposes of executing an order of compulsory testing. The important question of the place where the person ordered to be tested was to be confined would also arise. The propriety and permissibility of such action is certainly a matter of grave concern keeping in view the adverse civil consequences which may result.

100. Even if this court were to conclude that it was permissible for the defendant no.1 to be compulsorily tested, the enforceability of such an order is doubtful. Such forcible drawing of the sample would necessitate physically confining the defendant no. 1; producing him before medical experts and forcibly constraining him for the purposes of drawing a sample. Such a course would be an unwarranted intrusion on the rights of the defendant no.1 under Article 21 of the Constitution and is completely impermissible. The contention on behalf of the plaintiff that the defendant no.1 is required to be physically confined and held to give a blood sample to ensure compliance of the order dated 23rd December, 2010 is therefore devoid of legal merit and is hereby rejected. What are the consequences which would visit the defence of the defendant no.1 upon his refusal to comply with the court direction?

101. It has been argued by Mr. Burqi that in the order dated 23rd December, 2010 the court had failed to consider the consequences of non-compliance of an order for submission or taking of sample as have been laid down by the Supreme Court in AIR 2003 SC 3450 Sharda vs. Dharmpal. It is urged that given the law laid down by the Supreme Court, the defendant no.1 is justified in refusing to submit the blood sample without incurring any consequences.

102. So far as a child s rights are concerned, the ascertainment of one s biological origins is essential not only in the social context or satisfaction of a child s right to know his origins. There are several additional imperative justifications beyond the concerns for the same which may usefully be summed up thus:

(i) The identity of a child as envisaged in Articles 8 and 9 of the United Nations Convention on the Rights of the Child is preserved which enables the child to understand the social legacy; traditional, cultural and ideological heritage ; the circumstances of the child s birth and identity of the father. The moral justification which underlines; the right of every person to know one s origin has often been termed as informational self- determination.

(ii) The child s interest in learning medical histories and information of his/her biological parents which would enable the child to be aware of genetic predispositions to certain illnesses; anticipate disease; facilitate accurate diagnosis and efficient treatment. It may allow a child to take preventive medical measures or undertake lifestyle adaptations to prevent disease, if possible or cope with

them. In the medical sense, such information would thus enable prevention of any hereditary disease.

(iii) Knowledge of biological origins would enable prevention of incestuous relationships.

(iv) The last but not the least, the financial interest of a child in accessing a share in the estate of the putative father, essential especially in the Indian context given some of the customised laws of succession.

(v) The child could enforce the right to be brought up by his or her father/mother and family.

103. In order to rule on the consequence of the defendant no.1 s refusal, it is necessary to dwell on the question of why DNA profiling and what is its value and significance? What is the weight to be attached to this scientific test, its result as well as a refusal by the party so ordered.

104. Before proceeding further, it is essential to understand DNA profiling, its importance and need. It is also necessary to consider the intrusiveness of blood sample collection procedure.

105. A single Bench pronouncement of the High Court reported at AIR 2009 Madras 64 Veeran vs. Veeravarmalle & Anr. was rendered in facts which were similar to the instant case. In para 13, 14, 15 & 16 the court had discussed the nature of the DNA test in the following terms :-

> 13. On-Site Medical Testing Inc., California speaks about the paternity test, wherein it is stated as follows:
>
> D.N.A. paternity testing uses D.N.A., the biological basis of inheritance, to prove or disprove the relationship between a child and an alleged father. It is based on the fact that we inherit half of our D.N.A. from our father and half from our mother. Cells are collected from the child, the alleged father, and the mother if possible. Using sophisticated laboratory procedures, genetic profiles are created for each individual. By comparing these profiles, it is possible to statistically prove whether the alleged father is or is not the child's biological father.
>
> 106. Dr. A.K. Sharma from the Central Forensic Science Laboratory, Directorate of Forensic Science, Ministry of Home Affairs, Government of India, 30 Gora Chand Road, Park Circus Kolkata in an article titled "DNA Profiling, Social, Legal Or Biological Parentage" published in the Indian Journal of Human Genetics (September-December, 2007, Vol.13, Issue 3) has written that the analysis in DNA profiling is based on a comparison of the results of biological evidence with reference samples (blood or oral swab). Dr. Sharma writes that "Indirect references of close blood relatives of the person to be identified are usually desired for establishing identity. A DNA profile for a multiplex of 15 autosomal short tandem repeat (STR) markers is generated and obligatory alleles are compared with that of parents, siblings, or close relatives for kinship analysis. An inconsistency at two or more loci

> (considering the mutation rate of STRS) generally leads to exclusion in a kinship case. Inclusion at all loci is statistically evaluated by calculating paternity, maternity, or sibship indices. The success of a DNA case not only depends on the authenticity of the reference samples but also on the authenticity of the biological relationship of the donors with the person in question, without which any comparison is futile".

107. Dr. Sharma emphasises that the authenticity of the reference sample is essential for an accurate result. He concludes with the following caution:-

> DNA profiling is the most effective tool for justice in criminal and civil cases. The above-mentioned exceptional situations are rare, but it is important that investigating officers, forensic analysts, and members of the judiciary be aware of the necessity of obtaining authentic biological (genetic) samples and of the problems that may be encountered.

108. So far as the scientific accuracy of DNA testing is concerned, the same has been explained by Ilene Sherwyn Cooper in „Advances in DNA Techniques Present Opportunity to Amend EPTL to Permit Paternity Testing , N.Y.S. T.B.J. July-August 1999 at 34, 41 (1999) in the following terms :-

> For paternity applications, the odds that two unrelated people possess the same DNA band pattern have been calculated to be, on average, 30 billion to one. Given that the Earth's population is about 5 billion (only 2.5 billion males), it is impossible to be more sure of a paternity determination with any other available test. This scientific test has a 99.99% chance of correct conclusions and is perceived as an objective scientific test which may be difficult for an individual to refute. Refusal therefore to give a blood sample for DNA profiling is not seen as legitimate.

109. In an article titled "The Gene Age - A Legal Perspective" by Justice R.K.Abichandani of the High Court of Gujarat presented in the Conference on "Impact of New Biology on Justice Delivery System : Issues Relating to DNA Finger Printing, Intellectual Property Rights and Ethical, Legal, Social Implications" held by the Centre for DNDA Fingerprinting and Diagnostics, Hyderabad and NALSAR University of Law, Hyderabad between 3rd to 5th October, 2003, after detailed analysis on DNA parentage testing my learned brother has observed as follows :-

> [13.1] Parentage testing refers to testing done to confirm or deny biological parentage of a particular child or individual. Such testing may be conducted by blood group or DNA analysis. DNA parentage testing may exclude a person as the biological parent of a child with certainty but it cannot prove absolutely that a person is the child's biological parent. The test result can, however, provide a probability that a person is the biological parent of a child and, if that probability is sufficiently high, an inference of parentage may be confidently drawn. (See ALRC Discussion Paper 66-Protection of Human Genetic Information - DNA Parentage Testing). xxx [13.3] DNA parentage testing may be used to rebut a presumption arising under the Act, or to establish evidence in the circumstances where no presumption arises. A man

might seek DNA parentage testing in order to obtain evidence of non-paternity for hte purpose of civil proceedings against the child's mother to prove □paternity fraud and claim damages for emotional stress and financial loss that he suffered due to such fraud. DNA parentage testing may provide evidence to show that a person has a biological connection with a deceased person and can be a proof in support of a succession claim. In mass disasters, such as, aeroplane crashes and the World Trade Centre collapse, DNA parentage and relationship testing is increasingly used in identifying human remains where the body of the deceased is no longer recognizable.

110. In the judgment of the Madras High Court reported at AIR 2009 Madras 64 Veeran vs. Veeravarmalle & Anr. on the issue of the accuracy and the nature of the DNA test, the court held as follows :-

"14. The Eastern Biotech & Life Science Company in UAE which is offering D.N.A. Test in Kuwait, Jordan, Lebanon, Bahrain, Qatar, Oman, Saudi and Syria speaks about the paternity test, wherein it is stated as follows:

□Paternity testing requires a painless sample from both the child and possible father. Even without a sample from the mother, D.N.A. paternity test results are up to 99.9999% accurate-that's one- in-a-million odds your results are incorrect.

15. The above analysis clearly shows that if the mother is not available, from the sample collected from the child and the alleged father, the paternity test can be conducted. Thus, if D.N.A. test is performed without the mother's sample, it requires additional analysis and it will take a few days longer to complete the same. However, the accuracy of the results will not be affected.

