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

% ***Pronounced on: 17th July, 2025***

\+ **CRL.M.C. 2984/2023**

Ms. X
D/o XYZXYZ
R/o XYZXYZ
NEW DELHI-110017 .....Petitioner

Through: Ms. Nandita Rao, Senior Adv. with Ms. Aditi Shivadhatri, Ms. Prerna Singh, Ms. Jagriti Singh, Ms. Mamta Saha, Mr. Amit Peswani and Mr. Ankur Raghav, Advocates.

versus

1. STATE (NCT OF DELHI)
through SHO, PS Saket
New Delhi-110017

2. ABHISHEK PARUTHI
S/o Sh. R. K. Paruthi
R/o H. N0.193, Gulmohar Enclave
New Delhi – 110049. .....Respondents

Through: Mr. Shoaib Haider, APP for the State with SI Udai Singh, P.S.Saket.
Mr. Rakesh Kumar Khanna, Sr. Adv. with Mr. Harsh Prabhakar, Mr. Dhruv Chaudhary, Ms. Pallavi Garg, Mr. Anirudh Tanwar, Mr. Shubham Sourav, Advocates for Respondent No.2 along with R-2 in-person.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. Petition under Section 482 Code of Criminal Procedure, 1973 *(hereinafter referred to as "Cr.P.C.")* has been filed by the Petitioner/Ms. X seeking quashing of Order dated 19.04.2023 passed by learned Additional Sessions Judge, New Delhi setting aside Order of learned M.M. dated 02.06.2022, whereby blood sample of Respondent No.2/Abhishek Paruthi was permitted to be taken for DNA analysis.

2. ***Briefly stated,*** on the Complaint made by the Petitioner / Prosecutrix, *FIR No.176/2021 under Sections 354/506/509* of the Indian Penal Code, 1860 *(hereinafter referred to as "IPC")* PS Saket, was registered against accused Karan Paruthi, elder brother of Respondent No.2/Abhishek Paruthi. On the statement of Petitioner recorded under Section 164 Cr.P.C., Sections 326/313/354/34 IPC were added against ***Respondent No.2/Abhishek Paruthi.***

3. During the pendency of investigations, the Prosecutrix had alleged that on midnight of 21/22.05.2021, while she was sleeping, someone rang her doorbell. She opened the door and found that accused, Karan Paruthi in drunkard condition at her door, who tried to forcefully enter the house by pushing her back, touching her in a wrong way and then tried choking her by strangulating her neck. She somehow kicked him back and managed to close her door. She tried to call Abhishek Paruthi / Respondent No.2, brother of Karan Paruthi, who did not respond to her calls. However, Karan Paruthi repeatedly rang the bell and kept kicking the door and loudly using defamatory and unparliamentary words. Neighbours also gathered and asked him to leave, on which he went down the stairs.

4. Thereafter, the Prosecutrix approached Abhishek Paruthi / Respondent No.2 and informed him about the incident. However, the

Prosecutrix was manipulated by the accused persons. On the next day, she filed the Complaint to the Police, on which FIR No.176/2021 was registered at Police Station Saket.

5. During investigations, accused Karan Paruthi & Abhishek Paruthi / Respondent No.2 did not join investigations. Accused Karan Paruthi was granted Bail in July, 2021, but he failed to join investigations for almost 05 months and Application for cancellation of Bail was filed by the State in the Court of learned Sessions Judge. It is only then, Karan Paruthi joined investigations, but did not cooperate with the Investigating Agency and failed to give his mobile phone.

6. Similarly, Abhishek Paruthi / Respondent No.2 absconded for almost 05 months and thereafter got Anticipatory Bail, but failed to join investigations. He also joined investigations after his Bail was cancelled *vide* Order dated 12.04.2022 and he was arrested on the same day at 08:30 PM. He was taken for medical examination, where he denied providing his medical samples. Even thereafter, he did not cooperate in the investigations and gave evasive responses with regard to whether he has indulged in sexual intercourse with the Petitioner.

7. It is submitted that the Status Report was filed by the IO indicating independent evidence that Abhishek Paruthi / Respondent No.2 forcibly tried to take the Petitioner in an Ambulance to have the foetus aborted. of During the investigation, evidence of the Doctor has also come on record that the accused person approached her to secure the abortion of the foetus. Respondent No. 2 has also failed to handover any of his mobile phones and refused to give his blood sample for DNA.

8. On 21.04.2022, IO moved an Application under Sections 53/53A Cr.P.C. seeking permission to get DNA analysis of Abhishek Paruthi / Respondent No.2 to match with that of the foetus. This Application was allowed by learned M.M. *vide* Order dated 02.06.2022.

