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Sharda Vs. Dharmpal

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Court : Supreme Court of India

Decided On : Mar-28-2003

Reported in : AIR2003SC3450; 2003(3)ALLMR(SC)331; 2003(3)ALT41(SC); 2003(2)AWC1534(SC); 2003(2)BLJR1420; 2003(2)CTC760; I(2003)DMC627SC; [2004(1)JCR98(SC)]; JT2003(3)SC399; 2003(2)KLT243; [2003]3SCR106; (2003) 4 SCC 493

Judge : V.N. Khare, C.J.,; S.B. Sinha and; Ar. Lakshmanan, JJ.

Acts : Hindu Marriage Act, 1955 - Sections 5, 12(1) and 13(1); Constitution of India - Article 21, 47 and 227; Mental Health Act, 1987 - Sections 2(1) and 5; Family Law Reform Act, 1987 - Sections 22 and 23; Family Law Reform Act, 1969 - Sections 20(1) and 20(2); Mental Health Act, 1983; Human Rights Law; C.C. Rules, 1981 - Order 19 - Order 21, Rule 6 - Order 40, Rule 1 - Order 103, Rule 27; Arbitration Act, 1950 - Sections 12(6); National Insurance (Industrial Injuries) Act, 1965 - Sections 50; Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995; National Trust for Welfare with Antism, Cerebral Palsy, Mental Retardation and Municipal Disabilities Act, 1999; Code of Civil Procedure (CPC) - Sections 75, 115 and 151 - Order 26, Rule 10A - Ord

Appeal No. : Civil Appeal No. 5933 of 2000

Appellant : Sharda

Respondent : Dharmpal

Advocate for Def. : Nanita Sharma and ; Vivek Sharma, Advs.

Advocate for Pet/Ap. : Naresh Kaushik,; O.P. Arya,; Shilpa Chohan,;

Disposition : Appeal dismissed

Prior history : From the Judgment and Order dated 17.11.99 of the Rajasthan High Court in S.B.C.R.P. No. 1414 of 1999

Books referred : Wigmore on Evidence, Volume VIII, third edition; Phipson on Evidence, 14th Edition; Halsbury's Laws of England, Volume 11, 4th Edition; Halsbury's Laws of England, Volume 17, 4th Edition; Halsbury's Laws of England, Fourth Edition, Reissue, Volume 8(2); E

Judgement :

S.B. Sinha, J.

1. Whether a party to a divorce proceeding can be compelled to amedical examination is the core question involved in this appeal. Thisquestion arises out of a judgment dated 17.11.1999 passed by the High Courtof Judicature for Rajasthan at Jodhpur in S.B. Civil Revision Petition No.1414/99 dismissing an application filed by the appellant herein questioningan order of the Addl. District & Session Judge No. 1, Hanumangarh CampSangaria dated 8.10.1999 directing to submit herself to medical examinationon the question as to whether she is of unsound mind.

2. The parties herein were married on 26.6.1991 according to the Hindurites. On or about 3.6.1995, the respondent filed an application for divorceagainst the appellant under Section 12(1)(b) and 13(1)(iii) of the HinduMarriage Act, 1955. He filed an application seeking directions for medicalexamination of the appellant on 5th May, 1999. The appellant objectedthereto inter alia on the ground that the Court had no jurisdiction to passsuch directions. By an order dated 8.10.1999 the said application wasallowed directing the appellant to submit herself to the medical examination.Aggrieved by the said order, she filed a Revision Petition before the HighCourt which was dismissed by the impugned judgment.

3. Mr. Kaushik, the learned counsel appearing on behalf of the appellantherein has principally raised two contentions in support of this appeal.Firstly, compelling a person to undergo a medical examination by an orderof the Court would be violative of right to 'personal liberty' guaranteedunder Article 21 of the Constitution of India. Secondly, in absence of aspecific empowering provision, a court dealing with matrimonial casescannot subject a party to the lis to undergo medical examination against hisher volition. In the event, if a party does not undergo such medicalexamination, the Court may merely draw an adverse inference.

4. The learned counsel in support of his aforementioned contentionsrelied upon Bipinchandra Shantilal Bhatt v. Madhuriben : AIR1963 Guj250 , Smt. Revamma v. Shri Shanthappa : AIR1972 Kant157 ,Shanti Devi v. Ram Nath , M. Venkatachallapati v.Aroja (AIR 1981 Madras 349), Gautam Kundu v. State of West Bengal : 1993 CriLJ3233 , P.A. Anbu Anandan v. Sivakumari : (1998)IIMLJ406 , Smt. Ningamma and Anr. v. Chikkaiah and Anr. : AIR2000 Kant50 .

5. Ms. Nanita Sharma, the learned counsel appearing on behalf of therespondent, submitted that a Matrimonial Court is required to arrive at afinding as to whether the appellant herein had been suffering fromunsoundness of mind, mental disorder or insanity by virtue of the provisionscontained in Section 5, Section 12(1) and Section 13(1) of the HinduMarriage Act, 1955. As such a state of mind of a party to the marriage mayrender the marriage voidable, the Court is entitled to take the expert'sopinion in his behalf so as to enable it to satisfy itself as regard theexistence of the conditions for grant of a decree for divorce.

6. The learned counsel further contended that the (SIC) to medicalexamination aided by scientific data would not infringe the right to personalliberty under Article 21 of the Constitution of India.

7. In support of the said contentions the learned counsel relied upon G.Venkatanarayan v. Kurupati Laxmi Devi : AIR 1985 AP1 , BirendraKumar Biswas v. Hemlata Biswas , GeorgeSwamidoss Joseph v. Miss Sundari Edward (1954) 67 Mad LW 676 andA.S. Mohammad Ibrahim Ummal v. Shaik Mohammad Marakavar andAnr. : (1948)2MLJ277 .