16. The above discussions make it very clear that it is not always necessary to conduct D.N.A. test on both the alleged father and mother and the D.N.A. test performed on the father will also show whether a particular child was born to the person on whom such test has been performed. While so, the argument advanced on the side of the petitioner that without conducting D.N.A. test on the second respondent, the alleged mother of the first respondent, there will be no useful purpose, by directing the petitioner alone to subject himself for D.N.A. test, is totally erroneous. In the fast technology development in scientific field, it is nothing wrong in directing a person to undergo D.N.A. test, which will enable the Court to arrive at a proper conclusion. Furthermore, the petitioner, who asserts that he had no relationship with the second respondent and the first respondent was not born to him, to prove his assertion, can very well subject himself for the said test to prove his case beyond reasonable doubt. In fact, the test result will amply prove his case also. (Emphasis supplied)

111. Reliability of the scientific evidence depends upon three factors; the validity of the underlying scientific principle ; the validity of the technique applying the principle ; and the proper application

of the technique on a particular occasion. Each individual has an entirely unique genetic signature (except in the case of identical twins) derived from DNA configuration.

112. DNA profiling has been statutorily recognized in the Code of Criminal Procedure and the aforenoticed judicial precedents as reliable scientific evidence.

113. Value is attached to genetic finger printing and DNA profiling as it would be difficult for the suspect or the person being tested to harder to fabricate with the evidence. It is therefore difficult to undermine the value of the test.

114. DNA fingerprinting has thus established high specificity, has extraordinary probative properties and is statutorily recognised. DNA samples can be obtained from blood; tissue; pulled head hair samples with intact roots; fingernail clippings; bone marrow; tooth pulp; dried blood stains and biopsy samples. Genetic fingerprinting falls outside the privilege against self-incrimination and is within the parameters of reasonable search and seizures provided there exists the element of cooperation as required for the purposes of taking, say, a blood or a semen sample.

115. The above narration adequately establishes the unimpeachable importance and value attached to the affirmative nature of the results of DNA profiling in a case where parentage is in issue. The refusal of the defendant no. 1 to furnish the sample and its consequence have tobe tested against these standards.

116. An issue of paternity may be established in three ways. Firstly, in accordance with the marital presumption rule (Section 112 of the Evidence Act); (or,) recognition of the paternity by the party; or, lastly by a judicial determination of paternity. The instant case is of the third kind.

117. From the above discussion, it is manifest that there is no difficulty if the person consents to the taking of intimate bodily samples. If the specimen had been obtained and the results indicate that the alleged father is the father of the child, a presumption of paternity is created. Such presumption can be rebutted only by clear and convincing evidence that the results of the genetic test are not reliable in that particular case. Difficulty arises if the taking of the sample is refused. The same may be for genuine or good causes or without.

118. In the case before the Family Division of England reported at 1988 (22) All ER 500 McVeigh v. Beattie, the appellant had resisted the application for blood test on which nevertheless directions for the test were made. The appellant subsequently indicated that he was not willing to submit himself to blood tests if there was a further application for a blood test direction. As the appellant did not submit to the blood test when further direction was made, the trial judges drew the inference that the appellant failed to comply with the blood test directions because he had sexual intercourse with the respondent and he knew that the blood test would show that he was probably the father of the respondent s child. Wood, J considered the question as "Was the appellant's failure or refusal to comply with the blood test direction evidence which was 'other evidence', i.e. capable of construing corroboration of the complainant's case that it was the appellant who was the father of her child or, to use the words of Sellers LJ in Simpson v. Collinson (1964) 1 All ER 262 at p. 267, was it evidence

that shows or tends to show the story is true."

It was stated by Wood, J. that it has been held that a report of a blood test relating to the party could constitute corroborative evidence.

119. In the context of refusal by an adult party to submit to a blood test, the observations of Lord Denning MR in the judgment reported at 1968 (1) All ER 20 entitled Re L at 26 (1969) p 119 at 159 shed valuable light and deserve to be considered in extenso:-

> "Both counsel for the husband and counsel for the wife felt bound to concede that, under these sections, the Court could not order an adult to submit to a blood test. A blood test which involves the insertion of a needle is an assault, unless consented to. It would need express statutory authority to require an adult to submit to it. ((1963) 2 All ER 841 (1964) P. 67). If these sections do not authorise the court to order an adult to have his blood tested, I do not see that they authorise the court to make such an order in the case of an infant. A test of the child's blood would be useless unless there were tests of the adults also. But, I would say this. If an adult unreasonably refuses to have a blood test, or to allow a child to have one, I think that it is open to the court in any civil proceedings (no matter whether it be a paternity issue or an affiliation summons, or a custody proceeding) to treat his refusal as evidence against him, and may draw an inference therefrom adverse to him. This is simply common sense. It is in keeping with the rule that in a nullity case, if a party refuses to be medically examined, the court may infer that some impediment exists pointing to incapacity (see W. v. W. (otherwise L.) (1912) P.
>
> 78). Moreover, being a rule of evidence, it applies not only to the High Court but also in the magistrates' court, and to any court of the land."
>
> (Emphasis supplied)

120. In the context of criminal law, the refusal by a person without reasonable excuse to supply a sample for scientific examination arose for consideration before the Rajasthan High Court in the judgment reported at 1991 Cri.L.J. 939 Miss. Swati Lodha vs. State of Rajasthan & Anr. The court was concerned with the refusal to submit to a blood test by a person accused of the offence of rape in which a child had been born to the victim. In para 16 of the pronouncement, the court considered the value to be attached to the test also and held as follows :-

> □16. A review of the above law, would go to show the following propositions are well-settled :--
>
> (1) Report of a blood-test is capable of amounting to corroboration of the statement of the complainant. It amounts to corroboration even under the common law. The nature of the corroboration would necessarily vary according to the particular

circumstances of the offence charged. The test applicable to determine the nature and extent of the corroboration is the same whether the case falls within the rule of common law or within that class of offences for which corroboration is required by statute. A Criminal Court can make a direction for a blood-test to be taken by taking blood-sample of the complainant, accused and of the child. In certain cases, where it is contrary to the interest of a minor, the Court may not make a blood-test direction.

(2) The Court cannot order an adult to submit to blood- test. A blood-test which involves insertion of a needle in the veins of a person, is an assault, unless consented to. It would need express statutory authority to require an adult to submit to it. This is based on the fundamental that human body is inviolable and no one can prick it.

(3) Where a Court makes a direction for a blood- test, and the accused fails or refuses to comply with the blood-test direction, the Court can in the circumstances of the case, use the refusal or failure of the accused to submit to blood test as a corroborative evidence against him. If a party refuses to submit to blood-test, the Court may infer that some impediment existed which pointed out towards the implication of the accused. (Emphasis supplied)

121. On the issue of paternity, it thus requires to be considered whether the refusal to supply a sample for scientific examination is without reasonable excuse which is capable of amounting to corroboration of the evidence of the plaintiff to establish that the defendant no. 1 was his father or not. In this regard, in 1991 Cri.L.J. 939 (1) Swati Lodha v.

State of Rajasthan on the issue of what is "corroborative evidence" placing reliance on Mash v. Darley, (1914) 3 KB 1226, the Rajasthan High Court observed as follows:-

"12. The question, what is corroborative evidence, came up for consideration in Mash v. Darley (1914) 3 KB 1226. Dealing with the question, Buckley LJ observed at page 1231 of the report as follows:--

"Corroborative evidence, I conceive, may be found either in admissions by the man or inferences properly drawn from the conduct of the man.

xxx (13) Thus, within the criminal law, a refusal without reasonable excuse to supply a sample for scientific examination has been capable of amounting to corroboration.

122. In Swati Lodha (supra), the court noticed that the following questions were framed by learned Judges of the Family Division in England:-

"What is the argument against such inference being capable of such corroboration. It is said that a refusal points to no conclusion, ' because a blood test does not, prove anything; it may exclude, but, if it does not, then it will only place the respondent

> within a bracket of men, usually expressed as a percentage, who could have been the father. To this it can be said that a forensic test is not necessarily conclusive one way or the other, and the question might be asked, why not take any steps which could in effect exclude. What has the respondent to fear or to hide I am satisfied that the answer to this question is in the affirmative. If it were to be in the negative, then in my judgment the effect of Section 23 would be severely eroded, if not totally negated. No one would comply with a blood test direction and would be so with impunity."
>
> 123. On the consequences of refusal, a Division Bench of the Orissa High Court in the judgment reported at 2004 Cri.L.J. 4003 Thogorani alias K. Damayanti vs. State of Orissa & Ors. placed reliance on Sharda (supra) and in para 18 held that it is, therefore, inevitable to hold that in the event of the refusal of the opposite party no. 3 to give his blood sample for conducting DNA test, an adverse inference can be drawn by the trial court.

