

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

Date of decision: 27th April, 2012

+ **FAO(OS) No. 547/2011**

% **ROHIT SHEKHAR** **....Appellant**

Through: Mr. Amit Sibal, Mr. Vedanta Varma,
Mr. Giriraj Subramaniam, Ms. Pragya
Ohri, Mr Vibhor Kush, Advocates.

Versus

NARAYAN DUTT TIWARI & ANR. **..... Respondents**

Through: Mr. Bahar U. Barqui, Mr Pramod
Kumar Sharma, Mr. Jamal Akhtar,
Advs. for R-1.
Mr. Gaurav Mitra with Mr. Mohit
Chadha, Adv for R-2.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGMENT

RAJIV SAHAI ENDLAW, J.

1. The challenge in this appeal is to the judgment dated 23rd September, 2011 of the learned Single Judge allowing I.A. No. 10394/2011 of the respondent no.1 (defendant no.1 in the Suit) in CS(OS) No. 700/2008 filed by the appellant. Notice of the appeal was issued and the counsels have been heard.

2. CS(OS) No. 700/2008 is filed by the appellant for declaration, that he is the natural born son of the respondent no.1 and the respondent no.2 Dr. Ujjwala Sharma, and that the respondent no.1 is the father of the appellant and for perpetual injunction restraining respondent no.1 from denying in public or otherwise the fact that he is the father of the appellant. The said suit is pending consideration.

3. During the pendency of the suit, the appellant filed I.A. No. 4720/2008 under Order XXXIX Rules 1 & 2 of the Civil Procedure Code, 1908 (CPC) for direction to the respondent no.1 to submit himself for a DNA test and/or any other test required to determine the parentage of the appellant. The said application was contested by the respondent no.1. The learned Single Judge before whom the suit was then pending, vide order/judgment dated 23rd December, 2010 allowed the said application and directed the parties to appear before the Joint Registrar on 8th February, 2011; the Joint Registrar was directed to arrange for the DNA testing of the respondent no.1 by the Centre for Cellular & Molecular Biology (Constituent Laboratory of the Council of Scientific Industrial Research, Government of India); the respondent no.1 was directed to, on the date and time to be designated by the Joint Registrar, furnish the samples for such

testing; the said Institute was directed to furnish the report to the Court within six weeks of receiving the samples.

4. The respondent no.1 preferred an appeal being FAO(OS) No. 44/2011 against the aforesaid order/judgment dated 23rd December, 2010. The said FAO(OS) was dismissed by the Division Bench of this Court on 7th February, 2011.

5. The respondent no.1 preferred a Special Leave Petition being SLP(Civil) No. 5756/2011 against the order dated 7th February, 2011 of the Division Bench. In the said SLP, the respondent no.1 sought *ad interim ex parte* stay of the operation of the orders of this Court. The Supreme Court, though on 18th March, 2011 issued notice of the SLP, but rejected the prayer for interim relief. The SLP is stated to be still pending.

6. The Joint Registrar of this Court, in accordance with the order dated 23rd December, 2010 (*supra*) of which there was no stay, directed the respondent no.1 to appear for collection of blood samples. The respondent no.1 however did not appear and on the contrary, filed I.A. No. 10394/2011 (*supra*) against order whereon the present appeal is preferred. The respondent no.1 in the said application sought a direction that he should not be pressurized, compelled or forced in any manner to involuntarily provide

blood and/or other tissue sample(s) for DNA testing. The respondent no.1 on being asked to file an affidavit stating reasons for not furnishing the blood sample, in his affidavit dated 21st July, 2011 though admitted that there was no medical reason prohibiting him from giving sample for DNA testing but stated that he cannot be compelled to do so against his will. The learned Single Judge before whom the suit was now pending has vide order/judgment dated 23rd September, 2011 impugned in this appeal held the refusal of the respondent no.1 to submit the blood sample to be wilful, *mala fide*, unreasonable and unjustified. However after holding so, it has been held that the respondent no.1 cannot be physically compelled or be physically confined for submitting a blood sample for DNA profiling, in implementation of the order/judgment dated 23rd December, 2010. The learned Single Judge has further held that the weight to be attached to such refusal, shall be considered while evaluating the evidence produced by the parties.