8. The relevant statutory provisions of the Hindu Marriage Act, 1955(Section 5, 12(1)(b) and 13(1)(iii)) for adjudication of this case are outlinedas follows:

'5. CONDITIONS FOR A HINDUMARRIAGE - A marriage may be solemnizedbetween any two Hindus, if the followingconditions are fulfilled, namely,-

(i) neither party has a spouse living at the timeof the marriage;

(ii) at the time of the marriage, neither party -

(a) is incapable of giving a valid consentto it in consequence of unsoundnessof mind; or

(b) though capable of giving a validconsent, has been suffering frommental disorder of such a kind or tosuch an extent as to be unfit formarriage and the procreation ofchildren; or

(c) has been subject to recurrent attacksof insanity;

(iii) .....

(iv) .....

(v) .....

12. VOIDABLE MARRIAGES.

(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely,-

(a) .....

(b) that the marriage is in contravention of the condition specified in Clause (ii) of Section 5;

13. DIVORCE.

(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) ...

(ii) ...

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation: In this clause -

(a) the expression 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia:

(b) the expression 'psychopathic disorder' means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment or;'

9. Clause 2(b) of Section 5 provides for one of the conditions for a valid Hindu marriage that neither party must be suffering from unsoundness of mind, mental disorder or insanity. In terms of Section 12(1)(b) of the Act a marriage may be held to be voidable if the other party was suffering from mental disorder or insanity. Section 13(1)(iii) of the Act provides that a party to the marriage may present a petition for dissolution of marriage by a decree of divorce inter alia on the ground that the other party has been incurably of unsound mind and has been suffering continuously or intermittently from mental disorder of such a kind that the petitioner cannot reasonably be expected to live with the respondent. It is beyond any cavil that a marriage in contravention of the aforementioned provisions of the Hindu Marriage Act is per se not void but is merely voidable.

Issues for consideration

The following issues arise for consideration in the present case:

A. Whether a Matrimonial Court has the power to direct a party to undergo medical examination?

B. Whether passing of such an order would be in violation of Article 21 of the Constitution of India?

A. Power of the Court to direct a party to undergo medical examination

10. It is trite law that for the purpose of grant of a decree of divorce what is necessary is that the petitioner must establish that unsoundness of mind of the respondent is incurrable or his/her mental disorder is of such a kind and to such an extent that he cannot reasonably be expected to live with his/her spouse. Medical testimony for arriving at such finding although may not be imperative but undoubtedly would be of considerable assistance to the court. We may, however, hasten to add that such medical testimony being the evidence of experts would not leave the court from the obligation of satisfying itself on the point in issue beyond reasonable doubt. Relevance of a medical evidence, therefore, cannot be disputed.

11. A sound mind indisputably is a key to a happy married life. A party to the marriage must, thus, have normal and sound mind so as to live a happy marital life. A disorder of thought, behavior and mind leading to unsoundness of mind may give rise to a cause of action for filing an application under Section 13(1)(iii) of the Hindu Marriage Act. The burden of proof of the existence of requisite degree of mental disorder is on the spouse making the claim on that state of fact.

12. The decision rendered by various courts of this country including this Court lead to a conclusion that a decree for divorce in terms of Section 13(1)(iii) of the Act can be granted in the event the unsoundness of mind is held to be not curable. A party may behave strangely or oddly inappropriate and progressive in deterioration in the level of work may lead to a conclusion that he or she suffers from an illness of slow growing developing over years. The disease, however, must be of such a kind that the other spouse cannot reasonably be expected to

live with him or her. A few strong instances indicating a short temper and somewhat erratic behavior on the part of the spouse may not amount to his/her suffering continuously or intermittently from mental disorder.

13. It may be noticed that Section 2(1) of the Mental Health Act, 1987 defines 'mentally ill person' to mean a person who is in need of treatment by reason of any mental disorder other than mental retardation. Mental disorder may further be of varying degree.

14. This Court in Ram Narain Gupta v. Rameshwari : AIR 1988 SC2260 while considering a question as to whether a party to the marriage was suffering from schizophrenia observed:

'14. Indeed the caution of a learned another against too readily giving a name to a thing is worth recalling:

'Giving something a name seems to have a deadening influence upon all our relations to it. It brings matters to a finality. Nothing further seems to need to be done. The disease has been identified. The necessity for further understanding of it has ceased to exist.' It is precisely for this reason that a learned authority on mental health saw wisdom in eschewing the mere choice of words and the hollowness they would bring with them. He said:

'I do not use the word 'schizophrenia' because I do not think any such disease exists..... I know it means widely different things to different people. With a number of other psychiatrists. I hold that the words 'neurosis', 'psychoneurosis', 'psychopathic personality', and the like, are similarly valueless. I do not use them, and I try to prevent my students from using them, although the latter effort is almost futile once the psychiatrist discovers how conveniently ambiguous these terms really are.....'

'In general, we hold that mental illness should be thought and spoken of less in terms of disease entities than in term of personality disorganization. We can precisely define organization and disorganization; we cannot precisely define disease.....'

'Of course, one can describe a 'manic' or a 'depressed' or a 'schizophrenic' constellation of symptoms, but what is most important about this constellation in each case? (SIC) we thin, its curious external form, (SIC) rather what it indicates in regard to be process of disorganization and reorganization of a personality which is in fluctuant state of attempted adjustment to environmental reality. Is the imbalance increasing or decreasing? To what is the stress related? What psychological factors are accessible to external modification? What latent capacities for satisfaction in work, play, love, creativity, are discoverable for therapeutic planning? And this is language that can be understood. It is practical language and not language of incantation and exorcism.'

