DNA TESTS : A STUDY IN THE LIGHT OF SUPREME COURT'S DECISION IN B.P. JENA'S CASE*

By

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The issue of resort to DNA test has become very frequent, whenever the paternity of a child is in dispute. In people of the State of New York Vs. Joseph Castro,[1] the Supreme Court of New York ordered the holding of pre-trial to determine the admissibility of the new DNA[2] scientific evidence. The Centre for Cellular & Molecular Biology at Hyderabad carried out certain experiments in DNA Technology and by this method, the paternity of a child with absolute certainty can be fixed. DNA Technology has replaced the conventional blood test. In the conventional blood test, it is possible to ascertain that a certain blood belongs to a particular group. This can exclude a person whenever the person is involved in a legal issue like the accused in a criminal case or paternity issues, this conventional blood test cannot determine that the blood belongs to a particular person. In the DNA technology, it is now possible to say that the blood belongs to a certain person. Medical science is able to analyse the blood of individuals into definite groups and by examining the blood of a given person and a child to determine whether the man could or could not be the father[3].

2. In Kerala, a case concerning paternity issue was settled by recourse to the DNA Test. The Chief Judicial Magistrate's Court, Tellicherry directed both the petitioner (Vilasine) and the respondent (Kunihi Raman) to undergo DNA finger-printing test to ascertain the paternity of the child.

3. (In the test conducted by Dr. Lalji singh at Hyderabad, Cellular & Molecular Biology (termed as CCMB), led to the conclusion that Kunhi Raman was the biological father of the child. The expert opined that the chances of error with regard to the DNA Test was one in three hundred million.[4]

4. The Indian Supreme Court had the occasion to deal with DNA Test in some cases. The decision given by this Court laying down certain norms provides an interesting study and could be considered as a valuable addition to the legal issues relating to DNA Test jurisprudence. In Goutam Kundu's case,[5] the Supreme Court's ruling can be stated thus :-

(i) Courts in India cannot order blood test as a matter of course;

(ii) Whenever applications are made for such prayers in order to have roving inquiry, the prayer for blood-test cannot be entertained;

(iii) There must be a strong prima-facie case in that the husband must establish non-access in order to dispel the presumption arising under Sec. 112 of Indian Evidence Act;[6]

5. Sec 112 is based on reasons of public policy. Basterdising children would harm the interests of the child and of the society. The law leans in favour of the innocent child being bastardised, If his mother and her spouse were living together during the time of conception[7]. The outcome of the DNA Test

* B.P.Jena v. Convener Secretary, Orissa State Commissioner for Women: AIR 2010 SC.P.2851

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1. 1989 U.S. Supreme Court
2. DNA means Dioxy Ribo Neucleicated Test
3. Rayaden's, Law and practice in Divorce and family matters' – (1983)1 P.1054
4. Proceedings of the conference of the Scientists at Central Forensic Laboratory, held at Hyderabad on 05-01-1990. For details refer to the proceedings published by Central Forensic Laboratory, Hyderabad
5. *Gautam Kundu v. State of West Bengal & another: AIR 1993 SC P.2295*
6. Sec 112 of the Indian Evidence Act states as follows:- "The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten"
7. B.P. Jane Supra Para 13

shows that the son was born out of the wedlock of the parties, then the possibility of reunion of the parties to the marriage[8] is made more highly achievable. The conclusiveness of the legitimacy under Sec 112 of the Indian Evidence Act will outweigh even the DNA Test results. The Supreme Court observed in *Banarsi Dass's* case[9] thus:-

> "The result of a genuine DNA Test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Sec 112 of the Indian Evidence Act i.e., if a husband and wife was living together during the conception but the DNA Test revealed that the child was not born to the husband, the conclusiveness of law would remain irrebuttable"

6. The Supreme Court had the occasion to consider the DNA Test in the context of 'Right to Privacy'. In Sharada's case,[10] the Supreme Court ruled thus:-

(i) Right of privacy in terms of Art 21 of the Constitution is not an absolute right;

(ii) A matrimonial court has the power to order a person to undergo medical test;

(iii) Passing of such an order by the Court, would not be in violation of the right to personal liberty under Art 21 of the Constitution;

(iv) 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, the respondent refuses to submit himself from medical examination, the Court will be entitled to draw an adverse inference against him"

7. In B.P. Jana's [11], the Supreme Court made the following observation:-

> "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 ..... When there is apparent conflict between the right of privacy of person not to submit himself forcibly to medical examination and the 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 ..... whether it is possible for the Court to reach the truth without the use of such test".