7. The appellant impugns the said order/judgment contending:-

- A. that thereby the entire process of DNA testing, in pursuance to the earlier order dated 23rd December, 2010 of the learned Single Judge, order dated 7th February, 2011 of the Division Bench and rejection of the interim relief by the Supreme Court,

have been reversed and rendered null and void;

- B. that the relief claimed by the respondent no.1, in view of the earlier orders/judgments dated 23rd December, 2010, 7th February, 2011 & 18th March, 2011 (supra) was barred by *res judicata*;
- C. that the respondent no.1 was abusing the process of this Court;
- D. that the impugned order/judgment by directing trial to continue, seeks to judge the suit on the basis of oral evidence instead of on the basis of DNA evidence;
- E. that the learned Single Judge while considering the fundamental right of the respondent no.1, has ignored the right of the appellant to know his paternity;
- F. that the respondent no.1 being of advanced age, there is a possibility of crucial evidence disappearing;
- G. that an adverse inference can never have the same effect as a conclusive scientific determination of paternity.

8. In view of the aforesaid, it becomes relevant to discuss the earlier orders of the Single Judge and of the Division Bench of this Court and interim stay whereof, though sought was rejected.

9. The order dated 23rd December, 2010 of the learned Single Judge directing DNA test, observes/finds/holds:-

- a. a distinction has to be drawn between ‘legitimacy’ and ‘paternity’ of the child;
- b. Section 112 of the Indian Evidence Act, 1872 is intended to safeguard the interest of the child by securing his/her legitimacy and not to paternity;
- c. that a child has a right to know the truth of his/her origin;
- d. the right of a child to know his biological roots can be enforced through reliable scientific tests and if the interest of the child is best sub-served by establishing paternity of someone who is not the husband of his mother, the Court should not shut that consideration altogether; Indian law casts an obligation upon a biological father to maintain his child and does not disregard rights of an illegitimate child to maintenance;
- e. though the Supreme Court in ***Goutam Kundu v. State of West Bengal*** (1993) 3 SCC 418 had advised against conduct of scientific tests of the nature of giving blood samples for the purpose of DNA testing in a routine manner but did not

- altogether ban their conduct upon third party;
- f. that the Courts in *Sharda v. Dharmpal* AIR 2003 SC 3450 and *Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women* AIR 2010 SC 2851 have held that there is no violation of the right to life, or privacy of a person, in directing a DNA test to be undergone by him - to undergo such test is not an invasion of his right to life;
 - g. *Bhabani Prasad Jena* (supra), affirms the power of Court to direct a DNA test though cautions that the said power should be exercised after weighing all “pros and cons” and satisfying that the “test of ‘eminent need’” for such an order is fulfilled;
 - h. documents on the suit file established that respondent no.2 and her husband were estranged in 1970 and subsequently their marriage was dissolved – they had also filed affidavits in this regard and which could not at that stage of proceedings be disbelieved;
 - i. the husband of the respondent no.2 had also placed on record the DNA test report of himself and of the appellant to demonstrate that he could not be the father of the appellant;

- j. the presumption of legitimacy of a child born during the subsistence of a lawful wedlock provided in Section 112 of the Evidence Act is directed towards safeguarding the interest of the child and protecting it from being bastardized in the event that his paternity is in question; however that is not the issue in the present case;
- k. that the rationale laid down in the decisions, where it was the father who was resisting parenthood at the cost of bastardizing the child, does not apply where the child on attaining adulthood moves the Court to determine his parentage – the question of ‘protective jurisdiction’ of the Court or applicability of Section 112 of the Evidence Act then does not arise;
- l. the appellant, being over 29 years of age, capable of taking his decisions, the question of his welfare being adversely affected did not arise;
- m. that though the respondent no.1 could not be directed to undergo DNA test on mere asking of the appellant and on the assumption that he is the father of the appellant but the other material on record established a strong *prima facie* case

suggesting “eminent need” to issue the direction for DNA test.

