

IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH



DATED THIS THE 10TH DAY OF DECEMBER 2021

BEFORE

THE HON'BLE MR. JUSTICE H.P.SANDESH

WRIT PETITION No.201162/2021 (GM-RES)

BETWEEN:

MALAPPA @ MALINGARAYA,
S/O VEERESH KAVITAL,
AGE: 26 YEARS,
OCC: AGRICULTURIST,
R/O GONWAR VILLAGE,
TQ: SINDHANUR,
DIST: RAICHUR-585401.

...PETITIONER

(BY SRI MAHANTESH PATIL, ADVOCATE)

AND:

1. THE STATE OF KARNATAKA,
REP. BY ADDL. SPP,
HIGH COURT OF KARNATAKA,
KALABURAGI BENCH – 585 107.
(THROUGH BALAGNUR P.S.,
TQ: SINDHANUR,
DIST: RAICHUR-584101.

2. -----

...RESPONDENTS

(BY SRI GURURAJ V. HASILKAR, HCGP FOR R-1)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA READ WITH SECTION 482 OF CR.P.C. PRAYING THIS COURT TO ISSUE A WRIT IN THE NATURE OF CERTIORARI TO QUASH THE IMPUGNED ORDER DATED 04.01.2017 AND 05.01.2017 VIDE ANNEXURES-E AND F PASSED BY THE LEARNED I ADDL. JMFC, SINDHANUR IN CRIME NO.142/2016 (S.C.NO.61/2018) IN THE INTEREST OF JUSTICE AND EQUITY AND ETC.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 18.11.2021, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

This petition is filed under Article 226 of the Constitution of India read with Section 482 of Cr.P.C. praying this Court to:

- (i) issue a writ in the nature of certiorari to quash the impugned order dated 04.01.2017 and 05.01.2017 vide Annexures-E and F passed by the learned I Additional JMFC, Sindhanur in Crime No.142/2016 (S.C.No.61/2018);
- (ii) issue a writ in the nature of certiorari to quash the DNA profile report bearing No.FSL/197/DNAC/8/2017 dated 27.02.2017 vide Annexure-H and final opinion dated 30.03.2017 issued by the Medical Officer, Sindhanur vide Annexure-J;

(iii) issue such other writ or order or direction as this Court deems fit in the circumstances of the case.

2. The factual matrix of the case is that the police based on the complaint given by the victim, who has been arraigned as respondent No.2 herein, have registered a case in Crime No.142/2016 against the petitioner for the offences punishable under Sections 504, 506, 417 and 376 of IPC. The complainant in the complaint vide Annexure-B dated 04.10.2016 alleged that on 05.03.2016, this petitioner went to her house and called her to coolie work in his land and took her at around 9.30 a.m. and when both were working in the land at 3.00 p.m. he told her that he would marry her and called her to have sexual intercourse and when she refused that she will not allow him till he marries her and that if the said fact is known to the family they are going to scold her. But he did not heed to her request and forcibly committed rape on her and threatened not to reveal the same to her family members and if she reveals the same, he will take away the life and

as a result, she kept quiet. The petitioner repeated the same whenever he took her to work at his land 3-4 times and every time he was causing life threat and hence she did not reveal anything. The family members noticed her body development and she revealed that due to forcible intercourse by the petitioner, she became pregnant. When the family members enquired this petitioner and told him to marry her, he tried to avoid and every time he was escaping from their family members. When her parents went to the house of the accused and enquired again, he questioned that why they are questioning him, what evidence they are having that her daughter became pregnant due to the act of the petitioner and abused in a filthy language and in a rude manner. In the meanwhile, she became seven months pregnant. Hence, she lodged a complaint and the police after registration of the case, investigated the matter and filed the charge sheet against the accused for the above offences.

