

Case Report

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DNA Fingerprinting as an Evidence and Role of Indian Supreme Court

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Introduction:

Genetic revolution has brought about tremendous changes in our life. With the completion of human genome project, plethora's of information are being unleashed which are quite helpful in identifying specific diseases with varying degree of accuracy and specificity. Simultaneously these are equally helpful in deciding various civil and criminal cases. DNA technology, as a latest tool of forensic science is the by-product of modern genetic science. Current gold standards of evidence provided by forensic science is DNA testing. DNA fingerprinting technology is a new technique of identifying a person on the basis of genes as no persons have identical sub-genetic structure. DNA is a valuable tool used by forensic scientists that can absolutely prove the innocent prisoner and convict the guilty. DNA testing has now reached the point where suspects may be eliminated with confidence. Forensic DNA technology that conclusively eliminates a suspect is so radical and credible that it persuasively meets the very-high thresholds of proof required by a court to free a factually innocent person. The DNA evidence in the form of saliva, blood, skin tissues, hair and semen is often recovered from crime scenes and is crucial tool for investigation of violent crimes.

As the justice delivery system is innovatively adopting the DNA tests, there is an urgent need for a close watch over the various aspects relating to DNA finger printing tests. The sampling procedure is of much concern; because of the effect of contamination, cost of challenging and backlog of the laboratories. The adoption of this technique has raised various constitutional issues and there is an urgent need to discuss the issues particularly those relating to privacy and potential of abuse of these tests. The conclusiveness of these tests has raised the question of post conviction debate. The most concerned issue with the DNA fingerprinting test is related to the admissibility of these tests as evidence in the justice delivery system. The problem of DNA Data Bank and Data Base is the natural outgrowth of adopting these tests into the administration

of justice delivery system. The right of personal liberty is also a big concern.

The gradual process of adoptability of innovative scientific technique into various legal systems is a matter of discussion. The oscillating balance to keep pace with the rapidly growing technical advancements has opened the doors of discussion in various judicial systems. The American judiciary is a glaring example of the proper response towards these technical advances. In The developed countries like USA, UK etc., which have well equipped machinery, good infrastructure, and the problems relating to DNA technology, are somewhat different as compared to developing countries. Instead of legal constraints the problems there are mainly concerned with sampling procedure, personal liberty, and standards for admissibility in evidence.

The Indian justice delivery system is in its infancy for the admission of DNA tests. The existing adversarial justice system has problems to deal with the conclusive nature of the reports of these tests. In spite of the fact that there is no exclusive DNA legislation in India, the judiciary is gradually leaning towards the admissibility of DNA Tests in several cases. This has created various problems and constitutional issues. The social structure of India is also responsible for the problems, which are not, concerned worldwide generally. For example; the implication of DNA Tests and its effects in the matter of family laws have a potential for immense debate in India, where as in America the potential of abuse and laboratory concerns related with DNA testing are important issues for their discussions. Indian legal system is also not responding by way of amendments to cope up with the pace of rapid technological advancements.

DNA Fingerprinting:

Fingerprint is unique identification clue and no two person in millions have the same fingerprint. DNA profile is more accurate and precise tool of identification and no two person may have same

DNA profile, because of such uniqueness it is called DNA (Deoxy-ribo Nucleic Acid) fingerprint.

DNA Fingerprinting and Evidence Act:

Since the DNA test has not yet been included in the Evidence Act, it is, therefore, left to the discretion of the judges of various courts whether the DNA tests under section 45 of the Indian Evidence Act should be accepted or not. The following case is an example of what happens under such circumstances. The concerned judge has refused to order for DNA test in a paternity dispute and insisted, to depend on circumstantial evidence.

