

THE HON'BLE SRI JUSTICE G. KRISHNA MOHAN REDDY

CRIMINAL PETITION No.777 of 2010

November 30, 2012

Between:

Soma Rama Chandram, S/o.Late Venkatachalam
And others

... Petitioner

AND

The State of Andhra Pradesh, represented by its
Public Prosecutor, A.P. High Court, Hyderabad
And others

... Respondents

THE HON'BLE SRI JUSTICE G. KRISHNA MOHAN REDDY

CRIMINAL PETITION No.777 of 2010

ORDER:

This Criminal Petition has been preferred by the petitioner-accused under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C) to quash order dated 16.7.2009 in CrI.M.P. No.89 of 2009 (CrI.M.P) on the file of Judge, Family Court-cum-III Additional District Judge, Warangal.

The petitioner is the husband, the second respondent is the wife and the third respondent is the daughter of the second respondent. Whereas the petitioner herein is the respondent, the respondents 2 and 3 herein are the petitioners in the M.C. No.8 of 2009 (M.C). For the sake of convenience, I refer the parties as arrayed in the M.C. before the Court below.

The petitioners filed the M.C. to award certain amounts towards their maintenance against the respondent on the ground that he being the husband of the first of them and father of the second of them, neglected and deserted them without lawful cause while they got no

means to maintain themselves. It is the claim of the respondent in the M.C. that the first petitioner is guilty of adultery and the second petitioner was not born to him whereas she was born to the first petitioner by virtue of her adultery with a different male person by reason of which he got no responsibility to provide any maintenance to the second petitioner. In that context he filed the CrI.M.P under Section 12 of the Family Courts Act, 1984 read with Section 45 of the Indian Evidence Act, 1872 before the Court below seeking to send the second petitioner for DNA (Deoxyribo Nucleic Acid) test for the purpose of determining as to whether he happened to be her natural father for the purpose of awarding necessary maintenance to her as pleaded in the M.C against him on which the Court below passed the following order.

“Perused the petition and counter. As per Section 45 of Evidence Act, 112 of Evidence Act, 120 of Evidence Act, this Court cannot compel the party to go for DNA test. Accordingly the petition is dismissed”.

Learned counsel for the respondent would contend that by virtue of Order XXXIX Rules 1 and 2 CPC, for the purpose of dredging the actual paternity of the second petitioner, necessary orders are to be passed by the Court for subjecting her to necessary DNA test. He further contends that if the second petitioner refuses to submit herself for medical examination, an adverse inference can be drawn against her within the meaning of Section 114 of the Evidence Act. It is also contended by him that if an order is passed giving directions to carry out certain tests, non-implementation of the order will have the tendency of making the law and the Court, a laughing stock. According to him, under those principles, necessary force can also be applied against the person for the implementation of the order for having effective adjudication of the matter. He has drawn the attention of this Court to a decision of Delhi High Court in **Rohit Shekhar v Narayan Dutt Tiwari**^[1], in which it is observed that the first

respondent therein against whom such an order was passed should obey the order and if he continues to defy the order, necessary police assistance and reasonable force for the compliance thereof should be taken or applied. Learned counsel also has relied upon, in this context, the decision of the Apex Court in **Sharda v Dharmpal**^[2], in which it is observed under similar circumstances that an order of subjecting the second respondent therein for DNA test can be passed to achieve necessary object and if the order is not obeyed an adverse inference can be drawn.

On the other hand, learned counsel for the petitioners would contend that compelling the second petitioner to undergo DNA test against her consent is against the principle of testimonial compulsion as guaranteed under Article 21 of the Constitution of India, which therefore cannot be permitted.

Therefore it is to be seen as to whether the order passed by the Court below in rejecting the plea of the respondent to send the petitioner for DNA test in the circumstances of the case is reasonable and tenable or not, and whether necessary steps are to be taken for doing so to have the evidence of real paternity of the second respondent besides the question of paying maintenance to her against the respondent even using force and against her consent.

In **Sharda** case a question was considered as to whether an application filed seeking for sending the wife concerned (appellant) therein for medical examination, with regards to her unsoundness of mind said to be incurable, in the context of granting divorce to her husband under Sections 12(1)(b) and 13(1)(iii) of the Hindu Marriage Act, 1955 could be entertained. It was contended on behalf of the appellant therein also that the enquiry court got no jurisdiction to issue such directions as it would be violative of right to personal liberty guaranteed under Article 21 of the Constitution of India. In that context, the Apex Court has held as follows.

... The matter may be considered from another

angle. In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia...etc. normally without there being medical examination, it would be difficult to arrive at a conclusion as to whether the allegation made by his spouse against the other spouses seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If respondent avoids such medical examination on the ground that it violates his/her right to privacy or for a matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash. In matters of aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so-called right to privacy of the respondent. Thus the Court has to reconcile these competing interests by balancing the interests involved.