3. The prosecution also filed an application before the Magistrate to conduct the DNA test in terms of

Annexure-C dated 27.10.2016 reiterating the averments of the complaint and requested that in order to know the truth, it is necessary to conduct the DNA test since other witnesses have also given the statement in consonance with the allegations of the victim. The victim was also subjected to medical examination and she gave statement before the Magistrate under Section 164 of Cr.P.C. and the accused is in custody. The copy of the application was also furnished to the accused and the accused filed objection statement in terms of Annexure-D and in the objection statement, he contends that he is an innocent and conducting of the DNA test of the accused is not tenable in the eye of law. It is further contended that the victim has already married one Siddappa and there is no justification to draw the blood sample of the accused for DNA test. In the meanwhile, the Investigating Officer filed requisition submitting that the infant of the victim is reported to be dead on 07.12.2016 at 3.50 a.m. at Shankara Hospital, Sindhanur and requested that proper investigation is necessary and as to identify the DNA of the deceased baby

boy, sought a direction to direct the Chief Medical Officer ('CMO' for short) to extract the relevant portion of the body of the deceased boy for conducting the test for identifying the DNA. The Court having received the requisition, comes to the conclusion that the identification of the DNA of the deceased boy is very much necessary for investigation. The requisition was allowed and further directed the CMO to take relevant extract from the body of the infant and also directed to conduct the DNA test and facilitate for the same and the CMO was directed to forward the samples or report through the Investigating Officer to FSL, Bengaluru for conducting DNA test forthwith without any delay.

4. One more application was given to the Court on 07.12.2016 in terms of Annexure-D1, reiterating the grounds urged in the earlier application and also the subsequent development of the death of the infant and sending the extract of the infant for DNA test. In order to determine whether the petitioner was the biological father of the infant, which is dead, it is necessary to permit the

Investigating Officer to draw the blood sample and accordingly ordered to put up the application and that on 04.01.2017, based on the application, the learned Magistrate considering the grounds urged in the application and also the offences which has been alleged against the petitioner herein taken note of the offences punishable under Section 376 of IPC and also taken note of the fact that the victim was conceived and the accused has denied the alleged relationship, found that for the proper investigation as to find out the paternity of the infant, it is necessary to consider the request and the accused objected the same through the counsel. The Court ordered for collection of blood sample of the accused for DNA test, which is very much helpful for proper investigation and the said test will not in any way cause in justice to the accused. The CMO, Sindhanur, was directed to be present before the Court to draw the blood sample of the accused and further directed the CMO that after drawing the blood sample should hand over the same to the Investigating Officer in a sealed cover for further

action and the Investigating Officer after receiving the said sealed blood sample should submit to the FSL for DNA test and accordingly as per the direction, the CMO appeared before the Court. The accused was also present before the Court and he was enquired (in camera) and it is brought to the notice of the accused regarding the drawing of the blood sample. The accused consented the same. The Investigating Officer also sought permission to draw the panchanama with regard to the drawing of the blood and panchanama was drawn and the CMO after collecting the blood sample, sealed it and handed over it to the Investigating Officer and the report was awaited. Subsequently, the FSL report is received in terms of Annexure-H, wherein it is opined that the humerus bone and femur bone sent in item Nos.1 and 2 respectively, are of human origin and of male sex and DNA profile of dead male baby from whom the humerus and femur bones were collected and sent in item Nos.1 and 2 is consistent with having come from the offspring of Malappa @ Malingaraya S/o Veeresh, sample blood sent in item No.3 and given the

opinion that the petitioner is the biological father of the infant who died immediately after the birth. This report is dated 27.02.2017.

5. The present petition is filed on 31.05.2021 seeking a writ of certiorari to quash the order subjecting the petitioner for DNA test and also sought to quash the report. In the petition, the main grounds urged by the petitioner before this Court is that the very order dated 04.01.2017, 05.01.2017 and the DNA report dated 27.02.2017 and final opinion dated 30.03.2017, which are extracted as Annexures-E, F, H and J are against the principle of natural justice and violative of Article 20(3) of the Constitution of India. It is contended that the petitioner was never consented to undergo DNA profiling and for that purpose to give his blood sample. The petitioner filed objections to the requisition for drawing the sample for the purpose of DNA by the Investigating Officer. Thereafter, one more requisition was filed for drawing the blood sample from the petitioner and the learned Magistrate without following the procedure

