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RIGHT TO PRIVACY OF PUTATIVE FATHER VS RIGHT OF THE CHILD TO KNOW IDENTITY AND ORIGINS FROM DNA EVIDENCE IN PATERNITY DISPUTES

Gaur Kanika[1*]

[1]Research Scholar, Panjab University, Chandigarh-160014, India

ABSTRACT

DNA has been quintessential evidence in deciding paternity disputes since its inception and has now become a beacon of hope for children desperately yearning for their right to know identity, right to origins and right to family relations. But, nevertheless, there are various legal implications of DNA Evidence. The Right to Privacy of an individual is sacrosanct and is provided by Supreme law of the Land i.e. the Constitution of India (Article 21) but that right of Father in paternity disputes infringes a Child's Right to know his origins, Right to identity and Right to Family relations which are clearly guaranteed by various International Instruments. In this Paper, the merit of both the rights in a paternity dispute will be analyzed and also the harmonization of both the rights to bring about a balanced result.

Keywords: DNA, Right to identification, Child's Right, etc.

Introduction

What is Forensic Evidence?

The word 'Forensic' is derived from Latin language which means "public" (Oxford English Dictionary, 2005). In ancient Rome, the Senate met in the Forum, a public place where the political and the policy issues of the day were discussed and debate. Hence, technically, "forensic" means as applied to public or legal concerns.

Together, "forensic science" is an apt term for the profession of scientists whose work answers questions for the courts through reports and testimony. Forensic Science would therefore, mean the science which is used in the courts of justice. [1]

Background of Forensic Science in Legal system

With the onset of Human Civilization on the planet Man lived in groups. Later, called as social groups. 'Might is Right' was the rule in the social groups till such time approved do's and don'ts governed the social groups and the then society. The laws were enacted on the basis of do's and don'ts, taboos and customs to run the society smoothly. The religious philosophers and preachers were consulted to seek justice who redressed such life problems in their own ways so as to compel the individuals to speak the truth due to the fear of Almighty Gvod. The police and different law agencies came into being who investigated, tried and adjudicated various matters. Two types of disputes mainly took place in the society, the civil and the criminal, accordingly, the Civil and Criminal laws were enacted to deal with the human problems and for their adjudication. The science and technology in the 20th century and now in 21st century is providing irrefutable evidence known as forensic evidence in solving civil disputes. If we go by the history of law

Corresponding Author Email: jrgaur@rru.ac.in

and forensic science it is as old as human civilization for the identification of one's artifacts as even in cave paintings, depiction of human hands along with the paintings and presence of finger and thumb impressions on the potsherds indicated that man even in those times used finger prints for the authenticity of the articles made by them. In 17th century palm and sole prints of new born babies were taken for the first time in British and American hospitals so as to avoid accidental or deliberate transfer of new born babies to the wrong mothers. The impact of forensic science especially DNA evidence in solving Paternity disputes in Civil law is paramount. DNA as a technology is comparatively new and since its inception has been used by Courts to bring justice to abandoned, neglected children and has been able to pin socio-legal obligations on the putative Father. [2]

What is DNA?

DNA is Deoxyribonucleic Acid is a molecule which contains genetic instructions for the development, functioning, growth and reproduction of all organisms and many viruses. Both DNA and RNA are nucleic Acids. DNA of no two persons is same on the planet except the peculiar case of identical twins. [3]

Types of DNA Testing Techniques

There are many ways to test DNA but two main types of testing is Restriction Fragment Length Polymorphism (RFLP) and Polymerase Chain Reaction (PCR) testing. RFLP technique uses large amount of DNA and is time consuming technique whereas PCR Technique can be used to amplify very small amounts of DNA in less time frame hence more samples can be analyzed in shorter duration of time. Cleaved Amplified Polymorphic Sequence (CAPS) is another name for PCR-RFLP technique.[4]

