

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL REVISION CASE NO.2012 OF 2017

ORDER:

This criminal revision case is filed under Sections 397 & 401 Cr.P.C, questioning the propriety, legality and regularity of the order in CrI.R.P.No.37 of 2017 dated 07.06.2017 passed by the Principal District Judge, West Godavari at Eluru, whereby, the Sessions Court directed the petitioner and the respondents 1 & 2 to give blood samples and to undergo DNA Test for determination of paternity of respondents 1 & 2.

Respondent nos. 1 & 2 are the children and respondent no.3 is the wife of the petitioner, who filed a petition under Section 25 Cr.P.C claiming maintenance from the petitioners, alleging that the marriage of the third respondent with the petitioner was performed on 21.04.1994 as per Christian Rites and they lived happily for sometime and blessed with two children i.e. respondents 1 & 2 during their wedlock. It is alleged that the petitioner again married one Chaganti Shanta Kumari and neglected the respondents 1 to 3 and they filed CrI.M.P.No.1650 of 2015 in M.C.No.10 of 2011 for grant of interim maintenance. The respondents herein filed counter in CrI.M.P.No.1650 of 2015 *inter alia* contending that the third respondent was married to another person by name Miriyala Devapriyudu, resident of Malleswaram Vilalge on 16.06.1987 at a Church in Malleswaram as per Christian rites and customs. But, the third respondent is falsely claiming that the petitioner as her husband and respondents 1 & 2 were born during their lawful wedlock. The third respondent also filed D.V.C No.26 of 2010 and after filing counter, the third respondent failed to prosecute the

same and the same was dismissed and she dragged the matter for one reason or the other by filing successive applications.

The petitioner without establishing lawful marriage, filed Crl.M.P.Mo.1650 of 2015 by misusing Section 45 of Indian Evidence Act and the petitioner has to file a suit for declaration to determine the paternity of respondents 1 & 2 and the paternity can be decided through facts and circumstances and D.N.A test cannot be directed as a matter of routine and she can take advantage of Section 112 of Indian Evidence Act and therefore, the petition filed under Section 45 of Indian Evidence Act, insisting the petitioner to give blood samples along with respondents 1 & 2 to decide the paternity is illegal and contrary to law.

The Judicial Magistrate of First Class, Chintalapudi vide order dated 10.03.2017 in Crl.M.P.Mo.1650 of 2015 in M.C.No.10 of 2011 dismissed the application filed by the respondents 1 to 3 herein, based on the law declared by the Apex Court and this Court in **Dukhtar Jahan v. Mohammed Farooq¹, Goutam Kundu v. State of West Bengal² Shaik Fakruddin v. Shaik Mohammed Hasan³, Soma Ramachandram v. State of Andhra Pradesh⁴.**

Aggrieved by the order of dismissal in Crl.M.P.Mo.1650 of 2015 in M.C.No.10 of 2011 dated 10.03.2017, the respondents 1 to 3 preferred Crl.R.P.No.37 of 2017 before the Principal District and Sessions Judge, West Godavari, Eluru, the Sessions Judge, by relying on the decisions of Apex Court and this Court in **Goutam**

¹ 1987 CrL.L.J. 849 (D.B)

² 1993 AIR (SC) 2295 (D.B)

³ 2005 (6) ALD 179

⁴ 2013 CrL.L.J. 1351

Kundu case, **Sarada v. Darmpal**⁵, **K. Sugandha Kumar v. K. Vijaya Laxmi**⁶, **Govindula Sathaiah v. Govindula Manjula**⁷ and **Manjudari Neerada @ Radhi v. M.P. Narasimha Rao**⁸ allowed the revision case, setting aside the order passed by the Judicial Magistrate of First Class, Chintalapudi vide order dated 10.03.2017 in Crl.M.P.Mo.1650 of 2015 in M.C.No.10 of 2011. Assailing the order in Crl.R.P.No.37 of 2017 dated 07.06.2017, the present criminal revision case is filed by the petitioner/husband, raising several contentions.