contemplated under Section 164 of the Cr.P.C., which also resulted in violation of Article 20(3) of the Constitution of India, ordered to draw the blood sample. The impugned orders are not reasoned orders. There is nothing to show that the accused was heard in the matter by explaining the consequence of the consent given by him for drawing the blood sample and there is no satisfaction or application of judicious mind with respect to the voluntariness of the petitioner in giving consent for drawing the blood sample. Hence, the entire process is unfair and violative of fundamental right of fair trial. The DNA report is having serious consequences and so the consent of the accused, must be free from force and undue influence and hence, it requires interference of this Court by exercising the powers under Article 226 of the Constitution of India read with Section 482 of Cr.P.C.

6. The learned counsel for the petitioner reiterated the grounds urged in the petition contending that Section 164 of Cr.P.C. has not been complied and the Court cannot entertain such an application subjecting him

for DNA test. The learned counsel also submits that the petitioner was not explained the consequences of drawing the blood sample. The learned counsel would submit that Section 53A of Cr.P.C. only confers the powers, but the same has to be subject to other provisions and there is no any specific provision under the Cr.P.C. for drawing of the blood samples for DNA test. The learned counsel submits that permission was given on the second application and no order was passed on the first application and when such being the case, it requires to be set aside.

7. The learned counsel for the petitioner in support of his arguments relied upon the judgment of the Apex Court in the case of **SELVI AND OTHERS v. STATE OF KARNATAKA** reported **(2010) 7 SCC 263** and brought to the notice of this Court paragraph No.167 of the judgment and contend that contentious provision is the explanation to Section 53 Cr.P.C. (amended in 2005). It has been contended that the phrase "modern and scientific techniques including DNA profiling and such other tests" should be liberally construed to include the impugned

techniques. It is further observed that with the development of newer technologies, their use can be governed by older statutes which had been framed to regulate the older technologies used for similar purposes. The learned counsel referring this judgment would contend that subjecting the petitioner for DNA test without the consent amounts to violation of Article 20(3) of the Constitution of India.

8. The learned counsel also relied upon the judgment of the Apex Court dated 01.10.2021 passed in **Civil Appeal No.6153/2021** in the case of **ASHOK KUMAR v. RAJ GUPTA AND OTHERS**, wherein it is held that when the defendants sought for conducting the DNA test to establish a biological link, the Trial Court rightly dismissed the application observing lack of consent by the plaintiff. But the High Court reversed the same. The Apex Court comes to the conclusion that in a declaratory suit where ownership over co-parcenary property is claimed, the plaintiff, against his wishes, can be subjected to DNA test and held that cannot compel the plaintiff to adduce

further evidence in support of the defendants' case. It is further observed that when the plaintiff is unwilling to subject himself to the DNA test, forcing him to undergo one would impinge on his personal liberty and his right to privacy and set aside the order of the High Court. The learned counsel referring this judgment would contend that the judgment of the Apex Court is aptly applicable to the case on hand.

9. The learned counsel relied upon the unreported judgment of this Court dated **16.07.2014** passed in **Crl.RP.No.100148/2014**, wherein this Court discussed the principles laid down in the judgment reported in **2014 Crl.L.J. 82** in the case of **Anjanappa v. State of Karnataka** and also discussed the judgment of the Apex Court reported in **(2010) 8 SCC 633** in the case of **Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women** and extracted paragraph Nos.19, 21, 22 and 23 and so also relied upon the judgment of this Court reported in **ILR 2004 KAR 2637** in the case of **H.M.Prakash @ Dali v. State of Karnataka**

and having considered the principles laid down in the judgment, this Court comes to the conclusion that the Sessions Judge has to make all his endeavour to secure the presence of the victim lady and ascertain as to whether she is ready and willing for the to DNA test and thereafter the learned Sessions Judge has to pass appropriate order and without securing the presence of the victim lady, the order has been passed and hence set aside the order and restored the application and directed the learned Sessions Judge to dispose of the application in accordance with law and bearing in mind the observations made.