15. This medical concern against too readily reducing a human being into a functional nonentity and as a negative unit in family or society is law's concern also is reflected, at lest partially, in the requirements of Section 13(1)(iii). In the last analysis, the mere branding of a person as schizophrenic will not suffice. For purposes of Section 13(1)(iii) 'schizophrenia' is what schizophrenia does.'

15. Having regard to the complexity of the situation, the doctor's opinion may be of utmost importance for granting or rejecting a prayer for a decree of divorce. The question is as to whether a mental disorder is curable can be subject matter of determination of by a Court of Law having regard to the expert medical opinion and particularly the ongoing development in the scientific and medical research in this direction.

16. The Hindu Marriage Act or any other law governing the field do 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 to a medical examination. However, in our opinion, this does not preclude a court from passing such an order. We may, however, notice that such provisions have expressly been inserted in England by way of Sections 22 and 23 of the Family Law Reform Act, 1987 on the recommendations of the Law Commission. Sections 23 is to the following terms:

'23. Provisions as to scientific tests

(1) For Sub-sections (1) and (2) of Section 20 of the Family Law Reform Act, 1969 (power of court to require use of blood tests) there shall be substituted the following subsections -

(1) In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction -

(a) for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and

(b) for the taking, within a period specified in the direction, of bodily samples from all or any of the following, namely, that person, any party who is alleged to be the father or mother of that person and any other party to the proceedings;

and the court may at any time revoke or vary a direction previously given by it under this subsection.'

17. The English courts at one point of time held that the Court had no power to order a blood test on the ground that it would be a battery which no court may authorize. (See S. v. S.W. v. Official Solicitor [1972] AC 24).

18. However, the Court has been empowered to issue such a direction in a civil litigation.

19. In B.R.B. v. B., (1968) 2 All.E.R.1023, it was held:

'A judge of the High Court has power to order a blood test whenever it is in the best interest of the child. The judges can be trusted to exercise this discretion wisely. No limited-condition or bound is set up to the way in which judges exercise their discretion. The object of the court always is to find out the truth. When scientific advances give fresh means of ascertaining it, there should not be any hesitations to use those means whenever the occasion requires.'

20. As regard cases involving capacity as given In re M.B. [(As Adult: Medical Treatment) 1997 (2) F.C.R. 541] when surgical or invasive treatment may be needed by a patient, certain guidelines had been enumerated in St. George's

Healthcare N.H.S. Trust v. S. Regina v. Collins and Ors. Ex parte S. reported in 1998 (3) WLR 936. These guidelines are:

'(i) They have no application where the patient is competent to accept or refuse treatment. In principle a patient may remain competent notwithstanding detention under the Mental Health Act 1983.

(ii) If the patient is competent and refused consent to the treatment, an application to the High Court for a declaration would be pointless. In this situation the advice given to the patient should be recorded. For their own potential hospital authorities should seek unequivocal assurances from the patient (to be recorded in writing) that the refusal represents an informed decision, that is, that she understands the nature of and reasons for the proposed treatment, and that risks and likely prognosis involved in the decision to refuse or accept it. If the patient is unwilling to sign a written indication of this refusal, this too should be noted in writing. Such a written indication is merely a record for evidential purposes. It should not be confused with or regarded as a disclaimer.

(iii) If the patient is incapable of giving or refusing consent, either in the long term or temporarily (e.g. due to unconsciousness) the patient must be cared for according to the authority's judgment of the patient's best interests. Where the patient has given an advance directive, before becoming incapable, treatment and care should normally be subject to the advance directive. However, if there is reason to doubt the reliability of the advance directive (for example it may sensibly be thought not to apply to the circumstances which have arisen), then an application for a declaration may be made.'

21. Although individuals have the right not to be subjected to compulsory physical interventions and treatments but every measure adversely affecting a person's physical and moral integrity necessarily does not involve an interference with respect to his private life. (Costello-Roberts v. United Kingdom reported in 1995 (19) EHRR 112).

22. (See Human Rights Law and Practice - Chapter 4 - The European Convention on Human Rights - Article 8: Right to respect for private and family life - Page 165

at 169)

23. In Wigmore on Evidence, Volume VIII, third edition, it has been observed:

'The Courts can as well command a witness to let the jury, or qualified experts, inspect his premises, his chattels, or his person, as to produce his documents. It is not to be supposed that our Courts will finally commit themselves to the denial of such a plain dictate of principle and of common sense.'

24. It has been further observed:

'(c) As to a witness' living body, whether by self-exhibition to the jury at the trial, or by inspection of experts out of court, there is ample authority denying and privilege of non-disclosure; the trial Court's discretion determining the necessity and the suitable conditions. But some Courts still decline to take this liberal view, even in cases where this form of evidence is most necessary, as on a charge of rape or of slander of chastity. It is astonishing that Courts are so tardy in ignoring the propriety of getting at the truth by direct and simple methods, especially when modern science can here be of such peculiar assistance. Notable examples of the vital necessity of here resorting to modern scientific methods are seen in the inquiry into paternity by blood-group examination and into the credibility of a woman-complainant in sex-crimes by psychiatric examination.

Whether a person under arrest (not a witness) may be measured, photographed, or physically examined, is considered post, under the privilege against self-crimination.'

25. In Phipson on Evidence, 14th Edition, it is stated:

'9-01 Competence is to be distinguished from compellability. A person may be admitted to give evidence, though in certain cases he will not be compelled by the court to do so. In general, all persons are both competent and compellable. A person, however, though competent and compellable as a witness may not be competent or may not be compellable to give evidence as to particular matters.'