The main contention raised by before this Court is that the first respondent is aged 19 years by the date of filing M.C.No.10 of 2011, and he is disentitled to claim maintenance, if he is proved to be son of the petitioner. That apart, third respondent has no *locus standi* to file a petition on behalf of the first respondent who attained the age of majority. But, the Trial Court did not take into consideration the age of the first respondent who became major and represented by the third respondent and thereby, the Trial Court committed a grave error.

It is also contended that the third respondent never married the petitioner on 21.04.1994 as alleged at Kanumolu Village, Krishna District and by the date of alleged marriage, the petitioner was already married to one Chaganti Shanta Kumari on 03.05.1986 as per Christian rites at Town Church, Chintalapudi and he is living with his legally wedded wife Shanta Kumari from the date of marriage and they were blessed with two children. It is

⁵ (2003) 3 ALD 1 SC

⁶ 2016 (2) ALD 101

⁷ 2016 (3) ALD 572

⁸ 2015 (4) ALT 157

further contended by the petitioner that the marriage between the petitioner and third respondent is illegal and that the third respondent already married to one Devapriyudu and they lead marital life, as admitted by the third respondent, thereby, the respondents 1 & 2 are not the children born to the petitioner due to sexual intercourse with the petitioner and the third respondent insisting upon the petitioner to undergo DNA test by giving blood samples is an illegality and therefore, the order passed by the Sessions Court is illegal. It is also contended that the proceedings under Section 125 Cr.P.C are summary in nature and the petition to refer the petitioner and the respondents 1 & 2 for DNA Test is impermissible under law. Apart from that, the petitioner cannot be compelled to give blood samples for D.N.A test which will have an adverse impact on the future life and prayed to set-aside the same.

During hearing, learned counsel for the petitioner Sri P. Vishnuvardhana Reddy vehemently contended that, in summary proceedings in under Section 125 Cr.P.C, the petitioner cannot be compelled to undergo D.N.A test and if, for any reason, reports are negative, the children i.e. respondents 1 & 2 cannot be bastardized, compelling the petitioner and respondents 1 & 2 to undergo D.N.A. test. It is also contended that, as the third respondent was already married to one Devapriyudu and she lived happily with him, in the absence of any divorce and proof that there was no access between the third respondent and Devapriyudu, the Court shall draw presumption under Section 112 of Indian Evidence Act and thereby, decide the real controversy between the parties without insisting the petitioner and

respondents 1 & 2 to undergo D.N.A test. But, the Sessions Court, on erroneous appreciation of law, overturned the order passed by the Judicial First Class Magistrate, Chintalapudi, which is an apparent error and exercising such power by the Sessions Judge under Section 397 Cr.P.C is erroneous and prayed to set-aside the order passed by the Sessions Judge.

Per contra, learned counsel for the respondents 1 to 3 Sri P. Raghavendra Rao supported the order of the Sessions Court in all respects, while placing reliance on the judgment of the Apex Court **Dipanwita Roy v. Ronobroto Roy**⁹.

Considering rival contentions and perusing the material available on record, the point that arises for consideration is”

“whether the petitioner and respondents 1 & 2 be directed to undergo D.N.A. Test by giving blood samples, to determine the paternity of respondents 1 & 2. If so, whether the order in Crl.R.P.No.37 of 2017 dated 07.06.2017 passed by the Principal District Judge, West Godavari at Eluru, is liable to be set-aside?”

P O I N T:

Before deciding the real controversy between the parties, it is apposite to discuss about the scope of revision under Sections 397 & 401 Cr.P.C, for better appreciation of facts.

The present petition is filed under Section 397 and 401 of Cr.P.C. Jurisdiction of this Court under Section 397 and 401 of Cr.P.C. is limited and the High Court may exercise such power only when the Court found that there is a manifest perversity in the order or the finding recorded by the Court is without any evidence or material, though Section 401 of Cr.P.C. confers a kind

⁹ AIR 2015 SC 418

of paternal and supervisory jurisdiction on the High Court over all other criminal Courts established in the State in order to correct miscarriage of justice arising from a misconception of law, irregularity or procedure, neglect or proper precautions or apparent harshness of treatment which has on the one hand resulted in some injury to the due maintenance of law and order or, on the other hand, in some underserved hardship to individuals. The revisional power conferred on the High Court by Section 401 of Cr.P.C. is discretionary power, has to be exercised in the aid of justice. Whether or not the High Court will exercise its revisional jurisdiction in a given case, must depend upon facts and circumstances of each case. The discretion conferred on the High Court by Section 401 of Cr.P.C. has to be exercised judicially, on judicial principles and not arbitrarily. Therefore, keeping in mind the scope of revision, I would like to decide the present issue before this Court. This Court normally cannot interfere with concurrent fact findings recorded by the Courts below, only in exceptional circumstances when findings are manifestly perverse or apparently erroneous.