DNA TESTS- The Journey of its Evolution in Indian Legal System

Section 112 of Indian Evidence Act 1882, was formulated at a time when DNA technology had not come into being but even today DNA tests are not ordered as a routine by the Indian Courts as that causes infringement of privacy of both the parties. Even the result of a genuine DNA Test may not be enough to escape the conclusiveness of the Section 112 Indian Evidence Act 1882.The Courts have given remarkable judgments in parentage disputes well starting with the *Gautam Kundu Case (1993)* [5] in which it was held that courts in India cannot order blood test as matter of course and there must be a strong prima facie case in which the husband must establish non-access in order to dispel the presumption arising under **S**ection 112 of the Indian Evidence Act, 1872. It was also held that no one can be compelled to give samples of blood for analysis in such paternity disputes but the Court is entitled to draw adverse inference if any party refuses for the test. The Hon'ble Court also traced evolution of DNA tests and said "*...There is no justification for the court below to refuse the same on the ground that section 112 of the Evidence Act would be an obstacle in seeking relief of blood group test. Before we deal with the arguments, we will examine the law as available in England. At the beginning of the century scientists established that human blood had certain characteristics which could be genetically transmitted. The first recognised system was ABO blood group. The blood group of a child is determined by the parents' genetic make- up but the number of possibilities is such that it is not possible to prove that certain individuals are the father on the basis of comparing blood groups, only, that they are not the father. By 1930s other immunological test became available. As a result the possibility of establishing paternity increased. An attempt by way of statutory provision to make blood test compulsory in England failed in 1938. However, in 1957 the Affiliation Proceedings Act was passed. Under that Act, it was assumed that a man was the father once a sexual relationship with the mother at the time of conception was proven unless he could show another man had intercourse with her at that time. Under the Act either party could ask for a blood test and either was entitled to refuse to take part, although only the mother can apply for maintenance. The Family Reforms Act, 1969 conferred powers on the court to direct taking blood test in civil proceedings in paternity cases… Since the passing of 1969 Act the general practice has been to use blood tests when paternity is in issue. However, it is to be stated the court cannot order a person to submit to tests but can draw adverse inferences from a refusal to do so….*" Further in Shardavs Dharampal Case (2003) [6] the power of the matrimonial court to order such tests was clarified and it was also held that having regard to the future of the child, such orders shall not be passed mechanically and there were three significant conclusions viz a matrimonial court has the power to order a person to undergo such 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 and 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. In Banarsi Dass vs Teeku Datta (2005) [7] the DNA Test was denied asserting that it is the responsibility of the party who claims to support their claim by way of placing supporting evidence and hence establishing their claim and DNA test cannot be ordered as a matter of routine. In Bhabani Prasad Jena vs Convenor Secretary, Orissa State Commission for Women and Another (2010) [8] the issue in question was when it is appropriate to order a DNA test. The Court discussed the previous cases on the matter like Gautam Kundu Case (1993) and Sardavs Dharampal case (2003) and held "*...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 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 to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed……*" Hence, it was cleared that a DNA test can't be ordered in a routine manner and must be ordered only when it is imminently needed.

In N D Tiwari case also called as Shri Rohit Shekhar vs Shri Narayan Dutt Tiwari Case (2011) [9] is an enlightening judgment on the issue. The petitioner who was born during a subsisting marriage of his Mother, asked for the DNA test of the respondent. The Court ordered DNA Test on the respondent, a third party to marriage, primarily recognizing from various international covenants the right of the child to know his biological antecedents and Supreme court of India as well did not intervene in the Delhi high court decision to order DNA test which was a new rule forward. The Judicial Courts held the interest of the Child is of paramount importance and supersedes all other issues involved.Infact, the Hon'ble Court ordered that the sample be taken from the putative father's home and directed him to be present there because the Court considered that the DNA test is imminently important to be done in this case. Recently in Kathi David Raju vs. State of A.P. and another (2019) [1] the hon'ble Supreme Court held that DNA tests should not be ordered unless a substantial investigation has first been completed; there has to be a concrete reason for ordering a DNA test and the police must not jump onto DNA tests. To bridge the gap between old law i.e. Section 112 of Indian Evidence Act 1882 and new scientific techniques the Law Commission of India in its 185th Report (2004) recommended that the DNA testing must be included in Section 112 by way of amendment in the said section.