... If for arriving at the satisfaction of the Court and to protect the right of a party to the lis who may otherwise be found to be incapable of protecting his own interest, the Court passes an appropriate order, the question of such action being violative of Article 21 of the Constitution of India would not arise. The Court having regard to Article 21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected.

... 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.

Thereby this decision categorically contemplates that the right guaranteed under Article 21 cannot be treated as absolute right. There must be some limitations to be imposed on that right particularly where two competing interests clash. With regards to the question of divorce where the Legislature has conferred a right upon one of the spouses to seek on such grounds, it would be the right of that spouse which comes in conflict with the so called right to the privacy of the other

spouse by reason of which the Court concerned has to reconcile those competing interests by balancing the interests involved. Therefore for arriving at the satisfaction of the Court and to protect the right of a party to the *lis* who may be otherwise be capable of protecting his interest if the Court passes an appropriate order the question of such an action being violative of Article 21 would not arise at all. Further if despite the order of the Court the spouse against whom such an order is passed to undergo necessary tests refuses to submit himself or herself for medical examination, the Court will be entitled to draw an adverse inference against him. In that context, the question of forcing the spouse to undergo necessary test was not under consideration.

The Supreme Court and High Courts have rendered in various decisions considering the concept of testimonial compulsion that sending a person for DNA or other medical test is within the powers of the Courts to do so as noted below.

The Supreme Court in **H.M. Kamaluddin Ansari & Co. v Union of India**^[3] 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.

The Supreme Court in **K.A. Ansari v Indian Airlines Ltd.**^[4] 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**^[5] it is 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 is 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.

The Supreme Court in **Selvi v State of Karnataka**^[6], while sitting over judgment of a single Judge, has 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 is 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 has held that the right of privacy is subject to such action as may be lawfully taken for the protection of rights of others; that the level of privacy 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 Supreme Court in **State of Haryana v State of Punjab**^[7], has held that the residuary powers under Section 51(e) Cr.PC 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 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.PC) has relied on the commentary titled “Statutory Interpretation”, 2nd Edition of Francis Bennion laying down:

“It is presumed 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.”

Similarly in **Suresh Jindal v BSES Rajdhani Power Limited**^[8], the Supreme Court has 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.

A Division Bench of Madras High Court in **Sri-la-Sri Sivasubramanyananda Swami v Sri-la-Sri Arunachalasamy**

Chidambaram^[9] has 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**^[10], it is 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 Court and to avoid gross miscarriage of justice. It is 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 is 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**^[11].

Yet another principle may be noted. The Supreme Court recently in **Shimnit Utsch India Pvt. Ltd v West Bengal Transport Infrastructure Development Corporation Ltd**^[12], has reinstated 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 has 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.

The Supreme Court also in **Mohanlal Shamji Soni v Union of India**^[13] has 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 Fernandex v Erasmo Jack de Sequeria

(Dead)^[14], it is 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 development 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'.

In **Buridi Vanajakshmi v Buridi Venkata Satya Varaha Prasad**

Gangadhar Rao^[15] relying upon **Sharda's** case, this Court held as follows.

The primacy duty of a Court is to see that truth is arrived at. The Hindu Marriage Act or any other law governing the field does not contain any express provision empowering the Court to issue a direction upon a party to a matrimonial proceedings to compel him to submit himself/herself to a medical examination. However, that does not preclude a Court from invoking its inherent jurisdiction to pass such order so as to secure the ends of justice. Medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties and perhaps may bring the parties to terms. It is laid down by the Supreme Court in **Sharda's** case that right to privacy in terms of Article 21 of the Constitution is not an absolute right. If there were a conflict between the fundamental rights of two parties, that right which advances public morality would prevail.

In **Rohit Shekhar** during the pendency of the suit, an interlocutory application was filed under Order XXXIX Rules 1 and 2 CPC for giving direction to the first respondent therein to submit himself for DNA test and/or any other test for the purpose of determining the parentage of the appellant, which was allowed on contest directing the parties to appear for the test. An appeal was filed before a Division Bench of Delhi High Court, which was dismissed.

Subsequently the first respondent therein filed another interlocutory application seeking to give direction that he should not be pressurized, compelled or forced in any manner to involuntarily provide blood or other tissue samples for DNA test. The application was dismissed and the matter was carried to Delhi High Court where a Single Judge held ultimately that the first respondent could not be physically compelled or confined for submitting blood sample for DNA profiling for the implementation of the order in the interlocutory application while further observing that weight to be attached to such refusal which should be considered while evaluating the evidence produced by the parties. The order was appealed to a Division Bench of the High Court. The Division Bench following the principles mentioned above has held that the first respondent is to be sent for the test even using necessary force against her to achieve the object.