Keeping the powers of this Court under Section 397 and 401 of Cr.P.C, I would like to advert to the disputed questions before this Court.

The **First** and foremost contention raised before this court is that the first respondent was major by the date of filing M.C.No.10 of 2011 and the third respondent cannot represent the first petitioner as a guardian and hence, the first respondent is disentitled to claim maintenance. In a petition filed under Section

45 of the Indian Evidence Act, these questions cannot be decided and if, any finding is recorded about the age of the first respondent and competency of the third respondent to represent the first respondent, it is beyond the scope of the relief claimed in the petition. Therefore, I am not inclined to record any finding on this aspect.

The **second** ground raised before this Court is that, the third respondent was already married to one Devapriyudu on 16.06.1987 at a Church in Malleswaram as per Christian rites and customs and the third respondent is not the legally wedded wife of the petitioner. To support his contention, learned counsel for the petitioner would draw attention of this Court to the deposition of the third respondent/P.W.1- Tamalam Jeevamruthaveni, she did not admit about her marriage with one Devapriyudu while contending that that her marriage with the petitioner was performed as per Christian rights and customs on 21.04.1994 and produced Ex.P-1 Marriage Certificate, so also house hold supply card marked as Ex.P-2, school admission cards of respondents 1 & 2 where the name of the petitioner was mentioned as father of respondents 1 & 2 vide Exs.P-3 & P-4. She also produced voluminous evidence to prove the relationship of wife and husband between the third respondent and the petitioner. In the cross-examination of P.W-1, she admitted that she is residing at Endapalli and she is the eldest among the 10 children born to her parents. The third respondent, in her cross-examination stated that both her parents are alive and they worked as teachers and retired. She was married to one Devapriyudu who is resident of

Malleswaram on 16.06.1987. Taking advantage of this admission, it was contended that, in the absence of divorce between the third respondent and Devapriyudu and proof that there was no access between the third respondent and Devapriyudu, the petitioner cannot be insisted to undergo D.N.A. Test. Similarly, P.W.2, father of the third respondent also admitted about performance of marriage of third respondent with Devapriyudu at C.S.I. Church, Malleswaram, while contending that the marriage was dissolved by divorce. P.W.1 also in further examination dated 22.07.2015 pleaded divorce. Therefore, as per the evidence on record, *prima facie*, the marriage between the third respondent and Devapriyudu was dissolved by divorce, but whether the divorce was real or not is a question of fact to be determined at the end of the trial in proceedings under Section 125 Cr.P.C. At this stage, this Court while deciding an application under Section 45 of Indian Evidence Act, cannot record a fact finding that the marriage was dissolved between the third respondent and Devapriyudu and it is beyond the scope of enquiry.

The **third** contention of the learned counsel for the petitioner before this Court is that, the petitioner was already married to one Chaganti Shanta Kumari and by the date of alleged marriage with the third respondent, the marriage between the petitioner and Chaganti Shanta Kumari is subsisting and thereby, the question of marrying another woman during subsistence of first marriage with Chaganti Shanta Kumari does not arise and consequently, the alleged marriage is invalid. As on today, there is *prima facie* evidence that the marriage of third respondent with the petitioner