A case M.P. No. 19938/91 filed on July 5, 1991 requesting the court to direct the respondents to undergo DNA test, was rejected on October 10, 1991. As against the said order a criminal R.P. No. 3358 of 1991 was filed which was disposed off by the 1st Additional Metropolitan Session Judge, Hyderabad on March 27, 1992. The said court held that presumption under section 112 of Evidence Act is always rebuttable; finally the court stated "The object of obtaining DNA fingerprinting test to disprove the paternity is only collecting a piece of evidence which is clearly prohibited u/s 112 of Evidence Act R/W Section 4 of Evidence Act."

According to various High Courts, in matters of civil proceedings in paternity cases the court must have regard to section 112 of the Evidence Act. 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 eight 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 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 legitimization of the child would result in injustice to the father. Courts have always desisted from lightly or hastily 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 as unchaste woman.

This section requires the party disputing the paternity to prove non-access in order to dispel the presumption." Access and non-access" mean "the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation."

But as we are aware, sciences being a developing subject, the possibilities of new techniques being developed should not be rules out. Science did come out with the most remarkable and authentic technology, which is hardly fallacious. The DNA fingerprinting as is generally referred to and by enlarging the base which can be called as DNA profiling is the most advanced method of discovering, asserting, and determining the lineage of any human being by comparing the DNA profile with the disputed subject. The distinct characteristic of its remotest possibility of failing (which is virtually nit) has made this method to gain acceptability of the judicial fraternity in the court. Even the Supreme Court has approved of its extremely encouraging results and has acknowledged its potential

as an effective aid in identification and investigation processes. It is the most positive evidence, which can distinctly segregate the person from among the millions and thus can pin-pointedly give the results and prove the facts conclusively.

Though the Constitution of India does give the right to every individual whereby he/she cannot be compelled to give evidence against one-self, yet from the latest decision of the Special Court constituted for trying the stock scorn case, the accused was made to submit himself for the lie-detector test; as the Court held that such a test is imperative for the proper and better investigation. Though lie detector cannot be said to be a perfect and best means of investigation apparatus, the Court has taken a view as stated above.

In the sensitive subjects of litigation like paternity, maintenance and other matrimonial matters, the application of DNA profiling is the best method, because, this process gives profiling of a person in regard to his lineage, and thus it should be treated more as a Document authenticated by an expert. The privilege attached to Order 11, Rule 12 to 16 of C.P.C. of that of Discovery and Production of Document and drawing adverse inference under Section 114 of Indian Evidence Act should be given to this document of DNA profiling.

Thus, in view of making justice and also to make it appear so, the Courts should direct parties to submit to DNA profiling tests; and in case of the refusal of the party so directed, should draw adverse inference without reading unreasonably in the lines of the provisions of the Constitution of India. Science has provided with the most remarkable technology of DNA fingerprinting, which is conclusive and hardly fallacious. It has made the section 112 of Evidence Act irrelevant. Refusal of ordering DNA fingerprinting test in such cases and taking recourse to the section 112 is unjustified. The Constitution and its provisions are meant to be used for doing justice and not for denying it. It is therefore, essential that DNA fingerprinting test is included in the Evidence Act.

The Indian Perspective: Study Of Case Laws:

DNA technology in course of time is bound to play a prominent role in our legal, system in both the criminal and civil areas giving a new look to the subject of expert testimony. In the matters of fixing the paternity and maternity of a child and also in cases of homicide and rape. DNA fingerprinting evidence will be a decisive and clinching factor. In India, barring a negligible number, cases have yet to come before the courts involving expert opinion in the science of DNA technology.

State through C.B.I v. Amarmani Tripathi,¹ in this case, Amarmani Tripathi was alleged for murder of Madhumita Shukla but he argued that there has not been any relation with her but after DNA testing it was proved that there was an illicit relation between them and the child in Madhumits's womb was of Amarmani. The court relied upon DNA Test and accepted it as an evidence.

Arushi Murder Case:

There is a famous case named **Arushi Murder case** which has been an issue for media and the investigating agency is taking help of DNA test for finding out the truth.