10. The learned counsel also relied upon the Division Bench judgment of this Court dated **03.09.2021** passed in **Cri.A.No.227/2020 c/w Cri.R.C.No.2/2020** and brought to the notice of this Court paragraph No.26, wherein it is discussed with regard to the serious infraction of right to privacy of the accused in the matter of prosecution having ventured to draw blood for the purpose of conducting the DNA test referring the judgment of the Apex Court in the case of **Selvi** (supra).

11. The learned counsel also relied upon the order of this Court dated **29.08.2019** passed in **W.P.No.203348/2019**, wherein this Court with regard to when an application is filed under Section 164A of Cr.P.C. or subjecting CW1, her child and himself for DNA test referring Section 164A of Cr.P.C. and also Article 20(3) of the Constitution of India comes to the conclusion that there is nothing to show that the accused was heard in the matter, let alone explaining the consequences of the application. He was not even questioned whether he has filed such an application voluntarily and hence set aside the order and directed to hear the petitioner on the application filed under Section 164A of Cr.P.C.

12. Per contra, the learned High Court Government Pleader appearing for respondent No.1-State would vehemently contend that with the consent of the accused only, blood sample was drawn, that too in the Court itself and the learned Magistrate before permitting to draw the blood sample of the petitioner, enquired the accused (in

camera) and explained the scope of drawing of the blood sample and thereafter after obtaining the consent only, blood was drawn. The Investigating Officer also drawn the mahazar for having followed the procedure. The learned Magistrate applied his judicious mind and in compliance with Sections 53 and 53A of Cr.P.C., directed the CMO to follow the procedure in drawing the blood sample and after drawing the same to keep it in a sealed cover and entrust the same to the Investigating Officer and also given direction to the Investigating Officer to send the same to the FSL forthwith. The learned counsel would submit that blood was drawn on 05.02.2017 itself and the report was received within a span of one and half month and this petitioner kept quiet even though report was received in 2017 itself, stating that the petitioner is the biological father of the male child which was born to the victim and after lapse of four years he has come up before this Court invoking the writ jurisdiction contending that it violates Article 20(3) of the Constitution of India. When the procedure has been followed and with the consent of the

petitioner only blood was drawn and report was received, after four years of the receipt of the report, the petitioner has approached the Court, that too when the report comes against him and hence there is no merit in the petition to invoke Article 226 of the Constitution of India read with Section 482 of Cr.P.C.

13. Having heard the learned counsel for the petitioner as well as the learned High Court Government Pleader and also considering the factual matrix of the case and also the grounds urged in the petition, the following points arise for the consideration of this Court:

- (i) Whether the drawing of the blood sample amounts to self-incrimination which violates Article 20(3) of the Constitution of India as contended by the petitioner?
- (ii) Whether the petitioner has given consent to undergo DNA profiling to give the blood sample and the same is obtained without following the procedure contemplated under Section 164 of the Cr.P.C. as contended, which resulted in

violation of Article 20(3) of the Constitution of India?

(iii) Whether the learned Magistrate has applied his judicious mind with respect to the voluntariness of the petitioner in giving consent for drawing the blood sample and whether the entire process followed by the Magistrate is violative of the fundamental right of fair trial as contended?

(iv) What Order?

Point Nos.(i) to (iii):

14. Having heard the learned counsel for the petitioner and also the grounds urged in the petition, the first and foremost count of argument before the Court is whether the drawing of the blood sample is in violation of Article 20(3) of the Constitution of India and whether it amounts to self-incrimination as contended by the petitioner. The learned counsel for the petitioner has relied upon the judgment of the Apex Court in the case of **Selvi** (supra) and brought to the notice of this Court that