124. In this regard, in para 7 of the judgment in 1972 Cri.L.J. 1392 Sulabai vs. Jagannath & Anr. the court held that in case where a person refuses to be subjected to medical examination by adopting obdurate attitude, an adverse inference can be drawn under Section 114 of the Indian Evidence Act observing as follows :-

> "7. .....Section 144 of the Indian Evidence Act provides for the presumption by the Court regarding existence of facts. Illustration (g) to that section is to the effect that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. If, therefore, in a case it is shown that a person wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved can be raised against him or her. This section, amongst other things, therefore, enables the Court to draw an adverse inference against a party who refuses to produce a document in his possession. Similarly, it enables the Court to draw a presumption against a person who can make evidence available to the Court but obstructs the availability of such evidence. If, therefore, a person in a case refuses to submit to a medical examination where the whole case depends on the state of his or her mind and body, I think that it would be open to the Court to draw an adverse inference or presumption against such a person. Such a person would be on a par with a party who wrongfully withholds evidence in his possession. In Ranganathan Chettiar v. Lakshmi Achi AIR 1955 Mad 546, it was held, that it was not open to a Court to invoke Section 151 of the Code of Civil Procedure for ordering a medical examination of a party against the consent of such party. The High Court observed that the Court might draw any adverse inference against a party who refuses to examine himself or herself. In Bipinchandra v. Madhuriben, cited above, the Gujarat High Court has also held that the fact that a party with ulterior motives adopts an obdurate and relentless attitude, cannot and does not render the Court helpless to counteract it. Where a party refuses to submit to a medical examination in a case where the whole case depends on the state of his mind and body, it will be open to the Court to draw an adverse inference or

> presumption against the recalcitrant party. Of course, the adverse inference that may be drawn by any Court is from the circumstances in each case and having regard to the refusal to let the best evidence being brought before the Court. In the present case if the circumstances permit, the learned Magistrate would be justified to draw an unfavourable inference against the petitioner. (Emphasis supplied)

125. So far as the consequences of refusal to submit to a blood test are concerned, in Goutam Kundu (supra) the petitioner disputed the paternity of the child as a defence to the wife and childs maintenance petition under section 125 CrPC and had prayed for the blood group test of the child to prove this fact. One of the circumstances which had weighed with the court was the lack of consent to the blood test by the respondents. The Supreme Court held that there was no illegality in refusing the blood test for the reason that no consent has been given by any of the respondents. In this regard, the Supreme Court observed as follows :-

> "The maximum that can be done where a party refuses to have a blood test is to draw an adverse inference (see in this connection Subayya Gounder v. Bhoppala, AIR 1959 Mad 396) and the earlier decision of the same court in Venkateshwarlu v. Subbayya, AIR 1951 Mad 910 (1). Such an adverse inference which has only a very little relevance here will not advance the appellant's case to any extent. He has to prove that he had no opportunity to have any sexual intercourse with the Ist respondent at a time when these children could have been begotton. That is the only proof that is permitted under S.112 to dislodge the conclusive presumption enjoined by the Section. (Underlining by me)

126. After a detailed consideration of judicial precedents from India and foreign jurisdictions in para 84 of Sharda vs. Dharmpal (supra), the Supreme Court held as follows :-

> "84. 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 an possession.

127. Upon the refusal to submit a sample for the test by a person, the foremost question which therefore arises is as to whether the refusal is malafide or with reasonable cause and justified?

128. In the period before DNA profiling came to recognized, when the blood grouping test was in vogue for forming opinion as to paternity of child, such issue arose before the Division Bench judgment of the Calcutta High Court reported at 1986 (2) HLR 219 Kartick Chandra Dass vs. Sabita Das. The Division Bench held that on the issue with regard to the expert opinion regarding blood test, the court would be guided by the principles embodied in section 45 of the Evidence Act. On the aspect as to whether or not the court could, even inspite of objections, compel such blood test and the consequence of the refusal, in para 7, the Division Bench had observed as follows :-

> "7. While is in true that in case of a person who is sui juris, the court cannot compel him to give sample of his or her blood for ascertaining his blood group. But when inspite of being ordered by the court, a person declines to undergo such blood test the court may at the appropriate stage of the case consider whether or not any adverse presumption ought to be drawn for such refusal to undergo blood test. We must add a word of caution by observing that there could be no inflexible rule that in every case of such refusal to allow blood sample to be taken an adverse presumption ought to be invariably drawn against such person. Same would depend upon the facts and circumstances of each particular case. (Underlining supplied)

129. It is equally important to bear in mind that in a given case there could be valid apprehensions and genuine reasons for the non- cooperation and the refusals to supply the bodily sample. Individuals have different sensibilities. Non-cooperation or refusal to supply the bodily sample may be the outcome of fear or embarrassment or even anger. Ignorance about the testing procedure or an outcome or apprehension about the accuracy of the outcome may also result in non- cooperation. In these circumstances, the refusal may always not be because of guilt or machiavellin motives. There may be genuine apprehensions as to the fate of the sample or the results.

130. There can be no denial that taking of a bodily sample involves an intrusion into the body which is not so when a fingerprint is taken. Requiring an individual into providing a sample may be visualized as inherently humiliating and degrading or involving indignity as compared to giving oral testimony.

A person may perceive the taking of a sample as inherently degrading. To construe such a refusal as corroboration may, in such circumstances, be misleading. Consequently, it cannot be held as an absolute proposition that in every case, a refusal to submit a bodily sample must inevitably result in the court drawing an adverse inference against the person so refusing.

131. On the other hand, there would be instances where the refusal to provide a bodily sample is unreasonable; obdurate; relentless in attitude, recalcitrant; without cause and those where the test evidence materially impacts adjudication on the issue. In such instances, it would certainly be open to the court to draw an adverse inference or treat the refusal as corroborative evidence, depending on the admissions on record and the quality and nature of the evidence placed before the court.

132. Given the value of the DNA profiling of the blood sample in a paternity action, the refusal of defendant no.1 to comply with the order dated 23rd December, 2010 may now be examined.

133. It is essential to notice the conduct of the defendant no.1 as manifest from the court proceedings on the record and. After the passing of the order dated 23rd December, 2010, the case was listed before the Joint Registrar on 8th February, 2011. It is noteworthy that the Joint Registrar is an experienced judge from the Delhi Higher Judicial Service. It was stated on behalf of defendant no.1 that judgment in FAO(OS) No. 44/2011 had been reserved on 7th February, 2011. The matter was adjourned. However, pending orders from the Division Bench, the Joint Registrar had deemed it appropriate to send a copy of the order dated 23rd December, 2010 to the Centre for Cellular &

Molecular Biology, Hyderabad, Andhra Pradesh seeking information.

134. As information was not received from the laboratory, on 19th February, 2011, a direction for obtaining information from the Institute as to the manner in which samples are to be taken for DNA testing was sought. On the next date of hearing i.e. on 19th February, 2011, it was stated by counsel for the defendant no. 1 that his appeal stood dismissed by the Division Bench and that a Special Leave Petition had been filed in the Supreme Court. The matter was thereafter adjourned to 8th March, 2011 by the Joint Registrar.

135. In the meantime, the plaintiff filed IA No. 2981/2011 dated 24th February, 2011 pointing out that information stood received from the Centre for Cellular & Molecular Biology to the effect that, in order to cater to the national needs, the Department of Biotechnology (DBT), of the Government of India had set up a separate institution by name the Centre for DNA Fingerprinting and Diagnostics which was headed by Dr. J. Gowrishankar as its director. The counsel for the plaintiff had disclosed the details of the address of the centre as were received by him. In this background, by way of IA No. 2981/2011, the plaintiff sought modification of the order dated 23rd December, 2010 so far the particulars of the laboratory which would undertake the testing. This application was listed before the court on 25th February, 2011. Notice was issued to the defendant no. 1 on 1st March, 2011 and 4th March, 2011.

136. No objections to the directions sought in IA No. 2981/2011 were made by or on behalf of the defendants. Consequently the following directions were issued by this court on 14th March, 2011 in the presence of counsel for the defendant no.1:-

> "xxxx
>
> 3. It is accordingly directed as follows :-
>
> (i) The testing of the samples of the defendant no. 1 shall be effected by taking or drawing appropriate samples in accordance with the requirements of the Centre for DNA Fingerprinting and Diagnostics (CDFD), Building 7, Gruhakalpa 5-4-399/B, Nampally, Hyderabad 500001.
>
> (ii) The Joint Registrar shall ascertain the requirements and formalities required to be completed from the Centre for DNA Fingerprinting & Diagnostics (CDFD), Hyderabad and ensure compliance thereof.
>
> (iii) The parties or their counsel shall appear before the Joint Registrar on 4th April, 2011.
>
> (iv) The defendant no. 1 is directed to furnish such sample on the date and time designated by the Joint Registrar.
>
> (v) This application is allowed in the above terms. (Underlining by me)

137. The learned Joint Registrar proceeded further in the matter with regard to obtaining details of the manner in which samples are to be taken. Orders dated 4th April, 2011 and 20th April, 2011 were recorded in the presence of the defendant no.1.