26. It has been further stated:

'1-13 Detention, preservation, inspection, samples, photographs, experiments - .....A report by a court expert may be ordered under Order 40, Rule 1, and this may involve experiments and tests. In patent actions this power is given by Order 103, Rule 27, but there is a discretion, and the court will not make an order for an inspection for what may be nothing more than a 'fishing' inspection; in arbitrations by the Arbitration Act 1950, Section 12(6); in reference by Order 36, and in country court cases by C.C. Rules 1981, Order 19 and Order 21, Rule 6 (an inspection of a lady's mouth by a dentist was, however, refused under these rules as not being 'any property or thing the subject-matter of the action'). Nonetheless, medical inspection of a party may be ordered in various cases, e.g. in Chancery to determine pregnancy, in nullity suits on the ground of impotence, and refusal to submit is evidence against the party; though bankrupts cannot be compulsorily examined with a view to their life insurance. A plaintiff in a personal injury action is liable to have his action stayed unless he submits to a medical examination on behalf of the defendant. Moreover, the court will not lightly order an examination which is unpleasant, painful or potentially dangerous. Since 1974, the court has had power to order that the parties exchange accounts of the substance of any oral or documentary expert medical evidence as a condition precedent to allowing the expert's report to be given at all. These two rules substantially nullify the common law privilege, which prevented the court from ordering the exchange of medical reports. The privilege still exists and will be of importance in relation to evidence obtained but, because unfavourable, not intended to be used or where the court exercises its discretion against disclosure. So, scientific experiments may be ordered, artistic tests undertaken, or specimens of handwriting brought into being, in our out of court, during the trial. Regulations may be made under the National Insurance (Industrial Injuries) Act 1965, Section 50, providing for examination and report on any questions arising for decision under the Act.'

27. In the event a Court of Law may find a person as disabled either physically or mentally, an appropriate direction for his rehabilitations having regard to Universal Declaration on the Rights of Disabled Persons, 1975, provisions of the Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995, the National Trust for Welfare with Antism, Cerebral Palsy, Mental Retardation and Municipal Disabilities Act, 1999 and other statutes, may be

issued.

28. The Court, however, indisputably is empowered to satisfy itself as to whether a party before it suffers from mental illness or not either for the purpose of appointment of a guardian in terms of Order 32, Rule 15 of Code of Civil Procedure or Section 41 of the Indian Lunacy Act is also for the determination of his competence as a witness.

29. Order 32, Rule 15 of Code of Civil Procedure and Section 41 of the Indian Lunacy Act read thus:

'Order 32 Rule 15: RULES 1 TO 4 (EXCEPT RULE 2-A) TO APPLY TO PERSONS OF UNSOUND MIND.

Rules 1 to 14 (except Rule 2-A) shall so, far as may be, apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.

41. Powers of Court in respect of attendance and examination of lunatic--

(1) The Court may require the alleged lunatic to attend at such convenient time and place as it may appoint for the purpose of being personally examined by the Court, or by any person from whom the Court may desire to have a report of the mental capacity and condition of such alleged lunatic.

(2) The Court may likewise make an order authorizing any person or persons therein named to have access to the alleged lunatic for the purpose of a personal examination.'

30. It will also be relevant to note that the Court has power to issue appropriate direction for protection of human rights of mentally ill persons and to see to it that a person suffering from mental illness gets adequate protection in terms of the Mental Health Act.

31. In Halsbury's Laws of England, Volume 11,4th Edition, it has been noticed that the mentally retarded persons are incompetent to give evidence. However it is stated:

'A person of unsound mind may give evidence if the trial judge is satisfied that he is then of sufficient understanding to give rational evidence his suffering from delusions does not render him incompetent.'

32. In Halsbury's Laws of England, Volume 17, 4th Edition, the Judge's duty in this behalf has been summarised stating:

'232. Judge's duty. Questions as to the competency or incompetency of a witness are decided by the judge, generally on a preliminary examination called the voirdire; but if the incompetency of a witness is not discovered until after he is sworn and has given evidence, his evidence may nonetheless be objected to and rejected.'

33. Yet again the primary duty of a Court is to see that truth is arrived at. A party to a civil litigation, it is axiomatic, is not entitled to constitutional protection under Article 20 of the Constitution of India. Thus, the Civil Court although may not have any specific provisions in the Code of Civil Procedure and the Evidence Act, has an inherent power in terms of Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.

34. Discretionary power under Section 151 of Code of Civil Procedure, it is trite, can be exercised also on an application filed by the party.

35. In certain cases medical examination by the experts in the field may not only found to be leading to truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms.

36. Having regard to development in medicinal technology, it is possible to find out that what was presumed to be a mental disorder of a spouse is not really so.

37. In matrimonial disputes, the court has also a conciliatory role to play- even for the said purpose if may require expert advice.

38. Under Section 75(e) of Code of Civil Procedure and Order 26 Rule 10A the Civil Court has the requisite power to issue a direction to hold a scientific, technical or expert investigation.

39. In Goutam Kundu v. State of West Bengal and Anr. : 1993 CriLJ3233 this Court while dealing with a question about the paternity of a child noticed the provision of Section 112 of the Evidence Act and held that the presumption arising thereunder can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities. It was held:

'26. From the above discussion it emerges-

(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to having roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The court must carefully examine as to what would be the consequence of ordering the blood test, whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis'.