was performed in the Church vide Ex.P-1 and whether it is true or not is a question of fact to be decided by the Magistrate at the end of the trial. But, at this stage, this Court cannot decide those controversies, in view of the limited scope of jurisdiction conferred on this Court under Sections 397 & 401 Cr.P.C. Apart from that, it is also not known whether the marriage of the petitioner with Chaganti Shanta Kumari was subsisting or not, unless the petitioner was examined in chief and cross-examined in M.C.No.10 of 2011. Even if, the marriage with Chaganti Shanta Kumari was subsisting, the marriage of the petitioner with the third respondent is not legal, as she would not attain the status of legally wedded wife, but the children born during the voidable marriage are illegitimate children and they are entitled to claim maintenance under Section 125 Cr.P.C, if they are able to prove their paternity and respondents 1 & 2 were born due to sexual intercourse between the petitioner and the third respondent. Therefore, such fact has to be proved by scientific method and the respondents 1 & 2 came forward to give their blood samples while insisting the petitioner to give blood samples to undergo D.N.A. test to determine the paternity of respondents 1 & 2 when the third respondent adduced evidence to prove that the marriage between the third respondent and Devapriyudu was dissolved by divorce, the question of access between Devapriyudu and third respondent by drawing a presumption under Section 112 of Indian Evidence Act does not arise. In such case, the only scientific method to decide the paternity is D.N.A. Test. The law laid down by various Courts, including the Apex Court and this Court is consistent and

I would like to advert to the law laid down by various Courts hereunder.

If the law laid down by the Apex Court in the aforesaid judgment is accepted, one of the modes of dispelling presumption under Section 112 of Indian Evidence Act is DNA Test and in view of more accuracy attached to the said DNA Test, the Court instead of banking upon presumption under Section 112 of Evidence Act, can order for DNA Test for more accurate result, the result in DNA Test will prevail over presumption under Section 112, since it is based on scientific investigation.

In **Goutam Kundu v. State of West Bengal**¹⁰, the Apex Court held that Section 112 of Indian Evidence Act requires the party disputing the paternity to prove non-access in order to dispel the presumption. 'Access' and 'Non-Access' mean the existence of opportunities for sexual intercourse; it does not mean actual 'cohabitation'.

In the **Goutam Kundu**⁵ case, the Supreme Court relied on the judgments of **Nandlal**⁴ and **Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and another**¹¹ cases and held that if the child is referred to DNA Test and if ultimately found to be son who is not born to the same father, then he would be bastardized. But in the later judgments, more particularly, in the judgment of **Nandlal**⁴ case, the Apex Court is of the view that reference of a child to DNA Test is no way effect the case of the petitioners.

¹⁰ (1993) 3 SCC 418

¹¹ (2010) 8 Supreme Court Cases 633

In **Banarsi Dass v. Teeku Dutta (Mrs) and another**¹², the Supreme Court highlighted the main object of a succession certificate is to facilitate collection of debts on succession and afford protection to the parties paying debts to the representatives of the deceased persons. The Apex Court also held that it is for the parties to place evidence in support of their respective claims and establish their stands. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given, as was noted in **Goutam Kundu**⁵ case. Even in the judgment of the Apex Court, the Court did not conclude that the parties can be referred to DNA test in any deserving cases as extreme step of referring the parties to DNA test is permissible, but not as a matter of routine.

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

¹² (2005) 4 Supreme Court Cases 449

rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman (vide **Dukhtar Jahan v. Mohd. Farooq**¹³)

Thus, in view of the law laid down by the Apex Court in the judgment referred supra, the presumption under Section 112 is not rebuttable presumption, though a conclusive proof is lead to presumption, still such presumption can be dispelled by the parties who is disputing the paternity by any modes of proof that there was no access between the first petitioner and the respondent.

In view of the law declared by the Apex Court and various Courts, referred supra, compelling the petitioner to undergo D.N.A. test along with the respondents 1 & 2 to determine their paternity is not illegal, since D.N.A. test is the only scientific method to decide the paternity.

In **Syed Mohd. Ghouse v. Norunnisa Begum**¹⁴ this Court discussed **Gautam Kundu**⁵ case and observed that the marital tie between the parties, *inter se*, was not in dispute in that case and only the paternity of the child was every much in dispute. Taking the recourse to the presumption under Section 112 of the Evidence Act, the Apex Court was of the view that it is for the appellant to prove non-access so as to dispel the presumption of legitimacy that could be drawn under Section 112 of the Evidence Act.