138. On 2nd May, 2011, the Joint Registrar has noticed that requisite information was received from Centre for DNA Fingerprinting and Diagnostics, Hyderabad („CDFD hereafter) enclosing the blood collection kits. Notice was issued for the 1st June, 2011 to the C.M.O, Dispensary of Government of NCT of Delhi in the premises of the Delhi High Court with the request to depute a doctor, who can collect the blood sample of the parties in this case. The case was renotified for 10th May, 2011. The Joint Registrar also appointed the 1st June, 2011 for the sample collection and fixed 2.15 p.m. as the time for the same. This order notices that the communication from the CDFD, Hyderabad had been duly supplied to the counsel for the defendant no. 1 in court.

139. It is noteworthy that on 6th May, 2011, it was pointed out that the defendant no. 1 had not paid costs to the plaintiff in terms of the orders passed on 13th August, 2010 and 7th February, 2011.

140. As noted above, pursuant to orders dated 23rd December, 2010, the Joint Registrar attached to this court, has interacted with the Centre for DNA Fingerprinting and Diagnosis, the autonomous institute set up by the Department of Biotechnology, Ministry of Science and Technology of the Government of India.

141. The letter dated 21st April, 2011 received from the Centre enclosing the Flinders Technology Associate („FTA) card for collection; shipment, archiving, and purification of nucleic acids from a wide variety of biological samples was sent by the lab. In this communication from the laboratory, they have prescripted the procedure for collection as follows :-

> For the establishment of maternity/paternity, we require the bloodstains of the mother, disputed child and the alleged /suspected biological father.
>
> For the identification of rapist in sexual assault cases , we require the forensic exhibits (viz., garments , vaginal swabs and slides) along with bloodstains of the suspect(s) and victims.
>
> For the Identification of the deceased, we require the bloodstains of the nearest relatives (viz., mother , father , brother , sister and children) along with the material objects of the deceased like teeth, post-mortem blood , muscle tissue, bone, hair with root and other material relevant to the cause.
>
> The bloodstains can be made using lancet on FTA cards being sent by us , in the presence of Court Authorities. These stains should be air dried and sent to us .The procedure for collection and shipment of bloodstains on FTA cards are given in the annexure .

> The forensic exhibits should be send as mentioned below. All the samples should be properly collected & sealed and sent to CDFD under certification along with specimen seal for comparison. The samples should reach CDFD between 10:00 am to 5:00 pm on any working day (Monday to Friday).

142. Detailed instructions in the said letter dated 21st of April, 2011 for collection and shipment of blood on FTA Cards have also been given. On the quantity of blood sample required, it is prescribed as follows :-

> □Application of blood samples (fresh whole blood or with the anti coagulants :EDTA , sodium citrate , ACD or heparin) Label the FTA card with appropriate sample identification . The date and time of collection , name of the concerned person whose bloodstains is collected , name of the Medical Officer who collected the blood and his/her signature need to be mentioned in the FTA card.
>
> In one circle of the card , drop the blood (<125 ul per 1-
>
> inch circle, 0.75 ul per ¾-inch circle) onto the card in a concentric circular motion within the printed circle area and allow it to air dry. Avoid □pudding of the liquid sample, as it will overload the chemicals on the card. Also do not rub or smear the blood onto the card. In the second circle, please pot at 4-6 locations by placing one drop of blood at each location. (Please see the figure below). xxxx

> 143. After participating without demur in the proceedings till here, the defendant no. 1 now effected a change in counsel. On 10th May, 2011 before the Joint Registrar, Mr. Pramod Kumar Sharma, Advocate put in appearance on behalf of defendant no. 1 and stated that he would file a vakalatnama within a week. The Joint Registrar has noted in his order that a report stood received from the CMO of the Dispensary of the Government of NCT of Delhi in the High Court premises to the effect that he would depute a doctor for collecting the blood sample on the scheduled date and time. The plaintiff was directed to bring the requisite demand draft towards the costs of the testing.

144. It is noteworthy that the defendant no.1 made no objections at all to the collection of the blood samples on any of the aforesaid hearing. On the contrary, he has participated without demur before the Joint Registrar for a period of over five months during which the learned Joint Registrar has obtained the prescribed procedure and the requisite kit from the laboratory for taking of samples; their preservation after which he has scheduled the date and time for and also identified the doctor who would take the sample.

145. It is at this stage that the defendant no. 1 has had an inexplicable change of heart. On 1st June, 2011 when all parties, including Dr. Preeti Rai from the dispensary of the Government of NCT of Delhi in the High Court were present to take the samples before the Joint Registrar, the following statement was made by counsel for the defendant no.1 □Learned counsel for defendant no.1 states

that the defendant no. 1 has not come to the court today and he has also moved an application vide diary no.84071 on 30.05.2011 with the prayer that the defendant no.1 may not be pressurized to give his blood samples. He has further stated that the application was returned under objection and it shall be re-filed today. This request was opposed by the plaintiff who had also brought the requisite drafts payable towards the testing.

146. The present application was filed in this background. It came to be listed before this court on 7th July, 2011 for the first time. An oral submission was made on behalf of defendant no.1 in the proceedings on 11th July, 2011 to the effect "on account of his age and long public service, he is not willing to give his blood sample for DNA testing". Having regard to the directions made in the judgment dated 23rd December, 2011, 7th February, 2011 and the order dated 18th March, 2011 passed by the Supreme Court of India, it was directed that the defendant no.1 shall file a personal affidavit to the above effect.

No such affidavit was brought as directed.

147. On 14th July, 2011, it was further noticed that despite the admissions contained in the written statement, more than hundred photographs featuring the defendant no. 1 filed by the plaintiff had been simply denied by counsel for the defendant no. 1. Learned counsel for the defendant no. 1 prayed for one last opportunity of one week to also file an affidavit of the defendant no. 1 personally of admission/denial of the documents filed by the plaintiff including each photograph specifically. On request of the defendant no. 1, he was again given time for filing the affidavits in terms of the order dated 11th July, 2011 as well as the affidavit of admission/denial.

148. An adjournment was again requested on behalf of learned counsel for the defendant no.1. Thereafter, only one affidavit dated 21st July, 2011 purporting to be in compliance with the directions made on 11th July, 2011 was tendered in court and taken on record. Further time was sought to place a personal affidavit of the defendant no.1 with regard to admission/denial of the plaintiff s documents which was also granted.

149. The affidavit dated 21st July, 2011 with regard to refusal to give blood sample is important for the purposes of the present application and is reproduced in extenso:-

> "1. That I am defendant no. 1 in the above mentioned suit. Being well conversant with the facts and circumstances thereof, I am filing this affidavit in compliance of order dated 11.7.2011 passed by this court.
>
> 2. I am acquainted with the directions passed by this court on 23.12.2010 directing me to give blood sample on a date and time designated by learned Jt. Registrar on the date fixed i.e. 8.2.2011; The order passed by Division Bench of this court dated 7.2.2011 referring to the case law in case a person directed refuses to undergo DNA test and finally rejection a stay prayer by Supreme Court in my Special Leave Petition (Civil) No. 5756/2011, however, notices were issued on aforesaid SLP which is still pending.

> 3. Being a Law Graduate and extensive personal experience in Vidhana Sabha, U.P., Lok Sabha, Rajya Sabha, vidhan Parishad, U.P. and Vidhan Sabha, Uttarakhand in Legislative fields; I understand the concluding law in this respect and say that the directions passed by this court on 23.12.2010 attained finality. The Supreme Court held as I understand that the person cannot be compelled to undergo DNA Test which is the final law as of now, of our land.
>
> 4. Besides I never suffered any allegation of my financial, moral, social and/or communal corruption in my public life for approximately 70 years. I achieve unblemished public career which justifies me to contest against the plaintiff who is bent upon to tarnish my public image by bringing false cause and even unwarranted contempt petition so as to get undue publicity in print as well as electronic media.
>
> 5. In order to preserve, protect and defend my personal dignity attained by my long cherished services to the Nation as well as Indian society, I being a senior citizen too, I am not willing to give my blood sample for DNA testing. Hence, I may not be compelled to do so. (Emphasis supplied)

150. In view of the submission that counsel for the defendant no.1 was not well, the case was adjourned to 28th July, 2011. Further adjournment was sought to bring the affidavit of admission/denial of the documents which was granted on 28th July, 2011.