8. When the latest DNA technology is available to ascertain the paternity of the child, there should not be any hesitation on the part of the parties to undergo the test. If a person is really the father of the child and if he refuses to undergo the test, it is clear evidence that he wants to deliberately disown the child and thereby escape the liability to maintain and bring up the child. It is then a violation of the 'right to life' of the child, guaranteed under Art. 21 of the Constitution. In the event of the child not of his, then DNA test will reveal this. It would strengthen his case of denial of paternity. In either way, it serves a very valuable piece of evidence of paternity or otherwise. This becomes very crucial in cases where parties live together not in lawful wedlock but in illegitimate relationship. In view of the utility served by the DNA test, an amendment to Sec. 112 of the Indian Evidence Act is needed in the following terms:-

After Sec 112 of the Indian Evidence Act, the following provisions be added :-

Provision I:- Provided where the marriage between the parties are not proved and they have been shown to be living in illegitimate relationship, the refusal of the parties to undergo the DNA Test ordered by the Court, the Court may conclusively presume that the man is the legitimate father of the child.

Provision II:- The Court may order the parties in a matrimonial dispute involving the legitimacy of a child to undergo the DNA test, where there is a strong prima-facie case and sufficient material in support thereof

8. *Ram Kanya v. Bharat Ram:* (2010) 1 SCC P.85
9. *Banarsi Dass v. Teeku Dukka & another:* (2005)4 SCC P.449
10. *Sharda v. Dharmpal:* AIR 2003 SC P.3450.
11. Supra At Para 13.

Provision III:- The Court may order DNA test, where it is necessary to arrive at the truth relating to paternity of the child and in cases where it is eminently needed for the just decision.

Explanation:- An order directing a person in disputed paternity to undergo DNA test shall not be regarded as a violation of Art 21 of the Constitution.

IF SECTION 149 IPC IS NOT APPLICABLE, SECTION 34 IPC IS APPLICABLE

By

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"What is not Kshara (not eternal) is Akshara (eternal) which is incarnation of Almighty and Yevam (all others) Dhrushyathe (being seen), Sruyethe (being heard) are Piva (false) and therefore, Scriptures praise Almighty as Aksharayanamaha".

As we all know, Section 34 of Indian Penal Code 1860 (for short 'The Code') deals with common Intention whereas Section 149 of 'The Code' deals with common object. The vital differences between the two have been well laid down by Hon'ble Apex Court in the case of *William Shaney v. State of Madhya Pradesh* reported in AIR 1956 SC 116 (D.B.) that there should be active participation in the commission of the Criminal Act for fastening criminal liability under Section 34 of 'The Code' but, the criminal liability under Section 149 of 'The Code' arises by reason of the membership of unlawful assembly with a common object though there is no active participation in the commission of offence and secondly, Section 34 of 'The Code' is not an offence by itself but, Section 149 of 'The Code' creates an offence by itself.

2. But, the scope of this article is as to whether Section 34 of 'The Code' is applicable when Section 149 of 'The Code' is not applicable. In the case of hamlet alias Sasi and others v. State of Kerala, a final report was filed by the Police after investigation against 44 persons for several offences including the offence under Section 302 r/w 149 of the 'The Code'. However, only 24 accused faced the trial of the case before the trial court. But, A-1 to A-4, A-6, A-7 and A-24 were only convicted by the trial court for several offences including the offence under Section 302 r/w 149 of the 'The Code'. In an appeal filed by the convicted accused persons, the Hon'ble High Court of Kerala while confirming the sentence imposed on A-1 to A-4 under Section 302 as well as under Sections 143, 147, 148 and 324 acquitted A-6 and A-7 of the offence punishable under Section 302 but convicted them of an offence punishable under Section 324 IPC and so far as A-24 is concerned, he was acquitted of all the charges.

3. So, the curious question arose before Hon'ble Apex Court in the above said case of hamlet alias *Sasi and others v. State of Kerala* reported in 2004 (1) ALT (Crl.) 20 (SC) is as to whether the conviction against A-1 to A-4 for offence under Section 302 r/w 149 IPC is maintainable since the requisite number of unlawful assembly viz., five or more persons is falling short of. For answering this question. Hon'ble Apex Court reiterated the proposition of law held by it in the case of *Nethala Pothuraju v. State of A.P.* reported in (1992) 1 SCC 49 where in it was held by it that the non applicability of Section 149 IPC is no bar in convicting the accused under Section 302 read with Section 34 IPC if the evidence discloses the commission of an offence in furtherance of the common intention of such accused and this is because both Sections 149 and 34 IPC deal with a combination of persons who become liable to be punished as sharers in the commission of offences and therefore, in cases where the prosecution is unable to prove the number of members of the unlawful assembly to be five or more, courts can convict the guilty persons with the aid of Section 34 IPC provided that there is evidence on record to show cause accused shared the common intention to commit the crime and while doing so, the courts will have to bear in mind the requirement of Section 34 and it is well known that to

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