That was a position prior to the advent of the DNA Test. DNA Test is now a developed, which conclusively determines, with

¹³ (1987) 1 SCC 624

¹⁴ 2001 (1) ALD (CrI.) 590 (AP)

reference to the gene characteristics, the paternity of a child. The Apex Court expressed its concern about the ramifications of such a blood test in the interest of the child. However, the decision does not say that such blood test cannot be ordered at all. It all depends upon the facts of a particular case. Nonetheless, the Apex Court was so emphatic on one aspect that no one can be compelled to give sample of blood for analysis, moreover, in the present case, children themselves came forward to give blood samples, not bothering about their interest.

It is thus obvious that before ordering the blood test, either for DNA or other test the Court has to consider the facts and circumstances of the given case and the ramifications of such an order. But the Court cannot compel a person to give the sample of blood. However, if that person refuses to give blood sample without any valid reason the Court is at liberty to draw the inference as a necessary corollary in sequel thereof.

In **Soma Rama Chandram v. The State of Andhra Pradesh represented by its Public Prosecutor, A.P. High Court and ors¹⁵**, a similar issue in maintenance case filed under Section 125 came up before this Court, where the child and mother claimed maintenance and father disputed the paternity of the child and this Court after reviewing various judgments of the Apex Court and other High Courts, considered the testimonial compulsion and held that it is applicable to criminal cases by virtue of Article 20(3) of Constitution and when there is paternity dispute, it is the duty of the party to raise such paternity dispute to prove his contention by

¹⁵ 2013 CrI. L.J. 1351

placing necessary evidence. But when scientific evidence is available, the Court can order for DNA test and the Court may also compel the parties to undergo such test.

DNA test in a matter relating to paternity of a child should not be directed by the Court as a matter of course or in routine manner, whenever such a request is made. The Court has to consider diverse aspects including presumption under Section 112 of Indian Evidence Act; pros and cons of such order and test of 'eminent need' whether it is not possible for the Court to reach the truth without use of such test. The result of genuine DNA test may not be enough to escape from the conclusiveness of Section 112 of Indian Evidence Act. Where there is apparent conflict between right of privacy of a person not to submit himself forcibly to medical examination and duty of the Court to reach truth, the Court must exercise its discretion only after balancing the interest of the parties and on due consideration whether for a just decision in the matter DNA test is eminently needed.

Similarly, in a matter where paternity of a child is in issue before the Court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the Court must be reluctant in the use of such scientific advances and tools which result in invasion of right of privacy of an individual and may not only prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes, the result of such scientific test may bastardize an

innocent child even though his mother and spouse were living together during the time of conception. Any order for DNA test can be given by the Court only if a strong *prima facie* case is made out for such case (vide **Bhabani Prasad Jena**²).

On the same lines, this Court in **Daru Gopal Lunani v. Sira Gopal Lunani and others**¹⁶ single Judge of this Court opined that DNA test should not be directed as a matter of routine and such direction can be given only in deserving cases where it is not possible to reach the truth of paternity without use of test and where strong *prima facie* material about marriage between the parties and husband gaining access to wife has been produced before the Court by the person claiming paternity relying on **Goutham Kundu**⁵, **Sharda v. Dharmpal**¹⁷, **Banarsi Dass**², **Ramkanya Bai v. Bharatram**¹⁸.

Recently, in **Govindula Sathaiah v. Govindula Manjula**¹⁹, following **Dipanvita Roy**¹ case, held that in case it is impossible to dispel the presumption under Section 112 of Indian Evidence Act, the Court can order DNA test to rebut the presumption by scientific evidence.

Long ago in **B. Vandana Kumari v. P. Praveen Kumar**²⁰, this Court held that to dislodge the conclusiveness of legitimacy of the child declared under Section 112 of the Evidence Act, the onus of proof is on the husband to establish that his wife concerned prior to marriage (from the facts of the decision) and DNA test is

¹⁶ 2014 (1) ALT 396

¹⁷ AIR 2003 SC 3450

¹⁸ 2010 (1) SCC 85

¹⁹ 2016 (3) ALD 572

²⁰ 2007 (1) ALT 193

one of the modes to prove that the child was not born due to sexual intercourse, even if test reveals that the child was not born due to sexual intercourse with husband, would not decide the core issue in the main O.P. However, it is only opinion evidence; it is a piece of evidence to establish the case of the husband to dispel the presumption under Section 112 of Indian Evidence Act, thereby reference to DNA test is justified.