151. In the present case, pending hearing of the present application, in the hearing on 28th July, 2011 and 2nd August, 2011, the option was given to the defendant no.1 to give his blood sample for preservation and that testing thereon could be deferred till adjudication in the matter. It was also put to the defendant no. 1 that if acceptable to the laboratory, any bodily sample (other than the blood sample) which include, hair, saliva, nails etc could be given by him. Such an option was given to the defendant no.1 on the premise that the DNA analysis could be carried out on samples obtained from such samples as well. Learned counsel for the defendant no. 1 categorically stated that the defendant no.1 was not willing to give any such sample.

152. The defendant no1 lays no challenge to the DNA profiling on grounds of any technical deficiency or of its arbitrary or injudicious application.

153. Before this court, the defendant no. 1 also does not dispute the accredition of the Government laboratory or the procedure prescribed or being followed for taking the sample or its testing in the application under consideration or the above affidavit. He also does not challenge the relevance or reliability of the DNA test.

154. The defendant no. 1 has not disputed the authority of the results of the test nor suggests any other kind of evidence of the same reliability as the DNA profiling which would have enable adjudication of the claim by the plaintiff.

155. Given the accuracy and value attached to the result of DNA profiling as well as the stature of the parties, in case the paternity denial by the defendant no. 1 was correct, he would be reasonably expected to participate in the DNA profiling test to establish the truth. To establish his defence, he would be expected to volunteer his blood sample to enable the truth to be brought out and the controversy being put to an end. Given the uncertainties of life, there could be serious issues with regard to succession to the estate of the defendant no.1.

156. In para 77 of Sharda vs. Dharmpal, the court also referred to the pronouncement reported at (1983) 714 F.2d 632 Zuniga vs. Pierce. In Zuniga (supra), the court was concerned with the effect of the order which resulted in piercing the confidentiality of a patient-psychotherapist relationship. In this case, on the issue of reconciling competing interests by balancing the interests involved, it was stated that "this is necessarily so because the appropriate scope of the privilege like the privilege itself, is determined by balancing the interest protected by shielding the evidence sought with those advanced by disclosure". The tripartite test states that a "legitimate need" must be present for the evidence to exist, the relevancy and materiality to the issue before the court, and the moving party must demonstrate that the information to which they are seeking access "cannot be secured from any less intrusive source".

157. In Sharda vs. Dharmpal (supra) (para 82), the Supreme Court laid down caution to the court which is considering passing the order for a person to provide a sample for DNA profiling and observed that the court must ensure the rights of a party to the lis who may be otherwise found to be incapable of protecting his interest, must be adequately protected; the court shall not inquire a roving inquiry and it must have material before it to enable it to exercise discretion. The applicant must have established a strong prima facie case before passing an order for DNA testing.

These concerns have been addressed by the court in the judgment dated 23rd December, 2010.

158. The DNA profiling is a modern scientific method which has been accepted in all jursidictions for the purposes of conclusively identifying parents. Given the evidentiary value of a DNA profiling especially in a paternity case, the refusal by the defendant no.1 to give his bodily sample would really have the effect of frustrating the importance of the test.

159. The refusal by defendant no. 1 to comply with the court order has to be tested against the above legal position.

160. It is in the pleadings of the parties that the wife of the defendant no. 1 expired in 1993. Given the criminal law in India, even if any criminality could be attached to the alleged relationship between the defendants, the only person who could have made a complaint foisting criminality in respect thereof upon the defendant no. 1 was his deceased wife. Given her demise, the defendant no.1 cannot even nurture an apprehension that any criminal liability could be attached to his conduct upon the result of the DNA test. No issue of self incrimination has been rightly urged in these proceedings.

161. In the instant case, the defendant no. 1 has stated that he has no off springs from his marriage.

162. The present case is also not concerned with any monetary claim in the nature of maintenance upon the defendant no.1 other than a simple prayer by the plaintiff of declaration of his parentage.

163. It is important to note that there is no plea of violation of bodily integrity of the defendant no. 1 in furnishing the blood sample before this court. The defendant no. 1 does not express any kind of apprehension from the physical testing on account of the minor intrusion entailed. He has placed no material on record to show that he has never undergone blood testing.

164. The defendant no.1 before this court does not submit that there is any medical necessity which prevents him from complying with a court order to undergo parentage testing.

165. The defendant no.1 has not refused to give his blood sample on account of any incapacity. The defendant no.1 has displayed no nervousness nor any kind of aversion let alone aversion for giving the sample. The defendant no.1 voices no religious prohibitions or physical or mental aversion or apprehension from the test.

166. It is the case of the plaintiff and defendant no. 2 that the plaintiff was born outside of marriage. He was born from a relationship between the defendant nos. 1 and 2. The defendant no. 2 has stated that though she was married to Sh. B.P. Sharma from which marriage they were blessed with one son Siddharth on 30th October, 1968; that the defendant no. 2 and her ex-husband did not have marital relationship or co-habitation since 1970; that the defendant no. 1 became close to the defendant no. 2 from 1968 and they entered into an intimate relationship in 1977 which resulted in the birth of Rohit Shekhar, the present plaintiff on 15th February, 1979.

167. It is the case of the plaintiff s biological mother-defendant no.2 that she was not living in a matrimonial relationship with her husband.

168. In his replication, the plaintiff has pointed out that the plaintiff and the defendant no. 2 have jointly or separately have been photographed with the defendant no.1 in his residences at Lucknow; Jantar Mantar Road; Tilak Road, Delhi; the Chief Minister s residence, Dehradun; the U.P. Niwas (now Uttarakhand Bhawan); in the Saket residence of Prof. Sher Singh and the Defence Colony residence of the plaintiff and his mother-defendant no.1 in close and familiar proximity to the exclusion of the defendant no.1 s wife.

169. The plaintiff sent a legal notice dated 7th November, 2007. The defendant no.1 has admitted receipt of the notice. The defendant no. 1 did not repudiate the facts in the legal notice. He admits in his written statement that he has sent no reply to this notice.

170. The defendant no. 1 s fear of unwarranted evasion of privacy are expressed in broad, and speculative which are completely untenable terms. Such concerns, if warranted, can be met by orders regulating the sampling, publication, treatment, disposal of the DNA report etc. Despite the available legal provision as well as liberty having been granted by the Supreme Court in the order dated 10th May, 2010, no such request has been made by the defendant no.1. The defendant no.1 therefore displays no aversion on the privacy threshold to the proceedings in the present case.

171. Apart from DNA profiling, alternative methods for establishing paternity would include proof by adoption or voluntary paternity or a court decree establishing paternity of the child by another man. None of these alternative methods are available in the case in hand.

172. The defendant no.1 submits that he is a law graduate and has extensive personal experience in the state assemblies as well as in legislative fields. He submits that he is not willing to give his blood sample for DNA testing in order to preserve, protect and defend his personal dignity attained by long cherished service to the nation.

173. In the affidavit which he has filed, the defendant no.1 has admitted full knowledge of the proceedings before this court and all orders. He has made a categorical assertion that he shall not undergo the ordered blood test. The only reason put forth by him that he cannot be compelled to undergo DNA test.

174. The defendant no. 1 has stated that he is aware of the requirement of the test and the consequences of his refusal.

175. Before examining the above factual background, the nature of the method for extracting the blood sample and the extent of its intrusion on bodily autonomy may be considered. The blood test procedure is routine. It is compulsory even in this country for those joining government or military service. Blood donation is widely practiced. Blood testing is undertaken routinely for identifying infections, health status etc of the person being tested. A blood sample is drawn by medical experts adopting a judicious method. The intrusion for a blood test is minimal.

176. In the judgment of the Massachusetts Supreme Court reported at 429, 366. 709 - NE2d 1085-(1999) Donald E. Landry v. Attorney General, the court examined the reasonableness of the search and seizure involving a blood test and concluded that the intrusion occasioned by a blood test, is "not significant" involving little risk or pain. The court further examined the "special needs doctrine beyond law enforcement" to justify taking of blood from convicted persons for DNA identifications and establishment of the DNA data bank as a deterrent to recidivism on the part of convicted persons.