40. Goutam Kundu (supra) is, therefore, not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regard mechanical passing of such order. In some other jurisdictions, it has been held that such directions should ordinarily be made if it is in the interest of the child.

41. We may now take note of some of the decisions cited by the learned counsel of the parties

42. In Bipinchandra Shantilal Bhatt (supra), it was held:

'7. But Miss Shah then relied on a case reported in Mahomed Ibrahim v. Mohammad Marakayar, : (1948)2MLJ277 , where it was held that when the question of unsoundness of mind of the plaintiff arises not only under Order 32 Rule 15 but also as a substantial issue in the suit, the Court has ample jurisdiction to inquire into the question whether the plaintiff is really by reason of the unsoundness of mind or mental infirmity incapable of protecting his interests. Now, this is an entirely different state of affairs. In the case cited, it was a question of the unsoundness of the mind of the plaintiff and the Court had to find out whether the Court would allow him to conduct the proceedings, or appoint somebody else or look after this interest and it was pointed out that it was always for the Court before which the manner came to be decided whether the plaintiff was capable of managing his own interest. That is not so in a case where it is alleged by a petitioner in a matrimonial petition that respondent is suffering from incurable unsoundness of mind. It is for the petitioner in such a case to establish such unsoundness of mind. It does not there become incumbent on the Court to find out whether the respondent is capable of taking care of his matrimonial home. That case, therefore, has no application to the facts of the case before me.'

43. In Smt. Reamma (supra), the Court relied upon the decision of Gujrat High Court in Bipinchandra Shantilal Bhatt (supra) and also the decision of the Andhra Pradesh Court in P. Sreeramamurthy v. Lakshmikantham : AIR 1955 AP207 for laying down a law that Section 151 of Code of Civil Procedure cannot be taken recourse to for the purpose of compelling a person to be subjected to a medical examination. We do not agree.

44. In Shanti Devi (supra) Bipinchandra Shantilal Bhatt (supra) was followed. In that case the respondent was already under the treatment of a doctor. A doctor was examined only after recording of the evidence of doctor and an application was filed that the respondent be permitted to undergo medical examination for the purpose of finding out as to whether unsoundness of mind of the respondent was incurable or not.

45. It was held that nobody can be forced to go to a mental hospital to undergo a medical treatment and it would be for the Court to draw an adverse inference against him for not doing so.

46. In P.A. Anbu Anandan (supra) the question before the Court was as to whether there had been a consummation of marriage. Following Gautam Kundu (supra) it was held that the Court cannot compel a person for compulsory medical examination of a party against his wish.

47. In Smt. Ningamma and Another (supra) it was observed:

'21...Right to personal liberty is also very important. To compel a person to undergo or to submit himself or herself to medical examination of his order blood test or the like without his consent or against his wish tantamounts to interference with his fundamental right of life or liberty particularly even when there is no provision either in the Code of Civil Procedure or the Evidence Act or any other law which may be said to authorize the Court to compel a person to undergo such a medical test as blood group test or the like against his wish, and to create doubt about the chastity of a woman or create doubt about the man's paternity. It will amount to nothing but interference with the right of personal liberty. Here as mentioned earlier, Section 112 read with Section 4 Evidence Act really have the effect of completely closing and debarring the party from leading any evidence with respect to the fact which the law says that to be the conclusive proof of legitimacy and paternity of child covered by Section 112 of Evidence Act, except by showing that during the relevant periods of time as referred to in Section 112 the parties to the marriage had no access to each other, and the allowing of medical test to test the blood group to determine paternity would run counter to the mandate of Article 21 of the Constitution as well and inherent powers are not meant to be exercised to interfere with the fundamental right of life and liberty of the person nor to nullify or stultify any statutory provision.'

Therein the Court was again considering the question as to whether a child was born out of the wedlock or not.

48. However, there have been several judgments where such a power has been found to be existing in the Court.

49. Mookerjee, A.C.J. speaking for a Division Bench in Birendra Kumar Biswas (supra) in a case under Section 19 of the Divorce Act for recession of marriage contract on the ground of existence of syphilis in one party to marriage after taking into consideration a large number of decisions observed:

'In these circumstances, we must hold that there has not been that full investigation of the case which the gravity of the result to the parties concerned required. The appeal must consequently be allowed and the case remanded for retrial. The allegation of fraud will be investigated and the question whether the condition of the respondent makes the rule of impotency as explained above applicable will be carefully reconsidered. We may add that it is necessary that there should be a proper medical examination of the person of the respondent. Reference may on this point be made to the following passage from the judgment of Lord Stowell in Briggs v. Morgan (1820) 3 Phill. 325:

'It has been said that the means (sic) for proof on these occasion are official (sic) natural modesty, but nature has provided (sic) other means, and we must be under the necessity of saying that all relief (sic) be denied or of applying the means within our power. The Court must not sacrifice justice to notions of delicacy of its own.' See also Norton v. Seton (1819) 3 Phill 117; Pollard v. Wybourn (1828) 1 Hag. Ecc. 725; Aleson v. Aleson (1728) 2 Lee Ecc. 576; Sparrow v. Harrison (1841) 3 Curt. 16; affirmed in Harrison v. Harrison (1842) 4 Moo. P.C. 96. Where a party refuses to attend for medical inspection, the Court may properly draw an unfavourable inference. This was laid down in the case of a female respondent F. v. P. (1896) 75 L.T. 192 and was extended to the case of a male respondent in B. v. B. (1901) P. 39 and was applied again in the case of a female respondent in W. v. S. (1905) P. 231. The Courts naturally exercise a wide discretion in ordering physical examination and always do so, subject to such conditions as will afford protection from violence to natural delicacy and sensibility. We understand that the respondent does not object to a proper medical examination.'