9. But, Abhishek Paruthi / Respondent No.2 challenged the Order by filing ***Crl. Revision Petition No.210/2022***, to which the prosecutrix filed her Reply dated 20.03.2022.

10. Learned ASJ allowed the aforesaid Crl. Revision Petition No.210/2022 and denied the Prosecution permission to match his DNA with that of the child.

11. *Aggrieved by the impugned Order, the Prosecutrix has filed present Petition.*

12. The **grounds for challenging the Order of learned ASJ** are that the procedure for investigation of cases under Section 376 IPC, are well defined. It has not been appreciated that medical sample of blood of accused is most crucial evidence for the present offence. Learned ASJ ventured into the issue of legitimacy of child with Abhishek Paruthi / Respondent No.2, which was absolutely not essential for proving the alleged offence.

13. It has been erroneously observed by the learned ASJ that the offence in question can be proved by other material evidence including oral testimony of the Prosecutrix.

14. It is submitted that the DNA analysis is material evidence for the case of the Prosecution under Section 376 IPC for which medical samples are mandatorily required to be taken. Non-collection of the blood sample would be fatal to the case of the Prosecution. The permission to obtain the DNA evidence, would conclusively prove this issue of the commission of the

offence. The rights of the minor child, is not in issue and no presumption can be drawn that ascertaining the paternity would result in harm to the interest of the child.

15. It is further submitted that the learned ASJ placed reliance on the cases of *Ashok Kumar vs. Raj Gupta & Ors.*, (2022) 1 SCC 20 and *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia*, SLP (C) No.9855/2022 decided on 20.02.2023. The mother of the child was legally wedded to the husband and there was no separation between them, raising a presumption under Section 112 of the Indian Evidence Act.

16. The facts *in the present case are distinguishable*, as the Prosecutrix was admittedly separated from her husband since 2018 and her husband had no access to her. The learned ASJ has erroneously placed reliance on Section 112 of the Indian Evidence Act and has not considered the averments contained in the Affidavit of both the parties of separation as sufficient to conclude that they were not having access to each other.

17. In *Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik*, AIR 2014 SC-932, the Apex Court noted that Section 112 of the Indian Evidence Act was enacted at the time when modern scientific advancement and DNA Test were not even in contemplation of legislature. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Legal fiction assumes existence of a fact, which may not really exist. However, presumption of a fact depends on the satisfaction of certain circumstances. The investigations are still pending and the rights of the Investigating Agency to conduct the proper investigation to collect all the material against the accused, must not be interfered with.

18. Pertinently, the mother of the child herself had stated that the child was conceived in consequence of continuous commission of offence upon her, but ignoring this fact, reliance has been placed on Section 112 of the Evidence Act, which is misplaced.

19. Reliance has been placed on *Narayan Dutt Tiwari vs. Rohit Shekhar and another*, (2012) 12 SCC 554 wherein the Supreme Court of India upheld the forceful extraction of DNA for the determination of paternity and restricted the right of privacy to the extent that the DNA Test would be conducted in the confines of the residence.

20. Furthermore, it has been overlooked that the Investigating Officer is entitled to collect the best available evidence to prove the case of the prosecution and depriving the Investigating Agency of such collection, on the basis of surmises on the relative merit of the legitimacy of a child, is arbitrary and contrary to law.

21. *It is, therefore, submitted that the impugned Order is liable to be set-aside and the blood sample of the Accused, be permitted to be taken by the Investigating Officer for DNA matching.*

22. **The Respondent No. 2, Mr. Abhishek Paruthi in his detailed Reply**, has taken the preliminary objection that the child has not been arrayed as a party, whose multiple legal and constitutional rights would be affected by the decision of this Court. The legitimacy of the child is sought to be challenged just at a drop of hat, which is not permissible under law.

23. It is submitted that the Complainant is an MBA and Advocate of about 40 years of age, who habitually levels rape and sexual assault allegations on various persons, for achieving the ulterior motive. The Complainant 'SA' is a married woman and was lawfully married to one Mr.

Gaurav Sethi on 27.02.2014. Within one year of marriage, she lodged an ***FIR No. 514/2014***, Police Station Greater Kailash-1, on the allegations of rape on false promise of marriage by one of her colleague, who was her junior and seven years younger to her in the Company where they were working.

24. Previously also, the Complainant has been involved in similar FIRs with allegations of rape, even though she was lawfully married to Mr. Gaurav Sethi. One ***FIR is of 2014***, while ***three FIRs are of 2016*** and ***one FIR is of 2021.*** All these five FIRs contained allegations of sexual molestation, stalking, assault, display of gun, deliberately causing miscarriage, criminal conspiracy, rape and sexual harassment. She has also levelled allegations of corruption, etc. against the police officials.