177. On this aspect, while considering a challenge to the DNA warrants under the Canadian Criminal Law in (2003) 2 SCR 678 : 2003 SCC 60 R v. S.A.B. in para 44, the Supreme Court of Canada had observed thus:-

> "With regards to privacy related to the person, the taking of bodily samples under a DNA warrant clearly interferes with bodily integrity. However, under a properly issued DNA warrant, the degree of offence to the physical integrity of the person is relatively modest (R. v. F.(S.) (2000), 141 C.C.C.

(3d) 225 (Ont.C.A.), at para 27). A buccal swab is quick and not terribly intrusive. Blood samples are obtained by pricking the surface of the skin - a procedure that is, as conceded by the appellant (at para.32 of his factum), not particularly invasive in the physical sense. With the exception of pubic

hair, the plucking of hairs should not be a particularly serious affront to privacy or dignity. In para 59, the court again reiterated that the degree of intrusion, both physical and informational is limited; the law provides for a search and seizure of DNA materials that is reasonable; in light of the high probative value of forensic DNA analysis, the interests of the state override those of the individual; the DNA provisions contain procedural safeguards that protect adequately the multiple interests of the suspected offender.

178. In para 15 of State vs. Mogamat Phadil Orrie (supra), the High Court of South Africa (Cape of Good Hope) observed that the taking of blood samples had become so widespread a practice in modern life that it was an experience which virtually every person in a modern society experiences on one or more occasions in their life. It has also a long been a vital tool in the administration of the criminal justice system. So far as compulsion in testing was concerned, in para 14 in State vs. M.P. Orrie (supra), the court held as follows :-

> "14. In S v Huma & Another 1995 (2) SACR 411 (W) it was held that the taking of finger-prints was neither inhuman nor degrading and does not constitute a contravention of a person's dignity as protected and enshrined in the then interim constitution. An involuntary blood test undoubtedly entails an invasion of the subject's right to privacy. Clearly however, the right to privacy is not inviolable and in appropriate circumstances must yield to other considerations of public policy. (See Seetal v. Pravitha and Another N.O. 1983 (3) SA 827 (D). Building on Seetal's case Kotze J held in M v R 1989 (1) SA 416 (O) that the Supreme Court possesses the power to order both a minor and an adult to submit to a blood test. See also the case of D v K 1997 (2) BCLR 209 (N) where Moodley AJ stated at 2201 :
>
> [t]he taking of a blood sample is a relatively painless procedure and can hardly be described as a cruel, inhuman or degrading treatment or punishment to the person submitting thereto.
>
> 179. An argument premised on intrusiveness of the order directing blood sample which was premised on the definition of "assault" in Section 351 was rejected by the Rajasthan High Court in 1971 Cri.L.J. 1405 Mahipal Maderna & Anr. Vs. State of Rajasthan observing thus :-
>
> " xxx
>
> 17. Section 9 of the Evidence Act provides that facts which establish the identity of any person whose identity is relevant, are relevant. It was therefore the duty of the Investigating Officer, under the law, to collect that evidence, for Section 4 (1), Criminal P.C. defines "investigation" to include all the proceedings under the Code for the collection of evidence. It will follow that in the absence of any legal provision to the contrary, he should be allowed to use the reasonable means for obtaining a few specimen of the hair of the accused for the purpose of establishing the identity of those who took part in the crime. This may in fact operate as a strong protection for

> the innocent persons, and is quite unexceptionable. In this view of the matter, any argument based on the definition of "assault" in Section 351, IPC, to which my attention has been invited by Mr. Singhvi, is quite fanciful for there can be no question of the use of "criminal force" in such a case as this, within the meaning of Section 350, IPC,.....
>
> .....In this view of the matter, any argument based on the definition of "assault" in Section 351, IPC, to which my attention has been invited by Mr. Singhvi, is quite fanciful for there can be no question of the use of "criminal force" in such a case as this, within the meaning of Section 350, , IPC..... Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is; far outweighed by the value of its deterrent effect; due to the public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of confusion of conflicting contentions. (Underlining supplied) This judgment has also been referred to in para 174 of (2010) 7 SCC 263 Selvi vs. State of Karnataka (at page 354).

180. The minimal intrusion involved in a blood sample; the miniscule pain involved ; its widespread use in medical testing and otherwise and the addressal of any dignity concerns by appropriate directions that the same to be taken by a health care expert, would render the refusal by defendant no.1 to submit to testing suspect, unless explained by good reasons.

181. It also requires to be borne in mind that while considering IA No.4720/2008 and the present application only the concerns of the defendant no.1 are being addressed. No heed is being paid to the trauma which the plaintiff is claimed to have suffering and the damage to his reputation and psyche which is urged to be incalculable. With regard to the suffering of the plaintiff on the denial by the defendant no.1, the defendant no.2-the biological mother of the plaintiff has stated as follows:-

> 4. That the contents of paragraph 4 of the plaint are correct and need no reply. It is further submitted that the defendant no.2 as a mother has seen her very young and bright upcoming son with immense potential getting demoralised, depressed, humiliated and cornered by his own father, the defendant no.1. As a result of defendant no.1's cruel and inhuman conduct of having the plaintiff rebuked and physically manhandled in 2001, the plaintiff became very tense. Since then, defendant no.2 had to constantly take the plaintiff to therapists since he developed acute insomnia, which severally affected his academic career and other pursuits. Constant depression, acute insomnia and demoralisation faced by the plaintiff for almost a decade led to a grave life threatening situation for the plaintiff wherein the defendant no.2 managed to save his life by sheer luck as the defendant no.2 made sure that the plaintiff on the night of September 12, 2007 was kept on a life support at Mool Chand Hospital, New Delhi and was later transferred to Max Hospital, Saket in a special ambulance arranged by the defendant no.2.

The defendant no. 2 then had to see her young 28 year old son, the plaintiff grappling with life and death situation for a week in ICU Max, Saket, New Delhi. If the case set up by the plaintiff is correct, the refusal to comply with the court order by the defendant no1 may irreversibly and irreparably damage the plaintiff.

182. The defendant no.1 has been ordered to undergo a blood test after considering his claimed rights. He therefore has „no right , or „privilege to refuse.

183. The defendant no. 1 is obliged to comply with a court order to undergo parentage testing.

184. The conscious and emphatic refusal clearly suggests that the defendant no.1 does not wish to run the risk of providing the plaintiff with the evidence that would establish his case and is malafide. The refusal of the respondent displays no good reason but bad faith.

185. The defendant no.1 has participated in the extensive proceedings undertaken by the Joint Registrar for calling the information from the laboratory without any protest or demur. He has in fact backtracked only on the date when blood sample was to be actually drawn. The attitude of the defendant no.1 as manifested in the present application and the affidavit dated 21st July, 2011 is certainly not a reasonable attitude. I therefore find that there is no justification or valid reason at all for the defendant no.1 not to provide the sample directed by this court to submit to the DNA testing.

186. It is held that the refusal by the defendant no. 1 constitutes wilful and wrongful refusal to comply with a valid court order. Consequence of the refusal

187. In Goutam Kundu (supra), the Supreme Court has laid down that the "rebuttable presumption of law that a child born during the lawful wedlock is legitimate and that access occurred between the parents.....can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.....". "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.....". The Supreme Court observed that the "courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials ....."

188. The presumption of paternity may be rebutted only by clear and convincing evidence. The "clear and convincing" evidence standard requires a greater degree of proof than the "preponderance" standards but lesser that proof "beyond a reasonable doubt" as required in criminal proceedings. In the judgment of the United States District Court in the judgment reported at 768 F.Supp. 577 Karen L Tipps v. Metropolitan Life Insurance Company v. Michael Steven Kiser, the court placed reliance on the observations in Sanders v. Harder, 148 Tex.593, 227 S.W.2d 206 (1950) to the effect that "the rule requiring that facts be established by clear and convincing evidence in practical effect, is, but an admonition to the judge to exercise great caution in weighing the evidence."

189. An examination of judicial precedents and writings in the issue suggest that, hypothetically, in order to conclude whether „X was the father of „Y born to „Z (the mother), the evidence on the following facts is essential:-

(i) Whether „Y was full term child and calculation of the proximate date/period of Y s conception by mother „Z .

(ii) Evidence that the mother „Z had an unprotected and exclusive sexual relationship only with the alleged father „X at the time encompassing the possible period of conception

(iii) The above evidence may be supported by circumstantial evidence in the nature of photographs, accessibility declarations furnished by „X and „Z regarding „Y etc. If there was clear and convincing evidence to the above effect, it could be conclusively held that the putative father was the father of the child.

190. Section 9 of the Indian Evidence Act, 1872 states that facts necessary to establish the identity of anything or person whose identity is relevant, are relevant facts, in so far as they are necessary for that purpose.

In this background, the result of the DNA profiling is a relevant fact to establish to parentage and paternity so far as plaintiff is concerned.