50. In G. Venkatanarayana (supra) the Andhra Pradesh High Court upon taking into consideration its earlier decision as also judgments of other High Courts including Bipinchandra Shantilal (supra), Smt. Revamma (supra) held:

'The close affinity between law and medicine is demonstrated by medical jurisprudence. The physician as an expert witness has become a common and welcome feature in Courts ranging from opinions on nature and degree of injures to the proximate cause of death in criminal cases, assessment of insanity and several other situations. When there is a dispute between the wife and husband about the potency of either of them their evidence reflected by truth constitutes the cream of evidence and the marshalling of adventitious or extraneous circumstances afford a poor substitute. In the event of diametrically opposite and rival versions of the parties the recourse to medical test resolves the riddle and the medical opinion assumes the acceptable piece of evidence. In the present atmosphere of looking forward to progeny of artificial insemination, scientific probe by virginity tests and the knowledge of pre-delivery sex the depreciation of the importance of determination of potency by medical test does not bear the impress of realistic approach.'

[See also George Swamidoss Joseph (supra)].

51. We wish to point out that the question as to whether a person is mentally ill or not although may be a subject matter of litigation, the Court having regard to the provisions contained in Order 32 Rule 15 of Code of Civil Procedure, Section 41 of the Indian Lunacy Act as also for the purpose of judging his competence to examine as a witness may issue requisite directions. It is, therefore, not correct to contend that for the aforementioned purposes the Court has no power at all. The prime concern of the Court is to find out as to whether a person who is said to be mentally ill could defend himself properly or not. Determination of such an issue although may have some relevance with the determination of the issue in the lis, nonetheless, the Court cannot be said to be wholly powerless in this behalf. Furthermore, it is one thing to say that a person would be subjected to test which would invade his right of privacy and may in some case amount to battery; but it is another thing to say that a party may be asked to submit himself to a psychiatrist

or a psychoanalyst so as to enable the Court to arrive at a just conclusion. Whether the party to the marriage requires a treatment or not can be found out only in the event, he is examined by a properly qualified Psychiatrist. For the said purpose, it may not be necessary to submit himself to any blood test or other pathological tests.

52. If the Court for the purpose envisaged under Order 32 Rule 5 of Code of Civil Procedure or Section 41 of the Indian Lunacy Act can do it suo motu, there is no reason why it cannot do so on an application filed by a party to the marriage.

53. Even otherwise the Court may issue an appropriate direction so as to satisfy himself as to whether apart from treatment he requires adequate protection inter alia by way of legal aid so that he may not be subject to an unjust order because of his incapacity. Keeping in view of the fact that in a case of mental illness the Court has adequate power to examine the party or get him examined by a qualified doctor, we are of the opinion that in an appropriate case the Court may take recourse to such a procedure even at the instance of the party to the lis.

54. Furthermore, the Court must be held to have the requisite power even under Section 151 of Code of Civil Procedure to issue such direction either suo motu or otherwise which, according to him, would lead to the truth.

B. Would subjecting a person to a medical test be in violation of Article 21 of the Constitution of India?

55. The right to privacy has been developed by the Supreme Court over a period of time. A bench of eight judges in M.P. Sharma v. Satish Chandra. : 1978(2)ELT287(SC) in the context of search and seizure observed that:

'When the Constitution makers have though fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction'

56. Similarly in Kharak Singh v. State of UP. : 1963 CriLJ329 , the majority judgment observed thus:

'The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.'

57. With the expansive interpretation of the phrase 'personal liberty', this right has been read into Article 21 of the Indian Constitution. [See R. Rajagopal v. State of Tamil Nadu and Ors. : AIR 1995 SC264 , People's Union of Civil Liberties v. Union of India : AIR 1997 SC568]. In some cases the right has been held to amalgam of various rights.

58. But the right to privacy in terms of Article 21 of the Constitution is not absolute right.

59. In Govind v. State of Madhya Pradesh and Anr. : 1975 CriLJ1111 , it was held:

'Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest.' (Para 31)

60. If there were a conflict between fundamental rights of two parties, that right which advances public morality would prevail. [See Mr. 'X' v. Hospital 'Z' (1998) 8 SCC 296 and Mr. 'X' v. Hospital 'Z' : AIR 2003 SC664]. In R. Rajagopal v. State of Tamil Nadu and Ors. : AIR 1995 SC264 , this Court upon formulating six principles, however, hastened to add that they are only broad principles and neither exhaustive nor all comprehending and indeed no such enunciation is possible or advisable.

61. In Govind v. State of Madhya Pradesh and Anr. (supra) it was held:

'28. The right to privacy in any event will necessarily have to go through a process of case- by-case development. Therefore, even assuming that the right to personal

liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.'

62. Having outlined the law relating to right to privacy in India, it is relevant in this context to notice that certain laws have been enacted by the Indian Parliament where the accused may be subjected to certain medical or other tests.

63. By way of example, we may refer to Section 185, 202, 203, 204 of the Motor Vehicles Act; Section 53 and 54 of the Code of Criminal Procedure and Section 3 of the Identification of Prisoners Act, 1920. Reference in this connection may also be made to Sections 269 and 270 of the Indian Penal Code. Constitutionality of these laws, if challenge is thrown, may be upheld.

64. In M. Vijaya v. The Chairman, Singareni Collieries and Ors. : 2001(5)ALD522 , the court, upon a detailed discussion of the competing rights of a private party and public right with reference to right to privacy of a person suspected of suffering from AIDS, held:

'There is an apparent conflict between the right to privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the State to identify HIV infected persons for the purpose of stopping further transmission of the virus. In the interests of the general public, it is necessary for the State to identify HIV positive cases and any action taken in that regard cannot be termed as unconstitutional as under Article 47 of the Constitution, the State was under an obligation to take all steps for the improvement of the public health. A law designed to achieve this object, if fair and reasonable, in our opinion will not be in breach of Article 21 of the Constitution of India.