Raju Namdev Patil v. Daman Die Administration,² A case was lodged under Sec. 302,307 and 320 of IPC but due to shortage of evidence the DNA test of accused was conducted and it was matched with the blood samples which were found at the place of occurrence and ultimately the court accepted it as an evidence.

In **Murli Manohar Mishra v. State of Karnataka**,³ the deceased was identified by DNA testing of his skeleton and the Supreme Court accepted it as evidence.

In August 2010, there was a matter with regard to the identification of a CRPF personnel Kanhaiya Yadav who was killed in Chattisgarh's Bastar District. To identify his body, the help of DNA test is to be taken but it was found the DNA test of Jwawn's body did not match to that DNA of the body and after taking into consideration all facts connected with the concerned matter the senior officers did not refuse the possibility that Yadav could have staged his own death for pecuniary benefits because if he was killed in the line of duty his family was eligible for a total payment of nearly Rs. 35 lakh. Thus, the authority has stopped all ex-gratia payment to Yadav's family. Mr. Dua, a senior police officer said that on paper Kanhaiya Yadav is missing and they are making all efforts to find him. Thus, DNA has been used to solve the complex matter.⁴

In a case that came before the court of Chief Judicial Magistrate, Tellicherry (Kerala), on vilasini a village girl, filed a petition against one Knhiraman for maintenance alleging that a child was born to her on account of the illicit connection between them.⁵ The defendant disowned her and denied the paternity of the child. The Chief Judicial Magistrate ordered both of them to undergo DNA fingerprinting test in order to ascertain the parentage of the child at CCMB, Hyderabad, which is carrying out experiments in this field. As Kunhiraman had no identical twin brother, the court safely arrived at the conclusion that he was the biological of the child.

The decision of the Kerala High Court in the case of **Sajeera v. V.P. K. Salim**⁶ also point in the same direction. In this case it was held that, "Now the DNA finger-printing test has been much advanced and resorted to by the Courts of law to resolve the dispute regarding paternity of the child". It was observed that the DNA test would certainly be corroborative evidence in support of the contention of PW I that she had no access to her husband at about the time the child would have been conceived.

It was observed in **Anil Kumar v. Turaka**⁷DNA encodes the person's unique genetic make up. compared to blood tests the odds of DNA fingerprinting going wrong are one in 30,000 million." thus DNA Tests, though hitherto considered, as purely corroborative evidence should be held sufficient to sustain convictions. It is then a question of degree and some risk of convicting the innocent must run. Although scientifically speaking, as observed above by the Andhra High Court, the probability of DNA fingerprinting going wrong approximates to impossibility.

In a recent judgment of the Supreme court in the year 2001, **Kamti Devi v. Poshi Ram**⁸ the Court gave priority to social parentage over biological parentage and thereby rejected DNA evidence by observing that though the result of a genuine DNA test is said to be scientifically accurate it is not enough to escape from the conclusiveness of section of the appellant. Fifteen years after

marriage the appellant gave birth to a child. The respondent filed a civil suit for declaration that he was not the father of the said child. Though the issue was not directly in issue in the instant case, the Supreme Court opined that even a DNA test that indicated that the respondent was not the father of the child would not be enough to rebut the conclusiveness of the marriage as proof of legitimacy of the child. The court held that the only way of rebutting the conclusive proof provision would be to adduce evidence of non-access.

In **Sharda v. Dharmpal**⁹ the Supreme Court took a very positive view regarding importance as well as admissibility of DNA evidence in matrimonial cases. The Supreme Court categorically observed that; a matrimonial court has the power to order a person to undergo medical test. 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.

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 refused to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

In the aforesaid case the Supreme Court by distinguishing its earlier decision in **Gautam Kundu** case further held that right to privacy under Article 21 of the Constitution is not an absolute right and in a case of conflict between the fundamental rights of the two parties, the court has to strike balance between the competing rights¹⁰.