191. Under section 114 of the Indian Evidence Act, 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 case. Illustration (g) in section 114 states that the court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

The unreasonable refusal by the defendant no.1 to give the blood sample would have to be tested against this statutory presumption.

192. Section 4 of the Indian Evidence Act, 1872 stipulates that where the Act provides that the court may presume a fact, it may either record such fact as proved unless and until it is disproved and may call for proof of it.

Thus while evaluating the evidence which may be produced, the court may treat such unreasonable refusal to provide the material evidence without a good cause as or capable of, amounting to corroboration of any evidence which has been produced against the person in relation to which the refusal is material.

As a consequence, the presumption of paternity would follow upon a refusal by an adult person to give the blood sample for testing. The burden of proving that he is not the father of the child then has to fall on the person refusing to give the specimen. Such a presumption can be rebutted only by clear and convincing evidence.

193. It would be possible for adverse inference to be drawn from a refusal, regardless of whether the refusal occurred before or after the making of the direction.

194. As a result of his refusal the defendant no.1 has implicitly agreed to be bound with the statutorily created presumption under section 114(g) of the Indian Evidence Act.

195. The refusal by the defendant to undergo the test is unreasonable and has to be taken on record.

196. The plaintiff and defendant no.2 would be required to give evidence, oral and/or documentary in support of the averments made in the pleadings.

Such evidence would be evaluated by the court and an appropriate inference with regard to the unreasonable refusal by the defendant no. 1 to submit to DNA profiling would be required to be drawn at that stage. Subject to the availability of the other evidence on the material aspects noticed above brought by the parties on record, the negative presumption that the results of the DNA test on his blood sample would have been unfavourable to the defendant no.1 would follow.

197. The plaintiff has filed CCP No.57/2011 also seeking initiation of proceedings under the Contempt of Court Act against the defendant no.1 for refusal to comply with the court direction which is pending for consideration and would be proceeded with in accordance with law when listed.

Exercise of jurisdictions by a civil court to direct a medical examination of a person

198. Before parting with the suit, it is essential to consider an important fact which is highlighted by the present case. The foregoing discussion shows that the issue of medical examination has repeatedly arisen before the civil court.

199. The instant suit raises a paternity assertion. However biological parentage may also be a relevant issue in cases and circumstances involving displacement including disasters, adoption as well as in children born by IVF procedure or surrogacy. Here maternity determinations may also be necessary. Visitation rights with children and custody claims claimed by the biological parent not having physical custody and control over the child raise such issues. The same may arise in a paternity action or be raised in an inheritance issue. Given the accuracy and value attached to DNA profiling, this test may either confirm an identity or shatter it. In matrimonial and other cases, there are several grounds on which a conclusion can be reached by the court only upon a medical examination of the person concerned. It may be necessary for a court to assess a person s health and capacity for the purposes of assessing the capability to prosecute claim; or defending a case or appearing as a witness in a case, all of which would entail a medical examination.

200. In this regard reference can be made to the legislation on the subject from other jurisdictions, some of which are as follows:-

(i) The Family Law Act, 1975 - Sections 69W and 69X in Australia

(ii) The Uniform Child Status Act, 1992 - Sections 7 and 8 in Canada Section 7(1) provides that on the application of a party to a proceeding the court may, give the party leave to obtain blood tests of person named by the court and to submit the results in evidence.

It is noteworthy that under Section 7(3), on refusal of the person named by the court to submit to a blood test the court may draw any inference it considers appropriate.

(iii) The Children s Act, 2005 - Section 37 in South Africa Section 37 of the Act states that if a party to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn such party of the effect which such refusal might have on the credibility of that party.

It is important to note that under Section 41(1) of this Statute, a child born as a result of artificial fertilisation or surrogacy or the guardian of:

(a) any medical information concerning that child s genetic parents; and

(b) any other information concerning that child s genetic parents but not before the child reaches the age of 18 years.

Sub-section (2) of Section 41 mandates that information disclosed in terms of subsection (1) may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation or the identity of the surrogate mother.

(iv) The Family Law Reform Act, 1969 in U.K. Part III especially Sections 20,22 and 23 deal with the use of blood tests.

Under Section 23(1), if a court gives a direction under Section 20 and any person fails to take any step required of him for giving effect to the direction the court may draw such inferences from that fact as appear proper in the circumstances.

Section 23(3) stipulates that if the person fails to consent to the taking of blood samples from himself, he shall be deemed for the purposes of this section to have failed to take a step required of him for the purpose of giving effect to the direction.

(v) The Family Proceeding Act, 1980 - Section54 in New Zealand Under Section 54(1), the Court may, of its own motion or on the application of a party to the proceedings, recommend that parentage tests be carried out on the child and any person who may be a natural parent of the child and that a report of the results be compiled, by a person who is qualified to compile such a report, and submitted to the Court.

Under Section 57, in any civil proceedings in which the natural parentage of a child is in issue, whether or not the Court has recommended under section 54(1) of this Act that parentage tests should be carried out on a person, evidence may be given to the Court as to the refusal of that person to consent (or, where the person is under 16 years of age, as to the refusal to consent to such parentage tests of the person who is competent to do so on that person's behalf).

The Sub-section (2) of Section 57 provides that Subject to the right of the person who refuses to consent to the parentage tests to explain the reasons for that person's refusal, and to cross-examine witnesses and call evidence, the Court may draw such inferences (if any) from the fact of refusal as appear to it to be proper in the circumstances.

(vi) The Uniform Parentage Act, 2000 (Amended in 2002) - Article 5 in USA

(vii) Section 501 provides the scope of the Article which governs genetic testing of an individual to determine parentage, whether the individual:

(i) voluntarily submits to testing; or

(ii) is tested pursuant to an order of the court or a support- enforcement agency.

Section 508 provides for genetic testing of collaterals when specimens are not available. Such order requires a finding that a need for genetic testing outweighs the legitimate interests of the individual sought to be tested.

Section 509 is concerned with the genetic testing of a deceased individual for good cause shown.

Section 622 provides the following consequences of declining genetic testing:-

(a) An order for genetic testing is enforceable by contempt.

(b) If an individual whose paternity is being determined declines to submit to genetic testing ordered by the court, the court for that reason may adjudicate parentage contrary to the position of that individual.

(c) Genetic testing of the mother of a child is not a condition precedent to testing the child and a man whose paternity is being determined. If the mother is unavailable or declines to submit to genetic testing, the court may order the testing of the child and every man whose paternity is being adjudicated. Testing of third and collateral parties

201. It is important to note that in the judicial precedents noticed in the judgment dated 23rd December, 2010 and herein, there does not appear to have been any case by a child (who had attained adulthood) seeking a declaration that the defendant was his biological father. The recommendations by the Law Commission (185th Report) in the proposed amendment to Section 112 of the Evidence Act also suggest that the main issue would be between the husband and wife.

The present case underlines the need for consideration beyond these concerns which must be anticipated and imperatively addressed.

202. Legal discussion has also arisen about the power of the court to direct posting of collateral parties and implementing an hierarchy of sources for paternity testing. This is necessary especially where the primary concern i.e. the putative father may not be available or cannot for any reason be tested (for instance, in a case of demise and non- availability of the sample).

In the judgment reported at 583 A.2d 782 in the matter of Estate of Peter Rogers, Sr.Deceased, the Superior Court of New Jersey (Appellate Division) observed that though the Parentage Act subjected only parties to a court order compelling blood test or genetic testing, the court had an inherent power to require non-party to give evidence in form of testimony in quest for truth, it also has the inherent power to require a non-party when they are needed to adjudicate a genuine issue before it to give evidence in form of blood sample in quest for truth.

203. In Sudwischer, 589 So.2d at 475, the Supreme Court of Louisiana employed the civil discovery rules which provide for discovery of any non- privileged matter that is relevant to the subject matter of the case. The court ordered the legitimate daughter of a decedent, who was not a party to the case, to submit to a blood test for DNA testing.

204. The putative child of decedent was held entitled to compel DNA blood testing of decedent s child and mother, notwithstanding that they were non-parties, in order to determine whether decedent was his biological father; although the mother was married to another man at time of child s birth, blood test had excluded husband as biological father, and putative child could share equally in decedent s estate if decedent was his father. (Ref: M.A.v. Estate of AC (N.J. Super. Ch. 1993, 643 A.2d 1047 274 N.J. Super 245)

205. So far as the power of the court to direct medical testing of non- parties is concerned, the same has been ruled upon by the court in the judgment dated 23rd December, 2010 while considering the binding judicial precedents of the Supreme Court and the recommendations of the Law Commission of India in the following terms :-

> "36. While the Court here advised that such tests should not be conducted in a routine manner, it did not ban their conduct, upon the third party, altogether. It held that ordering a test upon a person to determine biological relationships between him and the plaintiff would not attract the sanction of Article 21 of the Constitution of India Posthumous Testing

206. Jurisprudence is also available even about posthumous testing which issue could arise before the court given the concerns noticed above also.