10. The Division Bench of this Court vide order/judgment dated 7th February, 2011 dismissed the appeal against the order dated 23rd December, 2010 (supra), additionally observing /finding/holding:-

- I. that accuracy of a DNA test was not even imagined at the time when the law was formulated; that the affidavits of the respondent no.2 as well as her husband that the said husband had at the relevant time no sexual access to the respondent no.2 was sufficient to negate the argument of the counsel for the respondent no.1 of such access and was sufficient in law to rebut the presumption under Section 112 of the Indian Evidence Act;
- II. that the protective jurisdiction of the Court under Section 112 was not imperiled since declaration was sought by the child about his true paternity;
- III. that under Order XVIII Rule 16 of the CPC the Court is empowered to take evidence without necessarily waiting for the normal trial and the principle thereof applied to the facts of the present case also, for on the demise of the respondent no.1 the

vital evidence would disappear;

- IV. that there is a *prima facie* case in favour of the appellant; the appellant would suffer irreparable injury if immediate orders for DNA testing were not made and the balance of convenience is also in favour of the appellant.

11. The learned Single Judge, in the impugned judgment, has framed the following question:

“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?”

12. The impugned judgment though running into 109 pages, but the ratio thereof is, that though a matrimonial Court and the Civil Court has the implicit and the inherent power to order a person to submit himself for medical examination and to issue a direction to hold a scientific, technical and expert investigation but if despite the order of the Court, the respondent refuses to submit himself to medical examination, the Court is entitled only to take the refusal on record to draw an adverse inference therefrom.

Reliance in this regard is placed on *Sharda* (supra). It is also observed that physical confinement for forcible drawing of blood sample or sample of any other bodily substances is not envisaged in any statutory provision governing civil legislation under any tenet of justice. The learned Single Judge has observed that mandatory testing upon an unwilling person would entail an element of violence and intrusion of a person's physical person and may leave irreparable scars and is unwarranted and impermissible under Article 21 of the Constitution of India. It was thus concluded that the respondent no.1 could not be physically confined for the purpose of giving a blood sample and to ensure compliance of the order dated 23rd December, 2010.

13. The Apex Court undoubtedly in *Sharda* (supra) has held that "if despite an order passed by the Court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference" within the meaning of Section 114 of the Evidence Act would be made out. However, what we are concerned with here is, whether the order of the Court directing such DNA testing is an un-enforceable and un-implementable order, the only consequence of voluntary non-compliance whereof is to enable the Court to draw adverse inference. We find the aspect

of enforceability/implementability of the order for medical examination to have not been the subject matter of *Sharda* or the other judgments (supra), cited by the counsel for the respondent no. 1 before us also.

14. The Supreme Court in *H.M. Kamaluddin Ansari & Co. v. Union of India* (1983) 4 SCC 417 has held that orders of the Court are intended to be complied with and the Court would not pass an ineffective injunction order and the Court never passes an order for the fun of passing it and orders are passed only for the purpose of being carried out.

15. In our view, to say, that the exercise earlier undertaken by the Court, was an empty one and in futility – that though the Court could issue a direction for DNA testing but not implement or enforce the same, has the tendency of making the law and the Court, a laughing stock. The perception of “the law” as Mr. Bumble (in *Oliver Twist*) said "is a ass - a idiot" will be cemented, if the Courts themselves hold their own orders to be un-implementable and un-enforceable. It is the duty of every Court to prevent its machinery from being made a sham, thereby running down the Rule of Law and rendering itself an object of public ridicule. The House of Lords, in *Attorney-General v. Guardian Newspapers Ltd.* [1987] 1 W.L.R. 1248 observed that public interest requires that we have a legal system and

Courts which command public respect and if the Courts were to make orders manifestly incapable of achieving their avowed purpose, law would indeed be an ass. It was further held that the Court should not make orders which would be ineffective to achieve what they set out to do.