the Apex Court has observed that it violates Article 20(3) of the Constitution of India and it amounts to self-incrimination. On entire reading of the judgment of the Apex Court, the Apex Court having considered the contentions raised in the said matter, in detail discussed Articles 21 and 20(3) of the Constitution of India and also taken note of explanation (a) to Section 53 of Cr.P.C. and difference between the DNA profile and DNA sample and uses of DNA profile and elaborately discussed the same, particularly in paragraph No.165 extracted Section 53 of Cr.P.C. regarding examination of the accused by medical practitioner at the request of police officer and also taken note of Section 53A and Section 54 of Cr.P.C. and in paragraph No.166 having considered the proviso, it has been clarified that it is within the powers of a Court to direct such a medical examination on its own. Such an examination can also be directed in respect of a person who has been released from custody on bail as well as a person who has been granted anticipatory bail. It is further discussed that Section 53 of Cr.P.C. contemplates

the use of 'force as is reasonably necessary' for conducting a medical examination. It is further observed that this means that once a Court has directed the medical examination for a particular person, it is within the powers of investigators and examiners to resort to a reasonable degree of physical force for conducting the same.

15. In paragraph No.167 of the judgment discussed with regard to phrase "modern and scientific techniques including DNA profiling and such other test" should be liberally construed to include the impugned techniques. Having discussed Sections 53 and 53A of Cr.P.C. while summing up with regard to the DNA test, in paragraph No.220 observed that in the present case, the written submissions made on behalf of the respondents have tried to liken the compulsory administration of the impugned techniques with the DNA profiling technique. In light of this attempted analogy, we must stress that the DNA profiling technique has been expressly included among the various forms of medical examination in the amended explanation to Section 53 of Cr.P.C. It must also

be clarified that a "DNA profile" is different from a DNA sample which can be obtained from bodily substances. A DNA profile is a record created on the basis of DNA samples made available to the forensic experts. Creating and maintaining DNA profiles of offenders and suspects are useful practices since newly obtained DNA samples can be readily matched with the existing profiles that are already in the possession of the law enforcement agencies. The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts and further held that the taking and retention of DNA samples, which are in the nature of physical evidence does not face constitutional hurdles in the Indian context. However, if the DNA profiling technique is further developed and used for testimonial purposes, then such uses in the future could face challenges in the judicial domain. Having considered the principles laid down in the judgment referred supra, the Court has to take note of the facts of each case and in that case, it is observed that the respondents have tried to liken the compulsory administration of impugned

techniques with the DNA profiling technique, but not in the case on hand.

16. This Court also would like to rely upon the judgment of the Apex Court in the case of **STATE OF BOMBAY v. KATHI KALU OGHAD** reported in **AIR 1961 SC 1808**, wherein it is held that in majority decision by use of material sample such as finger prints for the purpose of comparison and identification held that it does not amount to a testimonial act for the purpose of Article 20(3) of the Constitution of India.

17. In the case on hand, first of all, it is the specific case of the victim that the petitioner took her to his land for work and both of them done the work from 9.00 a.m. to 3.00 p.m. and at 3.00 p.m. he subjected her for sexual act as against her wish and caused life threat not to disclose the same and then she became pregnant. The family members noticed the bodily development of the victim and then she revealed the same. It has to be noted that when the victim was seven months pregnant, a request was made in the month of October for DNA test

and on 07.12.2016, the victim gave birth to a child, which was dead and hence the DNA test permission was sought from the Court and permission was given and sent for FSL and simultaneously an application was given to the Court and after giving the application almost after one month, an order has been passed. It is also clear that the accused was secured and he was enquired in camera, and the Magistrate has explained the consequences and then only he gave the consent and the same is mentioned in the order sheet and the procedure was followed. The Magistrate in compliance of Section 53 and 53A of Cr.P.C. directed the CMO to draw the blood in accordance with law and directed to handover the same in a sealed cover to the Investigating Officer and the Investigating Officer also drawn the panchanama to that effect and thereafter the blood sample which was drawn was sent to the FSL. The FSL report was also received within one and half month i.e., in the month of February itself in terms of Annexure-H dated 27.02.2017 and the report was received that this petitioner being the biological father and source of DNA of

the dead male baby from the whom the humerus and femur bones were collected and sent in item Nos.1 and 2 respectively, matches with the blood sample of this petitioner. It has to be noted that the report was received in the year 2017 itself in the month of March though it is dated 27.02.2017 and having the knowledge of the same, the petitioner kept quiet for a period of four years and after lapse of four years approached this Court. Having considered the facts and circumstances of the case, it is not compulsorily drawn the blood sample to apply the modern scientific method and techniques as observed by the Apex Court in the case of **Selvi** case. Hence, the said judgment is not applicable to the case on hand.