25. She also made similar allegations of abortion against Mr. Randhir Kumar, Advocate, Saket Court, who is a married man with a family. She has made complaints to Bar Counsel only to achieve her ulterior motive against the Advocate.

26. The Investigating Officer in connivance with the Prosecutrix, is not disclosing true facts to the Court including lodging of multiple Rape FIRs, her lawful marriage to Mr. Gaurav Sethi, her Legal Status, Legitimacy of minor child and Corruption Complaints against the Delhi Police officials.

27. Further, she does not co-operate during the investigations and withdrew her allegations on the ground of Settlement or alleging mistake of facts and misconception or for other reasons.

28. It is asserted that the impugned Order has been correctly made in lines with the Judgment of the Apex Court. If the Application is permitted to be

maintainable, it would change the entire scope of Sessions Court trial and shall be against the scheme of the Code of Criminal Procedure.

29. It is further asserted that the co-accused, Karan, brother of the Respondent No. 2, was granted Anticipatory Bail by the learned Sessions Judge on 15.07.2021. Thereafter, State filed an Application for cancellation before the learned Sessions Judge, which was dismissed.

30. Complainant had also filed Transfer Petition No. 9/2021 making allegations of bias etc., on the learned Sessions Judge.

31. The Complainant also filed the Application for cancellation of Bail before this Court, which was allowed and the Respondent No. 2 was arrested. Regular Bail was granted *vide* Order dated 21.04.2022, which Order has also been challenged by the Complainant before this Court, which is pending consideration.

32. **On merits,** it is submitted that the role assigned to the Applicant, Abhishek is of a close friend, in FIR dated 22.06.2021, which has been concealed for achieving ulterior motives of the Complainant. It is further claimed that the FIR has been registered only under Section 354/506/509 IPC on 22.06.2021, against Karan Deep. The Statement under Section 164 Cr.P.C, is contrary to the record and the Annexure which is filed by the Complainant herself.

33. It is further submitted that the Chargesheet has yet not been filed since two years. Moreover, Respondent No. 2 was unable to join the investigations on account of another FIR lodged by his wife on account of matrimonial disputes at the instance of the Complainant, in Uttar Pradesh.

34. In the end, it is contended that the DNA is sought to be matched with a living minor child and not a foetus. It is submitted that the learned

Sessions Judge with a detailed reasoned Order, has rightly declined the taking of the sample of blood of the Respondent No. 2.

35. *There is no merit in the Petition, which is liable to be dismissed.*

36. **The Petitioner in her Rejoinder to the Reply of the Respondent No. 2**, asserted that the child was born to the Petitioner in consequence of the sexual offence committed upon her by the Respondent No. 2. The Accused is also involved in FIR No. 272/2021 under Section 307/323/504/506/498 IPC, Police Station Nauchandi, Meerut.

37. It is further asserted that the Respondent No. 2 has not considered that this is a criminal case and not civil litigation and therefore, there is no question of ascertainment of the legitimacy of the child. The *incomplete Chargesheet had to be filed because of non-cooperation of the accused.*

38. It is further asserted that the Statement of the Prosecutrix was recorded under Section 164 Cr.P.C. It is claimed that under the law, even if the offence of rape is committed on a married woman, the medical samples of the Accused as material evidence, is required to be collected by the IO and he cannot take the benefit of Section 112 of the Indian Evidence Act.

39. The allegations made are only to harass the Prosecutrix by claiming that she is habitual in making false FIRs, which is extremely objectionable and invites strict action against the Respondent No. 2. He is merely trying to discourage, demotivate and demean the Prosecutrix further. Insofar as the five FIRs are concerned, it is submitted that in *FIR No. 541/2014,* the trial was conducted and benefit of doubt was given to the Accused, who was acquitted. In the other *two FIRs bearing 246/2016 and 249/2016*, both were registered under Section 376 IPC on the same date and time, in which the

Prosecutrix was the Complainant and another lady Advocate, was Accused in FIR No. 420/2016.

40. A *cross-FIR bearing No. 249/2016 filed* against the present Petitioner by the Accused in *FIR No. 420/2016,* which was registered under Section 323 IPC and not under Section 376 IPC.

41. It is contended that each case has to be decided on the merits of its own case and reference to the other FIRs is not only unfair but is also demoralising for the Prosecutrix. Only two FIRs under Section 376 IPC, were registered against the Accused, who had been the Legal Advisor of the Prosecutrix throughout and was well aware of the FIRs.