In at least one Indian case, **Chandra Devi others v. State of Tamil Nadu**¹¹. The Court has relied on expert evidence on DNA evidence that has stated that out of the 3.3 billion base pairs only about 3 million vary from person to person i.e. 1% of the DNA is useful for analysis. This sensational case involved the rape and murder of several teenage girls in the Ashram of a god-man Premananda Alias Ravi, by the god man and his accomplices.

In a lengthy judgment the Madras High Court considered 4 important questions:-

Whether the DNA evidence is generally accepted by scientific community?

Whether the testing procedure used in this case is generally accepted as reliable, if performed properly?

Whether the tests were performed properly in this case?

Whether the conclusion reached in this case is acceptable?

In answering the first question the Court relied on the extent to which Courts in the United States had relied on evidence of DNA analysis. The 2nd, 3rd and 4th questions were all answered in the affirmative and the accused persons were convicted on various counts on the basis of the evidence of evidence of experts on DNA fingerprinting/profiling and other evidence.

However, in another case **M.V. Mahesh v. State of Karnataka**,¹² the Court acquitted the accused, one of the grounds being that the requisite amount of DNA of high molecular weight was not present so as to make the test results sufficiently conclusive and accurate. The Court further went on to say that the DNA test was not a fool proof one and also commented on the fact that there were no national standards set or established for DNA testing in India.

In *Syed Mohammad Ghouse v. Noorunnissa Begum*¹³ the Andhra Pradesh High Court held that the respondent in this case was under no compulsion to submit to a DNA test. The order of the family Court directing the DNA test was set aside and the Court relied on Kundu's case¹⁴.

In *Kanchan Bedi v. Gurpreet Singh Bedi*¹⁵ the defendant denied that any marriage had taken place between him and the plain tiff, and therefore he was no the father of the child. A DNA test was demanded to determine the paternity of the child and the direction of the Court with respect to the DNA test was challenged. Kundu's case was distinguished on facts and on the ground that the future of a minor infant was in question and the court's parents patriae jurisdiction had been invoked in this regard.

Again, in *Sajeera v. P.K. Salim* a direction to undergo a DNA test was given. However in this case it was already admitted by the mother that the child was born out of wedlock and there had been an illicit relationship. Moreover the Respondent had expressed willingness to undergo the test at the petitioner's cost and there was no question of compulsion.

Another related issue is of the refusal to undergo a DNA test in paternity cases. It has been held by the Supreme Court that refusal to undergo a paternity DNA test would bar a party from challenging the paternity of the child. *Dwarika Prasad Satpathy v. Bidyut Prava Dixit*,¹⁶

This decision of the Supreme Court has been followed in the case of *K. Selvaraj v. P. Jaykumari*¹⁷ and it was also stated that an adverse inference can be drawn in the party refuses to undergo a DNA test.

The point of adverse inference is also referred to in another case *Sadashiv Mallikarjun V. Naddini Sadashiv Kheradkar*.¹⁸ This seems to be a preferable interpretation and strikes a balance between to two extremes. The Court does not have the power to direct the giving of a sample but if it is not given the Court may draw an adverse inference.

Order 26, Rule 10-A of C.P.C. deals with commission for scientific investigation/Whether the Civil Court Or. 26. R. 10-A of C.P.C. compels any person for the purpose of scientific investigation for giving his sample blood completely against his will? It comes in contradiction with the observation of *Gautam Kundu's* case, moreover the guide lines in this case come in conflict with the spirit of S.53, Cr. P.C., 1973 for which an Investigating Officer with assistance of a medical practitioner can collect materials from the body of the arrested accused like blood, semen, nasal fluid, urine etc. for the purpose of DNA examination. The technique of DNA finger printing and the use of DNA profiling for individualization and allied cases haqs serious impact in the administration of a civil and criminal justice. But if the accused of the defendant or any other person refuses to give not only blood but also semen, urine, vaginal swab, nasal fluid etc for the purpose of DNA analysis, the entire purpose of crime investigation shall be frustrated: The same situation will also arise in the Civil Court. Their Lordships of the Hon'ble Apex Court in *Gautam Kundu's* case observed that no persons can be compelled to give sample blood for analysis against her will and no adverse inference can be drawn against her

for this refusal.