18. The learned counsel also relied upon the recent judgment of the Apex Court in the case of **Ashok Kumar** (supra), wherein DNA test is sought for in a declaratory suit and hence the Apex Court comes to the conclusion that when the plaintiff is unwilling to subject himself to DNA test, forcing him to undergo one would impinge on his personal liberty and his right to privacy and rejected the

prayer and hence the facts and circumstances of the case on hand is different from the facts of this case. Hence, the said judgment is also not applicable to the case on hand.

19. The learned counsel relied upon the unreported judgment of this Court dated 16.07.2014 passed in Crl.RP.100148/2014, wherein facts of the case is different and victim lady was not even asked as to whether she is willing to give blood sample or not and even she has not been secured and ascertained as to whether she is ready and willing for DNA test. Hence, this Court set aside the order and the same is also not applicable to the facts of the case on hand.

20. The learned counsel also relied upon the Division Bench judgment of this Court dated 03.09.2021 passed in **Crl.A.No.227/2020 c/w Crl.RC.No.2/2020** (supra) wherein the Division Bench in detail not discussed, but only comes to the conclusion that there has been a serious infraction of right to the privacy of the accused in the matter of prosecution having ventured to draw the

blood for the purpose of conducting DNA test and relied upon the judgment of **Selvi** case (supra). But the facts of the case on hand is different and hence the same is also not applicable to the case on hand.

21. The learned counsel relied upon the decision of this Court dated 29.08.2019 passed in W.P.No.203348/2019, wherein this Court has observed in paragraph No.12 that there is nothing to show that the accused was heard in the matter, let alone explaining the consequences of the application. He was not even questioned whether he has filed such application voluntarily. In the said case, the very accused himself has filed an application to keep C.W.1 present and child and subject him for DNA test. Hence, the Court allowed the petition and set aside the order and directed to consider the matter afresh. But the facts of the case on hand is different.

22. This Court would like to refer the judgment of the Apex Court consisting of 11 Judges in the case of

Kathi Kalu Oghad (supra) with regard to the scope and ambit of the investigation with regard to whether it affects the privacy of an accused in conducting the investigation, wherein the Apex has held that self-incriminatory information given by the accused without compulsion does not amount to violation of Article 20(3) of the Constitution of India. If the self-incriminatory information has been given by an accused person without any threat, that will not be hit by the provisions of Clause (3) of Article 20 of Constitution of India for the reason that there has been no compulsion. The Apex Court in paragraph No.10 has held that the taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice.

23. This Court would also like to refer to the decision of this Court in the case of **H.M. Prakash @ Dali**

(supra), wherein discussed with regard to Section 53 of Cr.P.C. i.e., prior to the amendment and also discussed whether an order directing taking of blood sample from the accused for DNA analysis is in violation of Article 20(3) of the Constitution of India. It is held that mere examination of a person and taking of blood sample in itself is not an incriminating circumstance and therefore, it cannot be said that by mere taking of blood sample of an accused, he is compelled to be a witness against himself and such an order will not offend against Article 20(3) of the Constitution of India. It is further held that there is nothing brutal or offensive or shocking in taking the blood sample under the protective eye of law. The constitutional mandate does not say that no person shall be deprived of his right or personal liberty under any circumstances. On the contrary, if such deprivation of right or personal liberty is in accordance with the procedure established by law, the same does not violate Article 21 of the Constitution of India.