42. It is asserted that the present Accused though engaged, but did not disclose this fact to anyone and kept on committing offence on the Prosecutrix and kept on falsely stating that he loved her and that he was committed and desperate to marry her.

43. It is further submitted that the Application under Section 53/53A Cr.P.C. was filed by the State for collecting corroborative evidence, which is material in the facts of the present case. The contentions raised by the Respondent, are without merit and the Application under Section 53/53A Cr.P.C. be allowed.

44. **Status Report was filed on behalf of the State** wherein it is explained that though initially, FIR was registered under Section 354/506/509 IPC but after the recording of the statement of the Prosecutrix under Section 164 Cr.P.C., Section 376 IPC was added. The Respondent No.2 was medically examined at AIIMS Hospital, but did not go operate with the doctor and denied to give his blood sample for the investigations. During the investigations, he has failed to hand over the mobile phone of the

Complainant, which according to the Complainant, had been in his possession.

45. *It is submitted that the Petition may be allowed.*

46. **Written Submissions and compilation of Judgments have been filed on behalf of the Petitioner and Respondents.**

47. **Submissions heard and record perused.**

48. FIR No.176/2021 under Section 354/506/509 IPC was registered on the Complaint of the Prosecutrix against Karan Paruthi, brother of Respondent No. 2. Subsequently, a Statement under Section 164 Cr.P.C. was recorded on 29.06.2021 wherein she made specific allegations of rape against the Respondent No. 2/Abhishek Paruthi, leading to addition of Section 376 IPC in the FIR.

49. It has been revealed during the investigations that the Prosecutrix was pregnant and has subsequently delivered a child, which according to her was the consequence of the alleged rape by Respondent No. 2. The Accused after he was arrested, was taken to AIIMS Hospital for his medical examination, but he did not co-operate and did not permit his blood sample to be taken for the purpose of investigations.

50. The Investigating Officer then moved an Application under Section 53/53A Cr.P.C. on 21.04.2022, which was allowed by the learned M.M. *vide* Order dated 02.06.2022 but was set-aside by the learned ASJ *vide* detailed Order dated 19.04.2023.

51. **The *main question* which arises is**: Whether the blood sample of the Accused facing Charges of 376 IPC, can be permitted to be collected under Section 53/53A Cr.P.C.?

52. **Section 53 Cr.P.C. provides for examination of accused by medical practitioner at the request of police officer.** It reads as under:

> ***"53. Examination of accused by medical practitioner at the request of police officer.—***
>
> *(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence,* ***it shall be lawful for 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 an 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.***
>
> *(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.*
>
> *Explanation.—****In this section and in sections 53A and 54,—***
>
> ***(a) "examination"*** *shall include the 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 and such other tests which the registered medical practitioner thinks necessary in a particular case;*
>
> ***(b) "registered medical practitioner"*** *means a medical practitioner who possesses any medical qualification as defined in clause (h) of section 2 of the*

Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register."

53. **Section 53 Cr.P.C.** provides that a person is arrested on the Charge of committing an offence under the circumstances that there is a reasonable ground to believe that examination of such person would afford evidence as to the commission of the offence, it shall be lawful for the medical practitioner, to make such examination of the person arrested on the request of the police officer.

54. **Section 53A Cr.P.C.** is a special provision enacted in relation to the offence of rape, which has been inserted w.e.f. 23.06.2006 by way of Act 25 of 2005. **It reads as under:-**

> ***53A. Examination of person accused of rape by medical practitioner.—***
>
> *(1) When a person is* ***arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence,*** *it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometres from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person* ***and to use such force as is reasonably necessary for that purpose****.*

> *(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:—*
> *(i)….*
>
> *(3) …*
> *(4) …*
>
> *(5)* ***The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate*** *referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section."*

55. Section 53A Cr.P.C. provides that in cases of rape/attempt to rape, where there is a reasonable ground to believe that the examination of such person would afford evidence as to the commission of the offence, direction be given for examination of such arrested person and *"to use such force as is reasonably necessary for that purpose."*

56. From the conjoint reading of Section 53 and 53A Cr.P.C., it emerges that a person accused of a crime may be medically examined on the request of the Police Officer. It is further qualified that in case of the allegations of rape, while directing the medical examination of the Accused person, further direction may be given *for use of such force* as is reasonably necessary for that purpose.