The principles laid down, which are binding, make it very clear that the main purport of the orders of the Courts are the implementation of those orders effectively however grave their effect may be. It is needless to say that justice is done to the parties to obtain necessary reliefs before the Courts. So far as conducting necessary medical tests including DNA test for the purpose of deciding paternity of a child or for any other similar purpose is concerned even necessary force can be used for deriving necessary result to make use of those results for proper adjudication of the matters. The concept of testimonial compulsion is applicable only to criminal cases purely by virtue of Article 20(3) of the Constitution of India which reads "*No person accused of any offence shall be compelled to be a witness against himself*".

Section 125 Cr.PC provides a swift and cheap remedy against any person who, despite means, neglects or refuses to maintain (a) his wife which includes a woman after divorce who has not remarried, unable to maintain herself; (b) his minor child, legitimate or illegitimate, unable to maintain itself, the liability in case of minor married daughter

arising only when the husband is not possessed of sufficient means and until she becomes major; (c) his major child, legitimate or illegitimate (excepting married daughter) unable to maintain himself owing to any physical or mental abnormality or injury; (d) his father or mother unable to maintain himself or herself. Emphasis has been laid in all cases on the "inability to maintain" because the primary object of the section is to prevent starvation and vagrancy. A major married daughter has been wholly excluded from the operation of this section as the responsibility of maintaining her should be on her husband. Its object is a measure of social justice falling within the constitutional sweep of Articles 15(3) and 39 enacted to protect the weaker sections like women and children, a secular safeguard irrespective of the personal laws of the parties. The object is to compel a man to perform the moral obligation which he owes to society in respect of his wife, children and parents so that they are not left beggared and destituted on the scrap-heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence. The jurisdiction of the Magistrate is preventive and not remedial and certainly not punitive. The scope is limited and orders passed by the Court as Section 127(2) Cr.PC expressly provides, are subject to any final adjudication by a civil court regarding status and civil rights. Having a social purpose, Section 125 Cr.PC and sister clauses in their interpretation must receive a compassionate expanse of the sense that the words permit. In this generous jurisdiction, a broader perception and appreciation of facts and their bearing must govern the verdict not chopping little logic or tinkering with burden of proof. The objection of the section is to prevent destitution on public grounds and vagrancy. Section 125 Cr.PC is only a speedy remedy against starvation of a deserted wife or child or indigent parents. It is a summary procedure which does not cover entirely the same grounds as the civil liability of a husband or father or son under his personal law to maintain his wife or child or parents. Thereby it is clear that the proceedings are purely civil in

nature for which the relevant provisions of Cr.PC are made applicable.

For the reasons mentioned above, the criminal petition is allowed. Miscellaneous petitions pending if any shall stand closed.

(G. KRISHNA MOHAN REDDY, J)

November 30, 2012

NOTE:

L.R. Copy be marked.

(By order)

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***THE HONOURABLE SRI JUSTICE G.KRISHNA MOHAN REDDY**

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And others

... Respondents

! Counsel for the Petitioners: Mr.M.Damodar Reddy

Counsel for the Respondent No.1: The Public Prosecutor

Counsel for the Respondent No.2: Mr. P.Venkanna

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>Head Note:

? Cases referred:

- 1) FAO (OS) No.547/2011, dated 27.4.2012
- 2) AIR 2003 SC 3450
- 3) (1983) 4 SSC 417
- 4) (2009) 2 SSC 164
- 5) (2000) 6 SSC 259
- 6) (2010) 7 SSC 263
- 7) (2004) 12 SCC 673
- 8) (2008) 1 SCC 341
- 9) (1993) 1 MLJ 274
- 10) (1977) 1 SCC 508
- 11) FAO (OS) No.547/2011
- 12) (2010) 6 SCC 303
- 13) 1991 Supp (1) SCC 271 : AIR 1991 SC 1346
- 14) (2012) 5 SCC 370 : 2012 (3) SCALE 550
- 15) 2010 (4) ALT 441

[\[1\]](#) FAO (OS) No.547/2011, dated 27.4.2012

[\[2\]](#) AIR 2003 SC 3450

[\[3\]](#) (1983) 4 SSC 417

[\[4\]](#) (2009) 2 SSC 164

[\[5\]](#) (2000) 6 SSC 259

[\[6\]](#) (2010) 7 SSC 263

[\[7\]](#) (2004) 12 SCC 673

- [\[8\]](#) (2008) 1 SCC 341
- [\[9\]](#) (1993) 1 MLJ 274
- [\[10\]](#) (1977) 1 SCC 508
- [\[11\]](#) FAO (OS) No.547/2011
- [\[12\]](#) (2010) 6 SCC 303
- [\[13\]](#) 1991 Supp (1) SCC 271 : AIR 1991 SC 1346
- [\[14\]](#) (2012) 5 SCC 370 : 2012 (3) SCALE 550
- [\[15\]](#) 2010 (4) ALT 441