In **Dipanvita Roy**⁹, the Apex Court held that the question that has to be answered in this case, is in respect of the alleged infidelity of the Appellant-wife. The Respondent-husband has made clear and categorical assertions in the petition filed by him Under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the Appellant-wife. It is in the process of substantiating his allegation of infidelity, that the Respondent-husband had made an application before the Family Court for conducting a DNA test, which would establish whether or not, he had fathered the male child born to the Appellant-wife. The Respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the Appellant-wife's infidelity) through a DNA test. The Apex Court therefore satisfied, that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the Respondent-

husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the Appellant-wife is right, she shall be proved to be so.

The law is consistent on power of the Court to order DNA test, but, certain restraint must be maintained to glass over or protect the innocent child from the stigma of bastardizing. On the date of enacting Indian Evidence Act, scientific methods with accuracy were not available and even the legislature might not visualize such accurate scientific methods to decide the paternity of a child, so the presumption based on inferences under Section 112 of the Act was incorporated. The presumptions are based on necessity but due to passage of time, advanced scientific methods are available to decide paternity with more accuracy, when accurate scientific tests are available, drawing presumption based on oral evidence or inferences based on circumstances may some times difficult. When advanced scientific method with accuracy is readily available, placing reliance on oral evidence of a witness who can easily tell lies depending on circumstances, again it depends on credibility of a witness.

Overall view of the Courts is that stigma cannot be attached to an innocent child by restoring to scientific methods to decide paternity. Yet, it is the duty of the Courts to protect the rights of father also. If father is not provided an opportunity to dispel the presumption under Section 112 of Indian Evidence Act by scientific evidence, it amounts to denial of opportunity to bring on record the truth. When no other accurate mode to dispel the presumption is available, husband can seek a direction to undergo DNA test which

is accurate, but wife and child being requested by notice filed petition for such relief, without hesitating to stigma. The respondents themselves came forward to give blood samples while insisting the petitioner to give blood samples for D.N.A. Test, the petitioner is hesitant to undergo test for the reasons best known to him. Even if the marriage of third respondent with Devapriyudu and the respondents 1 & 2 were born due to illicit contact, they will be termed as illegitimate children of both petitioner and third respondent, in such case, petitioner cannot deny his obligation to maintain respondents no.1 & 2, though illegitimate, as Section 125 Cr.P.C obligates father to maintain both legitimate and illegitimate children. D.N.A is only the scientific method to dispel the presumption under Section 112 of Indian Evidence Act to either of parties. The Sessions Court heard and concluded that except referring the parties to D.N.A. Test in evidence is sufficient to dispel the presumption under Section 112 of the Indian Evidence Act and ordered D.N.A Test, such order cannot lightly interpreted by this Court, while exercising jurisdiction under Sections 397 & 401 Cr.P.C. Hence, I find no ground to interfere with the order under challenge.

In **Maria Margarida Sequeira Fernandes v. Erasmo Jack De Sequeira**²¹, the Supreme Court in paragraphs 52, 41, 52, 38 and 51 held as under:

“Courts must give greater emphasis on the veracity of pleadings and documents in order to ascertain the truth which is the foundation of justice. In civil cases, adherence to Section 30 CPC would also help in ascertaining the truth. It seems that this provision which ought to be

²¹ (2012) 5 Supreme Court Cases 370

frequently used is rarely pressed in service by our judicial officers and Judges.

It must be the endeavour of all the judicial officers and Judges to ascertain truth in every matter. A Judge in the Indian system has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest". In order to bring on record the relevant fact, he has to play an active role; no doubt within the bounds of the statutorily defined procedural law. In the administration of justice, Judges and lawyers play equal roles. Like Judges, lawyers also must ensure that truth triumphs in the administration of justice."