57. Further, the Explanation to Section 53 was also inserted w.e.f. 23.06.2006 wherein it was explained that the *examination under Section 53 & 53A Cr.P.C., would include examination of blood, blood stains, semen etc.*

58. The Sections therefore, explicitly provide that ***in the offences of rape***, it has become mandatory for the Prosecution to go for DNA Test, to facilitate the Prosecution to prove its case against the Accused. Even prior to 2006 before Section 53A Cr.P.C. was inserted, the Prosecution could still resort to this procedure for DNA Test for analysis and matching of semen of the Accused which may have been found on the under garments of the Prosecutrix, to make its case full proof; in case the Investigating Agency did not do so, they may face the consequences.

59. The *main argument of the Respondent No. 2* to resist the taking of his blood sample, is that the Prosecutrix was legitimately and legally married to her husband at the time of alleged offence. The child was born during the subsistence of her marriage. The presumption under Section 112 of the Evidence Act provides a presumption of legitimacy of a child, who is born during the subsistence of marriage. The DNA Test analysis would amount to challenge to the legitimacy of the child, which is not in the interest of justice. The Respondent has thus, resisted giving his blood sample.

60. Before discussing the scope of presumption under Section 112 of the Indian Evidence Act, 1872, it is pertinent to observe that it is a settled principle of law that *'odiosa et inhonesta non sunt in lege praesumenda'* (nothing odious or dishonorable will be presumed by the law). The law presumes against vice and immorality. In a civilized society, it is imperative to presume the legitimacy of a child born during continuation of a valid marriage and whose parents had "access" to each other.

61. To comprehend the contention raised by Respondent No.2, it is pertinent to refer to that Section 112 of the Evidence Act which provides that birth during marriage is conclusive proof of legitimacy.

62. Section 112 Indian Evidence Act, 1872 reads as under:-

> ***"Section 112 of the Indian Evidence Act, 1872****, deals with the legitimacy of a child born during a valid marriage. It states that if a child is born during a marriage or within 280 days of its dissolution (the mother remaining unmarried), it is considered conclusive proof that the child is the legitimate offspring of the couple. This presumption can only be rebutted if it can be proven that the parties to the marriage had no access to each other at the time the child could have been conceived."*

63. **Section 112 of the Evidence Act** was enacted at a time when modern scientific technology such as DNA Test as well as Ribonucleic Acid Tests (RNA) were not in contemplation of the legislature. Therefore, this presumption was provided in the Indian Evidence Act, to presume the legitimacy of the child, if there was a subsisting relationship between the husband and wife. This was essentially not only to preserve the matrimonial fabric, but also to protect the rights of the child.

64. However, with the advancement of science and technology whereby DNA Test has evolved, there can be no denying to resort to the DNA Test, in order to ascertain the truth of the matter, which is most germane to the fair and just decision and for resolving the controversy.

65. Court of Appeals (Civil Division) in *Re G (Parentage Blood Sample),* (1997) 1 F.L.R. 360, observed that it is apposite for the Court to forensically establish what the individual through their refusal, had prevented from being scientifically determined. In this regard, it was held that *justice is best served by truth*. Justice is not served by impeding the establishment of truth.

66. *Thorpe LJ* in his opinion while agreeing with Waite LJ, observed that a putative father may seek to avoid his paternity which science could prove; alternatively, to cling on to a status that science could disprove. In both cases, selfish motives and emotional anxieties and needs may drive the refusal to co-operate in the scientific tests, which the Court may direct.

67. In the Court of Appeal (Civil Division) in *Re H and A (Children) (Paternity: Blood Tests)*, 2002 EWCA Civ 383, it was observed that the interest of justice in the abstract, are best served by the ascertainment of the truth and there must be few cases where the interests of children can be shown to be best served by the suppression of truth. Scientific evidence of blood group is available since the early part of this Century and the progress of serology has been so rapid that in many cases certainty or near certainty can be reached in the ascertainment of paternity. Why should a risk be taken of a judicial decision being made, which is factually wrong or may later be demonstrated to be wrong. *Where the science can assist in determination of facts, then it is not appropriate to determine the same on the basis of legal presumption or inference or by a long and acrimonious trial.* It is in the interest of justice that the best available evidence must be furnish in the Court and must not be confined to unsatisfactory alternatives as presumptions and inferences.

68. The House of Lords in *Regina (Qunitavalle) vs. Secretary of State for Health,* (2003) 2 A.C. 687 had held that the laws must be construed in the light of contemporary scientific knowledge and to give effect to a plain parliamentary purpose, the Statute must be held to cover a scientific development not known when the Statute was passed.

69. Therefore, one aspect is well established that the presumptions of fact must be permitted to be proved by the use of Science and Technology which has now become available.