16. The Supreme Court also, in *K.A. Ansari v. Indian Airlines Ltd.* (2009) 2 SCC 164 has held that difficulty in implementation of an order passed by the Court, howsoever, grave its effect may be, is no answer for its non- implementation. In *Deep Chand v. Mohan Lal* (2000) 6 SCC 259 it was held that the purpose of execution proceeding is to enable the decree-holder to obtain the fruits of his decree and even if there is any ambiguity, interpretation which assists the decree-holder should be accepted; the execution of decree should not be made futile on mere technicalities. It was further observed that keeping in view the prolonged factum of litigation resulting in the passing of a decree in favour of a litigant, a rational approach is necessitated and the policy of law is to give a fair and liberal, and not a technical construction, enabling the decree-holder to reap the fruits of his decree.

17. We may at this stage notice that under Section 36 of the CPC, the provisions relating to execution of decree, apply to the execution of orders

also; if any precedent is needed, reference can be made to *M.V.S. Manikayala Rao v. M. Narasimhaswami* AIR 1966 SC 470.

18. The Courts have always attempted against rendering the orders and decrees of the Court to be merely good on paper and otherwise ineffective to settle the rights of the parties. Attempts have always been made to take a view/interpretation which renders a decree of the Court to be executable rather than inexecutable. The Courts cannot hold a decree or order passed after long deliberations as in the present case also, to be merely paper decree/order incapable of deciding in fact what it was intended to decide or incapable of changing the position which it intended to change. The Court cannot take a role of a silent spectator and see its order being frustrated by a party. The power of enforcement of orders cannot be reduced into an empty one.

19. It cannot also be lost sight of that the order directing the respondent no.1 to undergo the DNA testing was an order in exercise of powers by the Court under Order XXXIX Rules 1 & 2 of the CPC and not in exercise of powers as under Order XII Rule 8 or under Order XI or Order XVI of the CPC, for non-compliance whereof adverse inference is permitted to be drawn. A Court of law cannot sit still with folded hands and countenance its

injunction being treated with indifference or scant courtesy by the party against whom it is directed and who is bound to obey its terms. This is particularly so when such injunction has been confirmed in appeal and stay thereof been rejected by the Supreme Court.

20. What also surprises us is that the order of injunction aforesaid, has been held by the learned Single Judge to be un-implementable and un-enforceable for the reason of implementation thereof being fraught with physical coercion and intrusion on the rights of the respondent no.1 under Article 21 of the Constitution and being not envisaged in any statutory provision governing civil litigation. However, the impugned order itself, as also the earlier order dated 23rd December, 2010 holds, a direction for such DNA testing to be not violative of Article 21. The Supreme Court in *Selvi v. State of Karnataka* (2010) 7 SCC 263 upheld the authority of Civil Court to order a medical examination in exercise of the inherent powers vested in it by Section 151 of the CPC, though held that the same reasoning cannot be applied in the criminal context (para 175). Rather (in para 203) it was held that compelled extraction of blood samples in the course of a medical examination does not amount to “conduct that shocks the conscience” and that “use of force as may be reasonably necessary is mandated by law and

hence it meets the threshold of procedure established by law". The learned Single Judge has in paras 74, 78, 79 and 80 of the impugned judgment also held that the right of privacy is subject to such action as may be lawfully taken for protection of rights of others; that the level of privacy protection depends on the context; that Human Rights law justifies carrying out of compulsory and mandatory medical examination which may be bodily invasive and that the right to privacy is not an absolute right and can be reasonably curtailed. The learned Single Judge having held so, we are unable to fathom as to how the same factors could be an impediment to the enforceability and implementability of the order. What is not an impediment to the making of the order, cannot become an impediment to the enforceability of the order and would tantamount to saying that the Court order is violative of the rights of the litigant. The Constitution Bench of Supreme Court in *Triveniben v. State of Gujarat* (1989) 1 SCC 678 and recently reiterated in *Indian Council for Enviro-Legal Action v. Union of India* (2011) 8 SCC 161 held that a judgment of Court can never be challenged under Article 14 or Article 21. It is thus not open to the respondent to urge that the earlier order in the suit directing DNA testing was violative of his rights.