It is well settled that right to life guaranteed under Article 21 is not mere animal existence. It is a right to enjoy all faculties of life. As a necessary corollary, right to life includes right to healthy life.'

65. It was observed:

'Yet another aspect of the matter is whether compelling a person to take HIV test amounts to denying the right to privacy? In Kharak Singh v. State of U.P., Govind v. State of M.P. and Ors. cases, the Supreme Court held that right to privacy is one of the penumbral rights of Article 21 of the Constitution. In all situations, a person can be asked to undergo HIV test with informed consent. If a person declines to take a test, is it permissible to compel such person to take the test? The question is whether right to privacy is violated if a person is subjected to such test by force without his consent? By the end of 1991, 36 federal states in USA enacted legislations regarding informed consent for HIV test. These legislations intended to promote voluntary test and risk reduction counselling. In USA, law also applies for involuntary tests and disclosure of information about the people in prisons, mental hospital, juvenile facilities and residential homes for mentally disabled persons. (See AIDS Law Today - Scott Burry and others published by Yale University - 1993).

In India there is no general law as such compelling a person to undergo HIV/AIDS test. Indeed, Article 20 of the Constitution states that no person accused of any offence shall be compelled to be a witness against himself. Be that as it may, under Prison Laws, as soon as a prisoner is admitted to prison, he is required to be examined medically and the record of prisoner's health is to be maintained in a register. Women prisoners can only be examined by the matron under the general or special powers of the Medical Officer. As per Section 37 of the Prisons Act, any prisoner wanting to be medically examined or appearing to be sick has to be reported before the Jailor who in turn is liable to call the attention of the Medical Officer in that behalf and all the directions issued by the Medical officer are to be recorded.'

66. It was also noticed:

'Under the ITP Act, the sex workers can also be compelled to undergo HIV/AIDS test. When sex workers are detained in corrective institutions or welfare homes either under Section 10A or under Section 17(4) or 19(2) of the Act, there are adequate provisions for medical examination. There are also provisions in segregating rescued women who are suffering from venereal diseases. We may

also notice that Section 2 of Dissolution of Muslim Marriage Act, 1939, Section 32 of Parsi marriage and Divorce Act, 1936, Section 10 of Indian Divorce Act, 1869. Section 13 of Hindu Marriage Act, 1956 and Section 27 of the Special Marriage Act, 1954 make incurable venereal diseases of either of spouses a ground for divorce. Further under Sections 269 and 270 of the Indian Penal Code, 1860, a person can be punished for negligent act of spreading infectious diseases.

In cases of divorce on the ground that the other spouse in suffering from HIV/AIDS or in case under Sections 269 and 270 I.P.C., can the person be compelled to give blood specimen for HIV test. The immunity under Article 20 does not extend to compulsion of giving of blood specimens.'

67. The question may be considered even from the human rights angel. Useful reference, in this connection, may be made to paragraph 149 and 164 of Halsbury's Laws of England, Fourth Edition, Reissue, Volume 8(2), which are as under:

'149. Respect of private and family life, home and correspondence. Everyone has the right to respect for his private and family life, his home and his correspondence. There may be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country. or for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.'

'164. Prohibition of discrimination. The enjoyment of the rights and freedoms as set out in the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) must be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This provision refers only to discrimination in respect of the enjoyment of the guaranteed rights and freedoms. However, its application does not presuppose a breach of any of the other provisions of the Convention. It is sufficient if the facts of

a case fall within the ambit of one or more of the substantive articles.

The provisions may only be violated by a difference in treatment between persons who are in comparable situations which has no objective and reasonable justification. Contracting states enjoy a margin of appreciation in relation to the question of justification, which depends upon the circumstances, subject matter and background of the case.'

68. The Court of Appeal, however, in R (on the application of S) v. Chief Constable of South Yorkshire, (2003) 1 All ER 148, upheld a legislation compelling preservation of finger prints, bodily samples, DNA profiles and DNA samples despite Article 8 and 14 etc. of the Human Rights Act, 1998 which are as under:

'8. Right to respect for private and family life. (1) Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

'14. Prohibition of discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

69. Lord Woolf, C.J., emphasizing the importance of protecting the public against the consequence of crime, held that such law does not violate either Article 8(2) or 14 of the Act, observing:

'The respondents strongly rely on the extent of the parliamentary scrutiny of the 2001 Act. It was extensive both in the House of Commons and in the House of Lords. In addition the Joint Committee on Human Rights carefully considered whether the amendment to Section 64 met the requirements of Article 8(2). The Joint Committee's Report issued on 23 April 2001 (HL Paper 69, HC 427) deals

with the amended Section 64 provisions at paras 86-92. In that report, the Joint Committee stated (at para 88):

'When we first looked at the Bill, we took the view that the clause [in relation to the retention of fingerprints and samples] amounted to an interference with the person's right to respect for private life [Article 8(1) of the convention], but that they provided a sound legal basis for retention, by ensuring that the circumstances in which retention and use were to be permitted were sufficiently clearly defined, appropriately directed, and limited in scope, in order to satisfy the justifying conditions under Article 82. Mr. Gordon strongly contests the correctness of the Joint Committee's assessment of the amendment but I respectfully agree with the Committee's approach. I regret to say that I cannot understand Mr. Gordon's submission that no justification has been shown for the amendment. Its purpose is obvious. The purpose is lawful. It is strictly confined to situations in which fingerprints and samples have been taken in accordance with Article 8. The fingerprints and samples can only be used for a purpose of 'the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution' Language which is very similar to that in Article 8(2).