70. This principle was succinctly worded in the case of *Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and Anr.*, (2014) 2 SCC 576. The Apex Court observed that the interest of justice is best served by ascertaining the truth and the Court should be furnished with the best available evidence and it may not be left to bank upon presumptions, unless science has no answer to the facts in issue. Where there is a conflict between the conclusive proof envisaged under law and the proof based on scientific advancement accepted by the world community to be correct, the latter must prevail.

71. The Apex Court considered the distinction between the *legal fiction* and *presumption of fact*. It was explained that legal fiction assumes existence of a fact, which may not really exist. However, a presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 Evidence Act does not create a legal fiction, but provides for presumption. While considering the husband's plea that he had no access to the wife when the child was begotten, it stood proved otherwise by the DNA Test Report. It was observed that the Appellant cannot be compelled to bear the fatherhood of a child, when the Scientific Reports prove to the contrary. Being conscious that the innocent child may not be bastardised as the marriage between her father and mother was subsisting at the time of her birth, it was observed that in view of the DNA Test Reports, the consequences cannot be forestalled. It is denying the truth; '*Truth must triumph',* is the hallmark of justice.

72. Likewise, in the case of *Bhabani Prasad Jena and Orissa State Commission for Women*, (2010) 8 SCC 633, similar observations were made that it would be permissible for a Court to direct the DNA examination to determine the veracity of the allegations, which constitute one of the grounds on which the party may succeed or lose. Needless to state that where conducting of such test can be avoided, it should be done. The reason is obvious; that the legitimacy of a child, who is not a party to the offence, but not be disturbed in his absence.

73. In the case of *Dipanwita Roy vs. Ronobroto Roy*, (2013) SCC OnLine SC 1300, which was a case *of matrimonial dispute involving extra marital relationship*. While referring to the aforesaid Judgments, it was held that but for the DNA Test, it would be impossible for the husband to confirm the assertions made in the pleadings. *DNA Testing is the most legitimate and scientifically perfect means which the husband could use, to establish his assertion of infidelity.* This should simultaneously be taken as the most authentic, rightful and correct means also for the wife to rebut the assertions made by the husband and to establish that she had not been unfaithful, adulterous or disloyal as claimed by the husband. *It was thus, concluded that the DNA Test is only to ascertain the true facts and may work in favour of the husband to prove the allegations of infidelity or may even work in favour of the wife, to dispel the allegations of infidelity made by the husband*.

74. The Supreme Court in the case of *Aparna Ajinkya Firodia vs. Ajinkya Arun Firodia*, (2024) 7 SCC 773 has held that the DNA Test was not directed to be conducted purely because of the peculiar facts of matrimonial dispute wherein there was an access between the husband and wife at the time the child was begotten. A word of caution was sounded that while

DNA Test may establish the adultery/infidelity relationship which may be impossible otherwise, *but each case has to be assessed in its own merits.* The DNA Test should be directed only in such cases where it is the only possible evidence and there is possible way to ascertain the truth regarding the adultery. ***In the peculiar facts of that case***, it was held that the DNA was not the only piece of evidence available. Furthermore, it was held that where the person refuses to get the DNA Test done, then the presumption under Section 114 (H) of Indian Evidence Act, would become applicable and an adverse inference may be drawn against the person so refusing.

75. In this case of *Aparna Ajinkya Firodia*, (supra) as well, the utility of DNA Test was reiterated, though was not considered appropriate to be resorted to in the facts of the case.

76. In the context of matrimonial disputes, the High Court of Calcutta in *Lob Das vs. State of West Bengal and Another*, 2024 SCC OnLine Calcutta 10836, observed that the Family Courts though competent to direct a person to undergo medical test including DNA Test which would not be violative of his right to personal liberty under Article 21 of the Constitution of India, ***but the Court must exercise this power only if it is expedient in the interest of justice to do so and only when the circumstances so warrant.***

77. In the case of *Goutam Kundu vs. State of West Bengal*, (1993) 3 SCC 418, the Apex Court laid down the guidelines for directing the blood test to be conducted to determine the paternity of the child. It was observed that the Courts in India, cannot order blood test as a matter of course while considering such prayers; where the Applications are made in order to have roving inquiry, the prayer for blood test must not be entertained. There must be a strong *prima facie* case that the husband must establish non-access in

order to dispel the presumption arising under Section 112 of the Indian Evidence Act. *The Court must carefully examine the consequences of ordering the blood test and whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.* No one can be compelled to give sample of blood for analysis.