(vide *Mohanlal Shamji Soni v. Union of India* [1991 SCC (Cri) 595], *Ritesh Tewari v. State of U.P.* [(2010) 10 SCC 677], *Jones v. National Coal Board* [(1957) 2 QB 55], *Chandra Shashi v. Anil Kumar Verma* [(1995) 1 SCC 421])

The whole idea of voyage of trial is to find out truth when husband want to disprove paternity evidence due to void or voidable marriage or adulterous life, who allegedly gave birth to a child due to sexual intercourse, by resorting to more accurate and scientific method, the Courts may lean towards ordering DNA test to do justice to both parties. But, in the interest of child, the Courts must be slow in passing such orders; however, it is the duty of Court to strike balance between the rights of both parties who approached the Court. In most of the decisions referred above, the law declared is consistent and leaning towards innocent child, but the Courts did not consider the liability of innocent husband to pay maintenance to his illegitimate children who is allegedly leading adulterous life and payment of maintenance to a child not born due to sexual intercourse with his wife, sometimes, if paternity of a child is accepted in maintenance case though its scope of enquiry is limited, it will have devastating effect in future, such child may claim right in the property and it is painful to any husband to pay maintenance to such children born due to sexual

intercourse leading adulterous life and to a child not born through him; in such case who will palliate the pang of such misfortune husband is again a question. Fortunately, wife contended that children allegedly born due to sexual intercourse between the petitioner and the third respondent, foreseeing serious consequences, more particularly, stigma on the child, filed the petition to prove her chastity, to claim maintenance and to wipe out the stigma on the children by more accurate and scientific evidence atleast to lead future life free from such stigma and to enable the respondents 1 & 2 herein to make all legitimate legal claim against the petitioner herein, in future. Therefore, the Courts have to strike balance between the rights of both parties and weigh the evidence and decide the matter without giving undue preference to any of the parties. In addition to the guidelines laid down by the Apex Court in **Goutam Kundu**⁵ case, the following may also be taken into consideration:

- (a) strike balance between rights of both parties;*
- (b) exercise such power without giving undue preference to any of the parties before the Court;*
- (c) Exercise such power to unearth truth by accurate suitable scientific evidence instead of relying on presumption based inferences.*

In view of the law declared by the Supreme Court and various Courts referred supra, compelling the petitioner to undergo D.N.A. Test along with the respondents 1 & 2 to determine their paternity is not illegal, since it is the best scientific test to prove with accuracy to prove the paternity of the children i.e. respondents 1 & 2.

In **Govindula Sathaiah** case, the learned Judge of this Court reiterated the same principle while directing the parties to undergo D.N.A test to determine the paternity and recorded a finding that in case, the parties failed to undergo the test, the Trial Court shall draw an adverse inference under Section 114 (h) of the Indian Evidence Act.

In view of the law declared by the Courts consistently, in various judgments referred above, compelling the petitioner to undergo D.N.A test along with respondents 1 & 2 cannot be faulted, since it is the only accurate scientific mode to determine the paternity. Therefore, the contention of the learned counsel for the petitioner is without any merit.

The **fourth** ground urged by the learned counsel for the petitioner before this Court is that, in a maintenance case, such extreme step to refer the respondents 1 & 2 and the petitioner to undergo DNA Test, since the proceedings are summary in nature under Section 125 of Cr.P.C and at best, the respondents 1 & 2 have to file a civil suit for declaration that the petitioner is the legally married husband of the third respondent. But, the contention is not based on any material and the Court can direct the petitioner or any of the parties to proceedings under Section 125 Cr.P.C to undergo any scientific test to determine the real controversy between the parties. In the present case, the controversy is paternity of respondents 1 & 2 which can be decided only based on scientific methods, but not on presumptions, though it is contended that in summary proceedings, the petitioner cannot be compelled to undergo D.N.A Test, this contention is not fortified

by any law declared by the Courts. Hence, I find that this contention is without any merit.

No doubt, the proceedings under Section 125 of Cr.P.C are summary in nature and incorporated with a view to provide immediate relief to the starving wife and children and it is intended to provide a speedy remedy to such persons. But, at the same time, certain safeguards are provided, more particularly, under Section 125(4) of Cr.P.C.