21. As far as the aspect of there being no statutory provision(s) for implementability/enforceability of such an order is concerned, we had during the hearing also invited the attention of the counsels to Section 51 of the CPC dealing with “Powers of Court to enforce execution”. The same, after prescribing the various modes of execution, in Clause (e) provides for execution “in such other manner as the nature of the relief granted may require”. The Supreme Court in *State of Haryana v. State of Punjab* (2004) 12 SCC 673 has held that the residuary powers under Section 51(e) allow a Court to pass orders for enforcing a decree in a manner which would give effect to it. It cannot also be lost sight of that at the time the civil procedure was codified in the year 1908, the tests such as of DNA were not even comprehensible much less available. However now that such tests, which are an aid in adjudication are available, the Courts cannot allow such advancements to bypass the Courts. The Supreme Court in *State of Maharashtra v. Dr. Praful B. Desai* (2003) 4 SCC 601 on the principle of interpretation of an ongoing statute (in that case Cr.P.C.) relied on the commentary titled “Statutory Interpretation”, 2nd Edition of Francis Bennion laying down:

“It is presumed the Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials."

22. Similarly in ***Suresh Jindal v. BSES Rajdhani Power Limited*** (2008)

1 SCC 341, it was held that creative interpretation of the provisions of the statute demands that with the advance in science and technology, the Court should read the provisions of a statute in such a manner so as to give effect thereto.

23. The House of Lords recently in *Regina (Quintavalle) v. Secretary of State for Health* [2003] 2 A.C. 687 held that the laws have to be construed in the light of contemporary scientific knowledge and in order to give effect to a plain parliamentary purpose, the statute may be held to cover a scientific development not known when the statute was passed. Notice may be taken of the amendment of the year 1976 to Section 75 of the CPC enabling the Court to issue commissions to hold a scientific, technical or expert investigation. The same is indicative of the legislative intent to keep pace with scientific advancements in the matter of judicial adjudication.

24. Even the Constitution of India, while laying down the Fundamental Duties, by Article 51-A (h) and (j) declares it to be the duty of every citizen of India to develop a scientific temper and the spirit of inquiry and reform and to strive towards excellence, to reach higher levels of achievement. What we wonder is that when modern tools of adjudication are at hand, must the Courts refuse to step out of their dogmas and insist upon the long route to be followed at the cost of misery to the litigants. The answer obviously has to be no. The Courts are for doing justice, by adjudicating rival claims and unearthing the truth and not for following age-old practices

and procedures when new, better methods are available.

25. We, in this context find the judgment of the Court of Appeal (Civil Division) in *Re G (Parentage: Blood Sample)* [1997] 1 F.L.R. 360 holding that the Court should find proven forensically what the person by his refusal had prevented from being established scientifically, to be apposite. It was further held therein:

“Justice is best served by truth. Justice is not served by impeding the establishment of truth. No injustice is done to him by conclusively establishing paternity. If he is the father, his position is put beyond doubt by the testing, and the justice of his position is entrenched by the destruction of the mother's doubts and aspersions. If he is not the father, no injustice is done by acknowledging him to be a devoted stepfather to a child of the family. Justice to the child, a factor not to be ignored, demands that the truth be known when truth can be established, as it undoubtedly can. Whilst, therefore, I do not in any way wish to undermine the sincerity of the father's belief that contact is of a continuing good to the child and that it will be reduced if the mother's beliefs prevail, that contact is best when taking place against the reality of fact, **and fact can be established by these tests being undertaken.**”

Thorpe LJ in his opinion, agreeing with Waite LJ that the appeal should be allowed, said:

“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 or emotional anxieties and needs may drive the refusal to co-operate in the scientific tests which the court has directed.