78. Likewise in the case of *Inayath Ali vs. State of Telangana*, (2024) 7 SCC 822, while considering the case under *Section 498A/323/354/506 and 509 IPC*, dealing with dowry related offences and the paternity of the child, it was observed that subjecting the child to DNA Test in a proceeding where his status is not required to be examined, must not be encouraged. It cannot be overlooked that merely because something is permissible under the law, it cannot be directed as a matter of course to be performed particularly when the directions would have an effect of being invasive to the physical autonomy of a person.

79. The word of caution while directing the blood sample to be taken for DNA testing in the Case of *Rohit Shekhar vs. Narayan Dutt Tiwari & Anr.*, AIR 2012 Del. 151 *[partly modified in Narayan Dutt Tiwari vs. Rohit Shekhar, (2012) 12 SCC 554]*, held that the DNA Test should be issued only after ***the test of imminent need*** is satisfied. The truth is like a guiding star and the quest in the judicial process and the voyage of trial. Significantly, even though this was a Civil dispute where petitioner had sought his paternity established, e***ven reasonable force was permitted to be used to get the blood sample of the Respondent***.

80. The Respondent had placed reliance on the case of *'W' vs. 'H' & Anr.',* 2016 SCC OnLine Del 4786, to contend that wherever the issue of paternity of a child is raised, the presumption under Section 112 of the

Evidence Act, becomes applicable and there can be no direction to test the paternity of the child by taking the blood sample of the Respondent. *First and foremost*, this Judgment is in a Petition for divorce under Hindu Marriage Act where the divorce was sought on the ground of adultery. It is in that context that the Application for DNA test was filed to establish that the child so born was not from the relationship of the Petitioner and the Respondent. It was observed that while Section 112 of the Evidence Act presumes the legitimacy of the child born to a married woman, is deemed to be legitimate and the said presumption must not be disturbed on 'slender' materials unless 'compulsive and clinching' facts are brought to shake the presumption by calling for a DNA examination. It was thus, concluded that the DNA test is not to be directed as a matter of routine and the discretion must be exercised only after balancing the interest of the parties and on due consideration whether for a just decision, DNA test is imminently needed.

81. Similarly, in the case of *Ramkanya Bai vs. Bharatram*, (2010) 1 SCC 85 wherein the Order of the High Court directing DNA test of the child was set-aside by holding that it was not justified because **there was a possibility of re-union.** It was held that the discretion must be exercised only after balancing the interest of the parties and on due consideration whether for a just decision in the matter, DNA test is imminently needed.

82. Similarly, in the case of *Kamti Devi (Smt.) vs. Poshi Ram*, 2001 SC 2226, again, it was a Civil Suit filed by the husband, to challenge the paternity of the child after 15 years of marriage of the parties, on the ground that he had no access to the Appellant during the period when the child was begotten. In the context of the questioning of the paternity of a child begotten during the subsistence of marriage, it was observed that though the

genuine DNA test is scientifically accurate, but it is not enough to escape the conclusiveness under Section 112 of the Indian Evidence Act., if the husband and wife had been living together during the time of conception of the child. In this context, it was observed that by way of **abundant caution** and as a **matter of public policy,** law cannot be allowed the consequence of the child being branded as illegitimate on the strength of mere tilting of probability. In the facts of the said case, the DNA test to ascertain the paternity of the child, was denied.

83. The judgments relied upon by the learned Counsel for the Respondents essentially arise in the matrimonial disputes. While earlier the trend was to not resort to the DNA profiling because it impinges on the valuable right of a child, who was not even a party to such litigation and also in view of the Section 112 of the Evidence Act, which provided for the legitimacy of a child born during the subsistence of a marriage or proof of access of the husband to the wife. However, the recent trends have changed as has been noted in the judgments discussed above and more so in the criminal cases where the DNA profiling can in fact work in favour of the accused person, to scientifically ascertain his innocence in case the DNA profiling does not match with that of the child or the victim.

84. On the other hand, if the DNA profile matches, it ensures that the guilty are not let off, for want of cogent conclusive evidence. Therefore, the judgments on which reliance has been placed by the Petitioner while recognising the importance of DNA *profile has merely highlighted that they may not be resorted to in every case, especially, in matrimonial dispute*, unless expedient and necessary to discern the truth.

85. This underscores that the fundamental principles governing DNA testing are well-established and undisputed, particularly in criminal proceedings. In appropriate cases, especially those involving allegations of sexual assault, recourse to DNA testing is not only permissible but imperative.

86. In this regard, reference may also be made to Section 53A Cr.P.C., which makes it mandatory for getting the DNA Test, blood sample, etc., done in case of sexual assault offences. In the case of *Krishan Kumar Malik vs. State of Haryana*, (2011) 7 SCC 130 while considering the Criminal Case under Section 376/366 IPC, it was observed that after the incorporation of Section 53A in Cr.P.C., it has become necessary for the prosecution to going for the DNA Test in such types of cases.