24. This Court would also like to rely upon the judgment of the Apex Court in the case of **BANARSI DASS v. TEEKU DUTTA AND ANOTHER** reported in **(2005) 4 SCC 449**, wherein with regard to DNA test to determine paternity, the Apex Court has held that DNA test is not to be directed as a matter of routine; it is to be directed only in deserving cases. Hence, it is clear that ordering for DNA itself should not be as a matter of routine but wherein deserving cases, the Court can direct for DNA test and there is no prohibition for ordering DNA test and the same is subject to each facts and circumstances of the case.

25. This Court would also like to rely upon the judgment of the Apex Court in the case of **DIPANWITA ROY v. RONOBROTO ROY** reported in **(2015) 1 SCC 355**, wherein the Apex Court discussed regarding Section 112 of the Evidence Act, birth during subsistence of marriage, as proof of legitimacy and presumption as to, under Section 112 of the Evidence Act, conclusive rebuttal of, by DNA test. In this case, the husband took up the

contention that the wife was leading adulterous relationship. To establish the said contention of paternity/adultery, husband prayed the Court to order for DNA test. The Apex Court in this judgment relying upon the judgment in the case of **NANDLAL WASUDEO BADWAIK v. LATA NANDLAL BADWAIK** reported in **(2014) 2 SCC 576** held that, this Court has therefore clearly opined, that proof based on a DNA test would be sufficient to dislodge a presumption under Section 112 of the Evidence Act. The Apex Court also referred to the judgment in the case of **Bhabani Prasad Jena** (supra) and held that it is borne from the decisions rendered by this Court that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination to determine the veracity of the allegations which constitute one of the grounds, on which the party concerned would either succeed or loose. It is further observed that it is not disputed that if the direction to hold such a test can be avoided, it should be so avoided. The reason is that the legitimacy of a child should not be put to

peril. The Apex Court in the said judgment held that DNA test being an extremely delicate and sensitive aspect, a direction for said test, held, can be given if a strong prima facie and an eminent need is made out for such a course. Cautious and judicious approach prescribed, considering that such infringement on right to privacy, may not only be prejudicial to rights of the parties but may have devastating effect on the child.

26. This Court would also like to rely upon the judgment of the Apex Court in the case of **K.S. PUTTASWANY AND ANOTHER v. UNION OF INDIA AND OTHERS** reported in **(2017) 10 SCC 1**, wherein elaborate discussion is made with regard to the right to privacy being a basic fundamental right and detail discussion was made in the judgment by nine judges and taken note of the issue regarding right of privacy, wherein the Apex Court held that right to privacy has been declared a constitutionally protected right in India. The Court should therefore examine the proportionality of the legitimate aims being pursued, that is whether the same

are not arbitrary, discriminatory, whether they may have an adverse impact on the person and that they justify the encroachment upon the privacy and personal autonomy of the person, being subjected to the DNA test. The same is also discussed in the judgment in the case of **Ashok Kumar** (supra). Having taken note of the principles of the right to privacy, in paragraph No.15 held that DNA is unique to an individual (barring twins) and can be used to identify a person's identity, trace familiar linkages or even reveal sensitive health information. But the question is whether a person can be compelled to provide a sample for DNA in such matters can also be answered considering the test of proportionality laid down in the unanimous decision of this Court i.e., in the judgment reported in the case of **K.S.Puttaswamy** (supra).

27. Having considered the factual aspects of the case and also the principles laid down in the judgments referred supra, it is clear that prior to amending Section 53 of Cr.P.C. and explanation and Section 53A, there was no specific provision for conducting DNA test and it was a

practice and having felt the difficulties of the Investigating Officer in unearthing the truth, the parliament felt that it is necessary to bring an amendment and hence amendment was brought in 2005 by Act 25/2005 substituting the explanation which came to effect from 23.06.2006 in respect of Sections 53A and 54 of Cr.P.C. i.e., examination by registered medical practitioner. In the explanation it is made clear regarding examination is concerned that it shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case. The other amendment is also brought in the very same Act. Section 53A examination of person accused of rape by medical practitioner, wherein the offence on a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will

afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital, acting at the request of the police officer not below the rank of a Sub-Inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of a arrested person and to use such force as is reasonably necessary for that purpose. A specific amendment is made to explanation 53 and also an amendment is brought inserting Section 53A. No doubt under Section 164A of Cr.P.C., a proviso is inserted – Medical examination of the victim of rape and what the report should contain on examination also particulars are given and explanation is also same that for the purpose of the said Section, “examination” and “registered medical practitioner” shall have same meanings as in Section 53.