26. Though in the light of what we have held, it is not strictly relevant, but we are unable to restrain ourselves from recording what the Court of Appeal (Civil Division) observed in *Re H and A (Children) (Paternity: Blood Tests)* [2002] EWCA Civ 383:-

“Over thirty years ago in his speech in *S v Mc C* Lord Hodson said:

“The only disadvantage to the child which is put forward as an argument against the use of a blood test, not for therapeutic purposes but to ascertain paternity, is that the child is exposed to the risk that he may lose the protection of the presumption of legitimacy.

Without seeking to depreciate the value of this presumption it is, I think, fair to say that whatever may have been the position in the past the general attitude towards illegitimacy has changed and the legal incidents of being born a bastard are now almost non-existent. I need not dilate upon this, for I recognise that it is impossible to say that there is no stigma of bastardy even though it be no more than the indirect stigma of the imputation of unchastity to the mother of the child so described. On the other hand, it is difficult to conceive of cases where, assuming illegitimacy in fact, it is to the advantage of the child that this legal status of legitimacy should be preserved only perhaps to be displaced by firm evidence of illegitimacy decided later in his or her life from a blood test.

The interests 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 groups has been 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 the risk be taken of a judicial decision being made which is factually wrong and may later be demonstrated to be wrong?”

Those principles have been consistently applied in subsequent cases, including *Re H (A Minor)(Blood Tests: Parental Rights)* [1996] WLR 506 and *Re T (A Child)(DNA Tests: Paternity)* [2001] 3 FCR 577 . The judge sought to distinguish those two authorities in his concluding paragraph, which I have cited above. It draws the distinction that in those two cases there were serious doubts as to the husband's procreative capacities. I do not consider that that factual distinction begins to displace the points of principle to be drawn from the cases, **first that the interests of justice are best served by the ascertainment of the truth and second that the court should be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences.** It seems to me obvious that all that Lord Hodson expressed in the passage that I have cited applies with even greater force and logic in a later era. **First there have been huge scientific advances with the arrival of DNA testing. Scientists no longer require blood, thus removing what for some is the unbearable process of its extraction. Of even greater importance is the abandonment of the legal concept of legitimacy achieved by the Family Law Act 1987.**”

It was further observed that paternity of any child is to be established by science and not by legal presumption or inference or by a long and acrimonious trial.

27. It is also not as if use of force and police for that purpose is unknown to Civil Jurisprudence. Such force, through the machinery of police is

always used for execution of orders/decrees upon resistance by the judgment debtor/persons against whom such orders are made. Use of police for the purpose of enforcing interim orders (see ***Kailash Chander Sharma v. Nirmala Wati*** 92 (2001) DLT 103), for restoring status quo ante and even for execution of local commissions is common (see ***Indian Express Newspapers (Bombay) P. Ltd. v. T.M. Nagarajan*** MANU/DE/0382/1987). The jurisprudence has been evolving. Finding the interim orders in the cases of infringement of trademarks to be defeated, the Courts have relied on John Doe orders which are implementable against unknown persons also and where the Commissioners are authorized to visit places of unnamed defendants and wherefrom the infringing goods may be found. We are unable to appreciate as to why when in execution of a decree or an order of possession it is permissible for the police to physically lift and remove him from the property to which he wants to cling or to demolish the house of the judgment debtor (see ***Ram Awatar Agarwal v. Corpn. of Calcutta*** (1999) 6 SCC 532), it should be held to be impermissible to compel a person to undergo a medical test or to give a bodily sample for such test.

28. The Supreme Court in ***Zahurul Islam v. Abul Kalam*** (1995) Supp (1) SCC 464 held that decrees have to be executed, if necessary with

the police help. A Division Bench of Madras High Court in *Sri-la-Sri Sivasubramanyananda Swami v. Sri-la-Sri Arunachalasamy Chidambaram* (1993) 1 MLJ 274 had the occasion to examine whether the Civil Courts can issue directions to the police officials for execution and implementation of the orders of the Civil Court. Relying on *Jaipur Mineral Development Syndicate v. CIT* (1977) 1 SCC 508, it was held that the Civil Courts in exercise of its inherent power and in the absence of any express or implied prohibition are entitled to pass orders as may be necessary to prevent abuse of the process of the Court and to avoid gross miscarriage of justice. It was accordingly held that a litigant who has secured an order from the Court is entitled to full benefit thereof and the Court is entitled to resort to law enforcement machinery to see that its orders are obeyed. It was further held that no technicality can prevent the Court from doing justice in exercise of its inherent powers. To the same effect is the judgment of the Karnataka High Court in *Smt. Karisiddamma v. Smt. Sanna Kenchamma* MANU/KA/0628/2009.