In a **Madharapu Prashu Ram v. Shaik Jainbhee**²², this Court in a petition filed under Section 125 of Cr.P.C upheld the order passed by the Trial Court referring the parties to undergo medical test and relied on **Goutam Kundu**⁵ case, where the following conclusions are arrived:

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

81. To sum up, our conclusions are:-

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

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

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

A detailed discussion of earlier decisions, which are of smaller Benches, will only lead to prolixity, which should be zealously avoided. However, in *Sham Lal*, a Two-Judge Bench has held that once the validity of marriage is proved and parents have access to each other, adultery of wife which though amounts to very strong evidence, is, by itself, not quite sufficient to repel the presumption of legitimacy of

²² 2013 CrL.J. 1077

children born from such wedlock and that is undesirable to enquire into paternity of a child in such cases.

Hence, in **Goutam Kundu**⁵ case the Apex Court concluded that in matrimonial cases, the Court has power to order any person to undergo medical test.

Learned counsel for the petitioner finally contended that compelling the petitioner to undergo D.N.A test would amount to self incrimination and it is against Article 20(3) of the Constitution of India.

In **Smt. Selvi and Ors. vs. State of Karnataka**²³, the Apex Court while deciding the permissibility of conducting Polygraph Test, 'Brain Electrical Activation Profile (BEAP) test' and Narco Analysis had an occasion to decide the scope of Articles 20(3) and 21 of the Constitution of India and held that the three tests referred above will lead to emission of P300 waves and the underlying theory is that in the case of guilty suspects, the exposure to the material probes will lead to the emission of P300 wave components which will be duly recorded by the instruments. By examining the records of these wave components the examiner can make inferences about the individual's familiarity with the information related to the crime and any person cannot be compelled to undergo those three tests against his will, in view of the desirable effects of those tests in certain situations. Therefore, validity of the tests is to be examined from wider perspective of personal liberty under Article 21 of the Constitution of India, which includes right to mental privacy, the right against cruel, inhuman or degrading treatment and the right to fair trial.

²³ AIR 2010 SC 1974

Thus, from the view expressed by the Apex Court, taking blood and hair samples is permissible during investigation. The same principle can be applied to the present facts and circumstances of the case, though it is summary proceeding under Section 125 Cr.P.C. Taking of such blood and hair samples would not infringe the fundamental rights guaranteed under Articles 21 and 20(3) of the Constitution of India, consequently, I find no merit in the contentions.

The **fifth** and last contention raised before this Court is that the paternity can be decided based on presumption under Section 112 of the Indian Evidence Act. But, the access or non-access of the third respondent with her husband does not arise in this case, since the marriage was allegedly dissolved by divorce. Even if, there was access between Devapriyudu and the third respondent, there is every possibility to have sexual intercourse with any other person also, during subsistence of marriage. In such case, the children born to the third respondent due to sexual intercourse with any other person like the petitioner herein are entitled to claim maintenance, being the illegitimate children, as per Section 125 Cr.P.C. Therefore, the presumption alone under Section 112 of Indian Evidence Act is not sufficient to determine the paternity and it would not have any impact on the future life of respondents 1 & 2, since they themselves voluntarily came forward to give blood samples to determine their paternity. But, obviously, for the reasons best known to him, the petitioner is not coming forward to determine the paternity of the respondents 1 & 2 to undergo D.N.A. Test. Hence, the contention of the learned counsel for the

petitioner is unsustainable, in view of serious question to be decided, which will have a stigma on the character of the third respondent, if she failed to prove that respondents 1 & 2 were the children born due to sexual intercourse with the petitioner and third respondent. Therefore, to rule out all possibilities, ordering D.N.A Test is the only course to determine the paternity of respondents 1 & 2, as such, the Sessions Judge while deciding revision under Section 397 Cr.P.C, rightly allowed the application, setting aside the order passed by the Judicial Magistrate of I Class at Chintalapudi, directing the petitioner and respondents 1 & 2 to undergo D.N.A Test.

Hence, I find no error to interfere with the order in CrI.R.P.No.37 of 2017 dated 07.06.2017 passed by the Principal District Judge, West Godavari at Eluru, in view of limited jurisdiction of this Court. Consequently, the criminal revision case is liable to be dismissed.

In the result, the criminal revision case is dismissed.

Consequently, miscellaneous applications, pending if any, shall also stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date: 2017

SP