207. An action to determine the fact of paternity was held to be maintainable after the death of the father in Manuel v. Spector, 712 S.W.2d 219, 222 (Tex.App.-San Antonio 1986).

208. In the judgment reported at 2008 ME 79, 946 A.2d 389 titled In re: Kingsbury, the court held that a blood relative of the decedent who was also a party in action could be directed to submit to DNA testing, failing which exhumation of the body would be directed. The court held that the compelling interests of the illegitimate child far outweighed the „temporary moral distress which would result from the exhumation of the decedents body which was essential in the light of the intestacy law policy goal of determining the rightful heirs of the decedents and that the law should favour posthumous paternity determination over temporary emotional distress as well as any public interest in preserving legal certainty.

209. Paternity testing issues may also arise in adoption and sperm donor cases. In cases involving adoption or artificially conceived children, there would be a living biological father. Such father would have a competing interest which may include the desire to remain anonymous to the child so as to be free from obligations. In the context of such cases, the father s interest in anonymity may outweigh an adopted or artificially conceived child s right to know while the father is living.

210. Similar considerations may be advocated by a child born outside of marriage in a posthumous paternity determination case. An issue of paternity may arise in succession matters. A half-sister/half-brother; a grandparent and grand child may also have legitimate reasons to find out their biological inheritance.

211. It may be noted that with regard to posthumous testing, the family or relatives of a decedent may evince emotional and religious interest in keeping his body undisturbed. These interests have to be examined especially in the light of the social, biological and financial interest of recognised heirs of the decedent in denying a putative illegitimate child, of accessing any proof of paternity which would include a sample of their DNA. Upon testing of such sample, the putative child can certainly gain a substantial share in the estate.

Several authors have urged that the child s access to proof of paternity are far outweighed by the said financial interest of the recognised heirs of an intestate decedent.

212. It is important to note that the issue of anonymity or autonomy has not weighed with the court in the case of posthumous paternity testing cases.

213. It may be noted that the State of Maine in United States of America has statutory provisions which have a bearing on the issue.

214. No such legislation exists in India. Upon such issue arising the court would be required to consider the same under the broad general principles in statutory provisions and the jurisdiction to make orders may be sourced to the inherent power of the court to do justice.

215. The above discussion would show that no specific legislation on medical examinations exists in India on these issues in civil jurisidction. Different aspects on these issues have, however, been considered in the binding judicial precedents noted above. It is noteworthy that no precedent involving a civil action by an adult seeking declaration of his parentage in civil court is available.

216. In this background, it would be appropriate to collate the principles laid down by the Supreme Court as well as the High Courts in the several judicial pronouncements noticed hereinabove which are to the following effect:-

(i) A matrimonial court and the civil court have the implicit and inherent power to order a person to submit himself for medical examination (Re: Sharda)

(ii) The court under section 75(e) of the CPC and order XXVI, rule 10A has the requisite power to issue a direction to hold a scientific, technical or expert investigation. (Re : Sharda; Selvi)

(iii) Passing of an order for medical examination would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution (Re : Goutam Kundu)

(iv) The direction for the medical examination can be issued suo motto by the court or upon an application filed by a party (Re : Sharda) The principles of natural justice would require to be complied with.

(v) The court would examine that the proportionality of the legitimate aims being pursued are not arbitrary, discriminatory or pointless or which may adversely impact the best interest of the child (for instance, bastradise a child) and that they justify the restrictions on privacy and personal autonomy concerns of the person directed to be subjected to medical examination

(vi) The court should not exercise such power as matter of course or in order to have a roving inquiry (Re : Goutam Kundu) Such power would be exercised if the applicant has a strong prima facie case and there is sufficient material before the court (Re: Sharda) The court would consider the age; physical and mental health of the persons involved.

(vii) No one can be compelled to give a sample of blood for analysis (Re: Goutam Kundu). If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled take the refusal on record and to draw an adverse inference against him (Re: Sharda)

(viii) A direction to a person to undergo a medical examination could be made to enable the court to leading the truth; in matrimonial cases also for removal of misunderstanding, bringing a party to terms; for judging competency of a person to be a witness; whether a person/party needs treatment or protection; the capacity of a person/party to protect his interest or defence in litigation; whether the person needs legal aid (Re; Sharda)

(ix) In a case involving a paternity claim/denial issue, the conclusive proof standard mandated by Section 112 of the Evidence Act, read with Section 4, admits an extremely limited choice before the Court, to allow evidence of "non access" to a wife by the husband, who alleges that the child begotten by her is not his offspring; it is designed to protect the best interests of the child, and his legitimacy (Re: Goutam Kundu ; Rohit Shekhar (Bhat, J - DOJ 23rd December, 2010)

(x) A "paternity" action by the son or daughter of one, claiming the defendant to be his or her biological father, filed in a civil court by an adult plaintiff, or claims paternity, for other reasons, (such as non- consensual sexual relationship the basis of facts, and on the basis of the child s rights/either under Section 125 Cr.PC, or in a suit for declaration or for maintenance) cannot be jettisoned by shutting out evidence, particularly based on DNA test reports, on the threshold application of Section 112; the Court has to weigh all pros and cons, and, on being satisfied about existence of "eminent need" make appropriate orders; (Re: Goutam Kundu; Bhabhani Jena; rohit Shekhar (Bhat, J- DOJ 23rd December, 2010)

(xi) In a case involving a parentage issue, the child s best interest shall dominate the consideration by the court. The court may refrain from ordering a test if it considers that this may not be in the child s best interest." The court would also consider the reasons for refusal of the examination of the child by the party having custody and make appropriate orders based on the best interest principle.

(xii) which could include an external and internal examination; a physical and psychological examination of the person. The medical examination may be directed to include and examination of blood, semen, sputum, sweat, hair samples, and finger nails by the use of modern scientific techniques in binding DNA profiling.

(xiii) The medical examination/expert investigation must be by a qualified doctor; qualified psychiatrist/expert in the field (Re: Sharda)

(xiv) The medical examination including the DNA profiling would be ordered by the court if relevant to the specific issue; necessary and relevant to ensure legitimacy of administration of justice ; where scientific tests are necessary for discovery, doing justice to all parties; and, where the relevant evidence cannot be obtained by any other non-intrusive methods.

(xv) The court has the jurisdiction to order DNA testing of blood relatives of a person alleged to be the parent, even though they are not parties to the litigation.

(xvi) The results of the scientific DNA testing shall be produced before the court in sealed cover and kept in a sealed cover. (xvii) The court would make appropriate direct preservation of the samples and also the confidentiality to be attached to the same. (xviii) The testing must be undertaken by an accredited laboratory with established and accepted credentials and expertise which meets the publicly sanctioned standards.

(xix) Appropriate directions covering the technical aspects with regard to drawing, preservation, transportation, and integrity of the sample specimen must be made so that integrity and identity of the sample/specimen is guaranteed.

(xx) The court could direct that the report of the DNA test should contain the following :-

(i) qualifications of the person making the report

(ii) details of identity of the person tested

(iii) circumstances in which and description of sample was taken from each person to whom the report relates and the manner in which the person was separately identified from each person to whom the test relates

(iv) the nature/system in which the test undertaken

(v) the results of the test

(vi) whether the results show that a person is not a natural parent of the child

(vii) whether the blood test carried out on a person does not show that the person is not a natural parent of the child, the report may contain an evaluation of the significance of the results of the test in determining whether that person is a natural parent of the child.

These guidelines would guide consideration of application for medical examination before a civil court and matrimonial court. Result In view of the above discussion, it is held as follows :-

(i) That the defendant no.1 cannot be physically compelled or be physically confined for submitting a blood sample for DNA profiling to implement the judgment dated 23rd December, 2010;

(ii) It is further held that the refusal by the defendant no.1 to submit the blood sample is wilful, malafide, unreasonable and unjustified. Such refusal is taken on record.

(iii) The court would construe the weight to be attached to and the impact of this refusal by the defendant no.1 while evaluating the evidence produced by the parties, which then may be treated as corroborative evidence leading to the presumption that the result of the DNA profiling of the defendant no.1 s blood sample would have supported the plaintiff s claim.

This application is disposed of in the above terms.

GITA MITTAL, J September 23, 2011 kr