29. We are also of the view that the plea of non-implementability and non-enforceability of such a direction ought to have been taken, when the appellant had sought the injunction and if not taken then, was barred by

the principles of constructive *res judicata*. It is a settled principle of law that the principles of *res judicata* and constructive *res judicata* apply to the successive stages of the same proceedings also. The Supreme Court, as far back as in ***Satyadhyan Ghosal v. Deorajin Debi*** AIR 1960 SC 941 observed that the principle of *res judicata* applies also as between the two stages in the same litigation to the extent that the Court having at an earlier stage decided the matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. Again in ***Arjun Singh v. Mohindra Kumar*** AIR 1964 SC 993, while reiterating the same principle, distinction was carved out between different kinds of interlocutory orders. It was observed that while interlocutory orders of injunction or receiver, which are designed to preserve the *status quo* pending the litigation and to ensure that the parties might not be prejudiced by the delay in the proceedings, are capable of being altered or varied by subsequent applications for the same relief though normally only on proof of new facts or new situations which subsequently emerge as they do not impinge upon the legal rights of the parties, other interlocutory orders designed to ensure the just, smooth, orderly and expeditious disposal of the suit even though not deciding any

matter in issue viz. on applications under Order IX, Rule 7 attract the principle of *res judicata* or principle analogous thereto; repeated applications seeking the same relief are not permitted.

30. The Supreme Court ***Y.B. Patil v. Y.L. Patil*** (1976) 4 SCC 66 opined that once an order made in course of a proceeding becomes final, it would be binding at subsequent stage of that proceeding. In ***Bhanu Kumar Jain v. Archana Kumar*** (2005) 1 SCC 787 it was clarified that the principles of constructive *res judicata* also apply with full force at subsequent stage of the same proceedings. The Supreme Court in ***Ajay Mohan v. H.N. Rai*** (2008) 2 SCC 507 held that a mere amendment of the plaint does not entitle the plaintiff to injunction under Order XXXIX, Rules 1 & 2 of the CPC which had been denied on an earlier occasion.

31. Seen in the aforesaid light it will be found that the opposition by the respondent no.1 to DNA testing was considered and decided when the application of the appellant for the said relief was considered. The application (I.A. No. 10394/2011) moved by the respondent no.1 and which has been allowed was thus by way of re-agitating the same issues and ought not to have been entertained much less allowed. We may further observe that the injunction directing DNA testing falls in the category of an order in

aid of disposal of the suit and decided the rights of the parties to the suit i.e. the right asserted by the appellant to have such DNA testing done and the right asserted by the respondent no.1 to not submit thereto. Once such rights had been adjudicated by the Suit Court and the appeal thereagainst had been dismissed and the application for stay having been rejected by the Apex Court, it was not open to the Suit Court to again entertain the said question. If such practices were to be permitted, it will have dangerous consequences. It is rarely that entire suit is decided by the same Judge. If it were to be permissible for each successive Judge presiding over a Court to take a different view, it will not only lead to the litigants and the counsels urging the same issues repeatedly each time on change of Roster but also be contrary to Rule of Law. A Division Bench of this Court in ***Swaran Singh v. Surinder Kumar*** 179 (2011) DLT 136 observed that even if the principles of *res judicata* were to be not attracted, the principle of issue estoppel precludes the Court from entertaining a second application (in that case under Order VII, Rule 11 of the CPC) based on the same factual matrix and no orders negating and nullifying the previous order can be made on change of Roster. The Supreme Court in ***Gajraj v. Sudha*** (1999) 3 SCC 109 held repeated applications under Order I, Rule 10 of the CPC to be not

maintainable.