Procedural Law followed by the Matrimonial Court in Paternity Disputes

Under Order XXVI Rule 10A CPC the Court might order a DNA test as it relates to scientific investigations and Rule 12 is relevant as well; both reads as:

Order XXVI Rule 10A CPC- Commission for scientific investigation.-

(1) Where any question arising in a suit involves any scientific investigation which cannot, in the opinion of the court, be conveniently conducted before the court, the court may, if it thinks it necessary or expedient in the interests of justice so to do, issue a commission to such person as it thinks fit, directing him to inquire into such question and report thereon to the court.

(2) The provisions of rule 10 of this Order shall, as far as may be, apply in relation to a Commissioner appointed under this rule as they apply in relation to a Commissioner appointed under rule 9.

Order XXVI Rule 12 CPC-

(1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

(2) Proceedings and report to be evidence. Court may direct further inquiry-The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

However, to streamline the laws on DNA, *The DNA Technology (Use and Application) Regulation Bill, 2019* [11] is pending to be made into an Act. The bill provides for regulation of DNA technology and provides for identification of certain persons. According to this bill the DNA testing would be allowed only for the matters as listed in its schedule and includes offences under Indian Penal Code 1860 and Civil Paternity disputes.

Right to Privacy under Indian Constitution

The Right to privacy is provided under Constitution of India under Article 21. According to Black's law dictionary privacy means "The right to be let al.one, the right of the person to be free from any unwarranted publicity; the right to live without any unwarranted interference by the public in matters with which the public is not necessarily concerned" [12] In *People's Union of Civil Liberties vs Union of India(1997)* [13] it was held that Right to Privacy is part of Right to Life and Personal Liberty under Article 21 of Constitution of India and cannot be curtailed except according to the 'procedure established by law'. The Right to privacy was declared a fundamental right by the judgment of *K.S. Puttaswamy vs Union of India (2015)* [14] in which it was held that Right to Privacy is an independent right and is constitutionally protected but like many other rights it is not absolute and has restrictions as provided by the law but proportionate to the objective that the state wants to achieve. Hence, it can be safely concluded that Right to Privacy of an individual is a restricted Right.

Right of the Child to know Origins and to Identity under International Law

The convention on Rights of Child CRC 1989 Article 7 and 8 states that

1. *"The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.*
2. *States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."*

Article 8 –

1. *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*
2. *Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."*

Hence, according to International Instruments a Child has Right to his identity, Right to know origins and Right to Family relations. Parentage disputes seek the help of Court to establish the parentage and to grant aforementioned Right to the Child.

DNA Tests and the Burden of Proof

The burden of proof lies on the party who asserts a claim and it is his responsibility to prove his case and standing but in case of DNA tests in paternity disputes the Courts have maintained a balance between the interest of the child and the right of an innocent husband or partner. Nevertheless, the law bends in the favor of legitimacy and hence any claim as to bastard child or unchaste woman has to be proved by strong preponderance of probabilities. [15]

DNA Tests in Adoption Cases

Adoptions in India are governed by Hindu Adoptions and Maintenance Act, 1956, The Guardians and Wards Act, 1890 and Juvenile Justice Act 2015. Right of the children who are adopted, abandoned or lost to know their origin or to know their identity with the help of DNA profiling is often in conflict with the right of the putative father or mother's right to privacy. But the right to know origins and right to identity of a child is not only important to fulfill the psychological need of the child to know his biological parents but due to medical reasons as well. There might be need for an organ donor or to know genetic medical history of the child. In India, especially, where mostly abandoned or "cradle babies" are put up for adoption, hence the identity of the putative father or mother is often kept in utmost secret. The Birth registration records are often carelessly kept which make it difficult for long lost children, abandoned children or inter-country

adopted children to trace their biological children. Hence, DNA test petitions in Adoption cases are inconvenient and time consuming. [16]