28. The very contention of the petitioner before this Court is that it amounts to self-incrimination and subjecting him for drawing of blood sample in order to test the paternity of the child amounts to violation of Article

20(3) of the Constitution of India and in view of the principles laid down in the judgments referred supra, the contentions of the petitioner cannot be accepted. The other contention that no enquiry was held as contemplated under section 164A of Cr.P.C. also cannot be accepted. I have already pointed out that it is the specific case of the victim that when she was on coolie work along with the accused, he subjected her for sexual act against her wish and also he promised to marry her and caused the life threat not to reveal the same. When she became pregnant, the parents have noticed the body development and on enquiry only, she revealed the same and the accused retorted that what evidence they are having to say that on account of his act, she became pregnant. It has to be noted that a requisition is made before the learned Magistrate for DNA test and copy was served and the accused also filed the objections and in the objections, he has raised the contention that the victim had already married one Siddappa and hence there is no need of DNA test. But the fact is that on account of the act of the

accused, she became pregnant and she gave birth to a child and the child died and extracts of the said child was collected and the same was sent to the FSL.

29. One more fresh requisition was given wherein the same grounds are reiterated which are urged in the first application and the only change made is that a male child was born and died and the same was sent to RFSL and the fresh application was filed reiterating the earlier grounds and subsequent development and based on the said application, the learned Magistrate has considered the request. It has to be noted that the learned Magistrate has secured the accused and examined him (in camera) and explained the consequences and thereafter he gave the consent and the learned Magistrate directed the CMO and also the Investigating Officer to follow the procedure as laid down under Sections 53, 53A and 164A of Cr.P.C. Only in compliance of the same and on the consent of the accused, which has been recorded in the order sheet, ordered to draw the blood sample. The CMO as well as the Investigating Officer complied the relevant proviso and

procedure and sealed and sent the same to the RFSL and the report was received in the month of March itself though blood was drawn on 05.01.2017. I have already pointed out that this present petition is filed after lapse of four years of receipt of the DNA report, wherein report is specific that the petitioner is the biological father of the child, which was born to the victim. It is clear that when the report came against him, he approached this Court by filing this petition, that too belatedly after four years of the report and all the procedures have been followed by the CMO as well as Investigating Officer. The learned Magistrate has applied the judicious mind and having considered Sections 53 and 53A of Cr.P.C. and in compliance of Section 164A of Cr.P.C., an order has been passed. Hence, I do not find any error committed by the learned Magistrate in ordering for DNA test. The DNA test is also available before the Court, which is marked as Annexure-H and only in order to overcome the positive report of the DNA, the petitioner has approached this Court by invoking the writ jurisdiction seeking the relief to

quash the order as well as the DNA report. The very contention of the learned counsel for the petitioner that it amounts to violation of Article 20(3) of the Constitution of India and also in violation of procedure contemplated under Section 164 of Cr.P.C. cannot be accepted. The other contention that the learned Magistrate has not applied his judicious mind in compliance of the procedures and amounts to fundamental right of fair trial also cannot be accepted. It is also important to note that the Apex Court in the judgments referred supra comes to the conclusion that if it impinges the paternity of the child, the Court has to be very conscious while ordering for DNA test and the said situation does not arise in the case on hand for the reason that the child born to the victim is no more and it will not be having any impact on the child as held by the judgment of the Apex Court referred supra and in over all no merit in the petition to exercise the powers under Section 482 of Cr.P.C. Hence, I answer point Nos.(i) to (iii) as negative.

Point No.(iv):

30. In view of the discussions made above, I pass the following:

ORDER

The writ petition is dismissed.

**Sd/-
JUDGE**

MD