32. Yet another principle may be noted. The Supreme Court recently in ***Shimnit Utsch India Pvt. Ltd. v. West Bengal Transport Infrastructure Development Corporation Ltd.*** (2010) 6 SCC 303 reiterated that law on the binding effect of an order passed by a Court of law is well settled; if an order has been passed by a Court which had jurisdiction to pass it, then the error or mistake in the order can be got corrected from a higher Court and not by ignoring the order or disobeying it expressly or impliedly. Halsbury's Laws of England opining that the fact that an order ought not to have been made is not sufficient excuse for disobeying it and disobedience to it constitutes a contempt was cited with approval.

33. We also find the action of the respondent no.1 of filing I.A. 10394/2011 to be contumacious. For this reason also, we are of the opinion that police force against him is justified.

34. We may highlight that as per the dicta of the Supreme Court noticed by the learned Single Judge also, a direction for DNA testing can be issued only after the test of eminent need is satisfied. The order dated 23rd December, 2010 directed DNA testing of the respondent no.1 only after holding the said test to be satisfied in the facts of the present case. The

impugned judgment though also holding that the test of eminent need is satisfied has declined to enforce the order. It is thus not as if the order for DNA testing is made or has been made in the present case on the asking or in a routine manner for the consequence only of adverse inference to flow from non-compliance thereof. We find inherent contradiction in the Court on the one hand holding eminent need for such a test and in the same breath allowing the need to remain unsatiated. We also find the drawing of adverse inference from refusal to comply with the direction for medical examination to be not sufficient to satiate the need found by the Court. A legal fiction under Section 114 of the Evidence Act, as adverse inference is, is not reality but which the said provision requires the Court to accept as reality. The Court is not bound to or obliged to draw such adverse inferences (see *Emperor v. Sibnath Banerjee* AIR 1943 FC 75, *Dhanvantrai Balwantrai Desai v. State of Maharashtra* AIR 1964 SC 575 and *Fakir Mohd. (Dead) by LRs v. Sita Ram* AIR 2002 SC 433). A presumption is not in itself evidence but only makes a *prima facie* case for parties in whose favour it exists (see *Sodhi Transport Co. v. State of U.P.* (1986) 2 SCC 486). As far back as in *Damisetti Ramchendrudu v. Damisetti Janakiramanna* AIR 1920 PC 84 it was held that presumption cannot

displace adequate evidence. The Supreme Court also in *Mohanlal Shamji Soni v. Union of India* 1991 Supp (1) SCC 271 held that it is the rule of law in evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue and the Court ought to take an active role in the proceedings in finding the truth and administering justice. Recently in *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria (Dead)* 2012 (3) SCALE 550 it was reiterated that the truth is the guiding star and the quest in the judicial process and the voyage of trial. The trend world over of full disclosure by the parties and deployment of powers to ensure that the scope of factual controversy is minimized was noticed. We are therefore of the opinion that adverse inference from non-compliance cannot be a substitute to the enforceability of a direction for DNA testing. The valuable right of the appellant under the said direction, to prove his paternity through such DNA testing cannot be taken away by asking the appellant to be satisfied with the comparatively weak ‘adverse inference’.

35. The impugned judgment refers extensively to the law in this regard in other countries. We are however of the opinion that once the Supreme Court in the judgments supra has held the Civil Court entitled to issue such a direction, the law in other jurisdictions pales into insignificance.

36. We therefore allow this appeal and set aside the order dated 23rd September, 2011. We further clarify that the observations/findings therein on any of the aspects which we find to be unnecessary and for which reason we have not gone into the challenge thereto shall not be binding at a subsequent stage of the proceedings. We further deem it necessary to now clarify the procedure to be followed for compliance of the direction contained in the order dated 23rd December, 2010. Upon the respondent no.1 continuing to defy the order, the Single Judge shall be entitled to take police assistance and use of reasonable force for compliance thereof. The respondent no.1 to also pay costs of this appeal quantified at ₹ 25,000/- to the appellant.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

APRIL 27, 2012

‘pp’