87. ***To sum up the principles***, the aforesaid Judgments consistently observed that the DNA testing, which is an almost perfect science to determine the commission of an offence of rape, must not be declined especially when after 2006, Section 53A Cr.P.C. has been introduced making it almost compulsory in rape cases, to conduct the blood test including the DNA analysis. As has been noted above, in case the police fails to do so, it may invite the wrath of the Court and is also not in the interest of justice. It is one surest way of ascertaining the truth of the matter, which may result in exoneration of an Accused from false implication as much as may work in favour of the victim to bring the guilty to the books. It is not as a DNA Test works only in favour of the victim but in many a cases, may lead to honourable acquittal of the Accused.

88. Though, Section 53A Cr.P.C. has now almost made it mandatory to take the blood sample but at the same time, balancing the rights of the

Accused and the victim is required between the two. The facts of each case have to be examined on their own merits and absolute evidence of non-access and that the factor of non-access to the victim, may be one such consideration for directing or refusing the blood sampling.

89. While there has been much debate in the matrimonial cases where there is a dispute between the husband and wife and the allegations of adultery have been made, the DNA testing which may bastardise the child, may not be in the interest of justice but the same presumptions and the considerations do not prevail in the criminal case, more so, when it is a case of rape. The expediency and the advancement of technology mandates that the blood sample must be taken for DNA analysis.

90. The core reason why the Respondent No. 2 has contested taking his Blood Sample for DNA testing is that the Complainant was a married woman and her marriage with her husband was subsisting and thus, the presumption under Section 112 of the Evidence Act works in his favour and the taking of Blood Sample is not justified in the circumstances.

91. The question in the present case, which arises now is ***whether the Petitioner had any access to her husband at the time when the child was begotten.***

92. Much had been argued on behalf of the Respondent that there was a subsisting marriage between the Prosecutrix and her husband. However, it is brought on record by the Prosecution that the Prosecutrix was separated from her husband since 2018 as is also evident from the averments made in the affidavit filed by both the parties in the Family Court along with the Petition under Section 13B(2)(1) of the Hindu Marriage Act, 1955. The

Prosecutrix as well as her ex-husband, both had stated on divorce that they were not having any access to each other.

93. It is only after the separation that the Prosecutrix allegedly became friendly with the Respondent and a child was begotten from their relationship. There can be no better evidence than the DNA Test, to support the assertions of the Prosecutrix that it is the forcible sexual relationship between her and the Respondent that had made her pregnant and to the birth of the child. There can be no better evidence to prove or disprove the commission of the offence. ***Therefore, the contentions of the Respondent to resist giving his blood sample, is clearly not tenable***.

94. The Respondent has not been forthcoming to give the blood sample. It has been stated on behalf of the State that when he was taken for his medical examination, he was non-cooperative and refused to give his blood sample.

95. In the case of *Rohit Shekhar,* (supra), it had been noted that the Orders of the Court, cannot be allowed to be disregarded with impunity. It was observed that the perception of *"the law" as Mr. Bumble (in Oliver Twist) said "is an ass – an idiot" will* get cemented if the Courts themselves hold their Orders to be un-implementable and un-enforceable. The Courts would be reduced to be the laughing stock and public ridicule and the it is the duty of every Court to prevent its machinery from being rendered a sham.

96. Furthermore, Section 53A Cr.P.C. itself states that where the Accused does not co-operate, the reasonable force as is necessary for the purpose, may be used.

97. It is, therefore, concluded that the FIR has been registered under Section 376 IPC and by virtue of Section 53A Cr.P.C., the Police is duty bound to take her blood sample for DNA analysis, especially because of the

denial by the Respondent No.2. The learned ASJ, therefore, fell in error in essentially venturing into the domain of civil litigation and ignoring the crystallised principles in respect of the criminal trial, which also is the mandate under Section 53A Cr.P.C.

98. **The impugned Order dated 19.04.2023 of the learned ASJ is hereby, set aside.** It is directed that the Respondent shall present himself for the taking of blood sample within fifteen days in co-ordination with the Investigating Officer, for the purpose of taking the blood sample. In case, the Respondent No.2 declines or resists, the Investigating Officer may use reasonable force for the purpose.

99. Accordingly, the Criminal Petition is disposed of.

100. Pending Application(s), if any, also stands disposed of.

(NEENA BANSAL KRISHNA)
JUDGE

JULY 17, 2025/*R/RS*