On the other hand, a Division Bench of Allahabad High Court¹⁹ dealing with a criminal case, was of the view that though there was no specific provision in Indian Law permitting taking of blood yet in a criminal case, and examination of person can be made under Section 9 (1) of the Cr PC which shall include the taking of blood samples, including an examination of an organ inside the body. The Court drew the aforesaid conclusion as per the provisions of Section 367 (1) and Section 482 of the Cr PC. it also held that there is nothing repulsive or shaking to conscience in taking the blood of an accused person in order to established his guilt and so far as the question of causing hurt is concerned, even causing some pain may be permissible under Section 53 Cr PC.

Dipanwita Roy vs Ronobroto Roy²⁰

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 leveled by him (of the appellant-wife's infidelity) through a DNA test. Court agree with him. In Court view, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. Court is 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 so.

Supreme Court would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant-wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation leveled by the respondent-husband, against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the concerned Court, by drawing a presumption of the nature contemplated in Section 114 of the Indian Evidence Act, especially, in terms of illustration (h) thereof.

This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the

presumption contemplated under Section 112 of the Indian Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved.

Thus it is quite clear that Indian Judiciary is very much active in adopting this new phenomenon. The main problem in this regards is the absence of any express DNA law. Wherever this is clear of law the courts are hesitating to order for DNA testing, but where there is possibility of any by-pass the courts are order for the tests through that.

Conclusion:

DNA fingerprinting is emerging as recognizable evidence for establishing guilt or innocence with a virtually hundred percent certainly. The vigilant search for truth is the hallmark of the criminal justice system. For this purpose, it becomes pertinent that the methods of investigation, rules of criminal procedure and appellate process should be so designed as to ensure that the guilty are punished while the innocent are protected. So the application of fingerprinting DNA profiles and DNA databases, which ensures hundred percent accuracy in the information, becomes indispensable for administration of justice. DNA fingerprinting has immense potential to speed up the process of criminal justice system. The time is ripe for courts to solidly support the use of scientific evidence in the courtroom, assuming the evidence is reliable and relevant to the matter in hand.

Apart from criminal cases DNA fingerprinting has been equally helpful in-deciding civil cases e.g. paternity/maternity, inheritance, maintenance etc. Once courts confront the fears of using genetic evidence in civil cases, the parties will benefit from more accurate claim adjudication, whether in calculating life time expectancy damages or proving legal causation. The fears relating to the use of genetic material requires a full public debate.

In the wake of recent developments and the positive approach of

judiciary for the admission of DNA as evidence, it can be presumed that in future there would be exclusive DNA legislation in India.

References:

1. www.manupatra.com
2. www.manupatra.com
3. www.manupatra.com
4. The Hindu, 20th August, Friday, 2010
5. Dr. V. Krishnamachar "DNA fingerprinting Evidence and Legal Admissibility, 1994-CrL J (Journal Section)
6. 2000 Cr LJ 1208 (Ker.) at 1210.
7. 1998 Cr LJ 4279 (A.P.)
8. (2001) 5 SCC 311: 2001 SCC (Cri) 892.
9. scc.p.525 para 81
10. Report one of committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, Vol. 1, India March 2003
11. Manu/TN/2335/2002
12. 1996 Cri LJ 221 (Kant)
13. 2001 Cri LJ 2028
14. 1993 Cri LJ : AIR 1993 SC 2295
15. 2003 (103) Delhi LT 165
16. 2000 Cri LJ AIR 1999 SC 3348
17. 200 Cri LJ 4748 (Kerala)
18. 1995 Cri LJ 4090 (Bom.)
19. Jamshed v. State of Uttar Pradesh, 1976 Cr LG 1680.
20. civil appeal no.- 9744/2014, SC