DNA Evidence in Parentage Disputes: A Forensic Science Perspective

DNA Evidence and earlier blood grouping has proved to be the clinching evidence in paternity/maternity disputes. A few cases as reported in the Forensic literature showing the importance of DNA profiling in paternity disputes are highlighted below-

Case I – Two women were admitted to PGIMER, Chandigarh for delivery. One woman delivered a male baby whereas the other delivered a female baby. The women was given female baby suspected that she delivered the male baby and the nurse has exchanged the babies and given her female baby. She lodged a complaint with the PGI authorities. Sample of blood were drawn from both the couples, husband and wives, and both the babies. DNA profiling of the blood samples confirmed that the babies have not been exchanged as alleged and were assigned to the right mothers. The couples were proved to be the genetic parents on the basis of DNA profiling.

Case II – A young girl was raped by two boys who were first cousins. She became pregnant and delivered a male baby. After the birth of the child, she filed suit for knowing the paternity of the child. She also stated that two persons were detained by police and were produced before a doctor for taking blood samples for subjecting to paternity test. The samples of the blood of the baby and mother were also collected and all the samples were sent to serology laboratory for paternity test. After having conducted blood group tests for 18 blood group system, it was not possible to find out the paternity of the child as both accused were first cousins. The samples were then subjected to DNA profiling and paternity of the child was established. Later on biological father of the baby married with the lady and they are living happily together.

Case III – A person claimed to be the long-lost child of a wealthy couple who have lost one of their sons in a fair when he was a small child of three years. The wealthy couple were suspicious about as to how should they believe that the person claiming to be their long-lost child is really their child or not. They wanted police verification. Police got the blood samples of the couple and the claiming person to be their child drawn from a doctor and sent the same for DNA profiling. The DNA results confirmed that the wealthy couple was really the genetic parents of the claiming person. They adopted him happily. [17]

There are cases of paternity disputes in family matters or paternity/maternity identification in cases of adopted children, child swapping at hospitals, lost children, kidnapped children reunited with families where DNA Evidence has proven to be of paramount importance.

Conclusion

The balance between the Right to privacy of the Putative Father and Right of the Child to identity, origins and to family relations is a delicate one. The judgments are dealt with on a case-to-case merit basis. But there is a trend of treating interest of the child as paramount. As discussed earlier in this paper the right to privacy takes a back seat where the interest of the child hangs in balance. [18] The courts have also been reluctant to upset the already established status of legitimacy of child; rather have taken great pains in conferring the status of legitimacy to the claimant. [19] To end the conflict of Section 112 Indian Evidence Act with the modern technology of DNA it is imperative that the said section be amended and accommodates DNA Evidence as conclusive evidence of paternity; as also recommended by the Law Commission in its 185th Report. [20] Lastly, as only the DNA tests ordered by the courts are legal in India which is by process of long and arduous litigation process, there has been a recent trend of an increase in "peace of mind" DNA tests done by private labs which sometimes lack experienced professionals or lack availability of mother's DNA sample in case of paternity test by doubting father (DNA of both parents is essential for correct DNA test Result) [21]. Hence, to curb such practices it is important that the pending DNA Technology (Use and Application) Regulation Bill, 2019 be passed expeditiously so that the State can protect the both the interest of the child and Right of privacy of both the parties. The Bill provides for penalties for various offences, including: (i) for disclosure of DNA information, or (ii) using DNA sample without authorization; disclosure of DNA information is punishable with imprisonment of up to three years and fine of up to one lakh rupees under the said proposed bill. Lastly, it is important that the burden of proof on the claimant is not onerous to prove what he asserts (in this case his claim to paternity of Putative Father) rather it must be on the Putative Father to dispel the claim of paternity.

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