In addition I regard the retention as being proportionate. By confining the retention to fingerprints and samples which have already lawfully been taken the amended provision limits the Article 8(1) interference significantly. As against that limited intrusion the scale of the database and therefore its value is substantially increased. I find myself in complete agreement with the Divisional Court that the interference with Article 8(1) rights of the individuals from whom the fingerprints and samples are taken is justified by Article 8(2).

In considering whether the interference with Article 8(1) is justified, it is relevant that if my approach to the article is correct, in this jurisdiction Article 8(1) may have a longer reach than is strictly required by the convention as applied by Strasbourg. If this is the result of the approach of society here then Parliament, as the democratically-elected body representative of the public, has undoubtedly the untrammelled right to establish the circumstances in which interference is justified as long as it does not fall below the standard set by the convention,

proportionality.'

70. As regard Article 14 Issue, the learned Judge stated:

'In the present circumstances when an offence is being investigated or is the subject of a charge it is accepted that fingerprints and samples amy be taken. Where they have not been taken before any question of the retention arises they have to be taken so there would be the additional interference with their rights which the taking involves. As no harmful consequences will flow from the retention unless the fingerprints or sample match those of someone alleged to be responsible for an offence the different treatment is fully justified.'

71. Waller, L.J., observed:

'The answer to Liberty's points is as I see it as follows. First the retention of samples permits (a) the checking of the integrity and future utility of the DNA database system; (b) a re-analysis for the up-grading of DNA profiles where new technology can improve the discriminating power of the DNA matching process; (c) re-analysis and thus an ability to extract other DNA markers and thus offer benefits in terms of speed, sensitivity and cost of searches of the database; (d) further analysis in investigations of alleged miscarriages of justice; and (e) further analysis so as to be able to identify any analytical or process errors. It is these benefits which must be balanced against the risks identified by Liberty. In relation to those risks, the position in any event is first that any change in the law will have to be itself convention compliant; second any change in practice would have to be convention compliant; and third unlawfulness must not be assumed. In my view thus the risks identified are not great, and such as they are outweighed by the benefits in achieving the aim of prosecuting and preventing crime.

The answer to the first question posed by Liberty is first that the fact that other jurisdictions do things differently cannot provide an automatic answer that this jurisdiction must be in breach of the convention, and in any event second, judicial scrutiny of the question of whether retention should be allowed does not provide an answer to any of the risks identified by Liberty which occur whether judges have scrutinized the question of retention or whether retention is on the basis

provided for by the new section.

The answer to the second question is that retention of the samples is beneficial in all the ways identified, and in particular it ensures the integrity and future utility of the database. The benefits outweigh any risks identified. The law is proportionate to the aim being sought to be achieved. That is so because in the fight against crime, there is the need to be allowed to retain the samples lawfully taken. To keep profiles alone would not be sufficient.'

72. In the United States of America, such laws have been held not to violate the Fifth Amendment of the US Constitution. In Armando Schmerber v. State of California 384 US 757 obtaining of an alcohol test has been held not to be unconstitutional. Similarly in Paul H. Breithaupt. v. Morris Abram 352 US 432 taking of blood sample from an accused has been held to be not in violation of Constitution 5th Amendment. In Charles Joseph Kastigar and Michael Gorean Stewart v. United States US 32 L.Ed. 2d 212 It is stated:

'The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established, but is not absolute, being subject to a number of exemptions, the most important of which is the Fifth Amendment privilege against self- incrimination.'

73. In Encyclopedia of the American Constitution, Volume 6 at page 2677 under the heading 'Testimonial and nontestimonial Compulsion', it is stated:

'The Court prefers a different formulation: does non-testimonial compulsion force a person to be a witness against himself criminally? The consistent answer has been 'no', even if there was a testimonial dimension to the forced admissions. If that testimonial dimension loomed too large, the Court loosened its distinction between testimonial and no testimonial compulsion and relied on some other distinction. Thus, when the driver of a vehicle involved in an accident was required by state law to stop and identify himself, though doing so subjected him to criminal penalties, the Court saw no Fifth Amendment issue, only a regulation promoting the satisfaction of civil liabilities. Similarly, when a lawyer or accountant was forced to turn over a client's incriminating records, the client had not been compelled at

all, though he paid the criminal penalty and lost the chance to make a Fifth Amendment plea. And when the police during the course of a lawful search found incriminating business records, the records were introduced in evidence, although they could not have been subpoenaed directly from the businessman. In these cases, where the compulsion was communicative or testimonial in character, the Court inconsistently discoursed on the need to decide as it did in order to avoid a decision against the introduction of non-testimonial evidence that had been compelled.'

We may further notice that this Court in State of Bombay v. Kathi Kalu Oghad : 1961 CriLJ856 and State (Delhi Administration) v. Gulzarilal Tandon : 1979 CriLJ1057 has held a direction to give specimen signature or handwriting for their comparison with the disputed handwriting is not violative of Clause (3) of Article 20 of the Constitution of India.

74. Such issues have cropped up in the United States of America in dissolution of marriage proceedings or a child custody dispute. In the course of such proceedings, mental health and parental fitness is sometimes called into question by one of the parties. Frequently one party will seek to introduce evidence of the other party's mental health though medical records. However, Federal common law, state common law, state statutes and the federal rules of evidence recognize the importance of protecting confidential communication with mental health professionals by recognizing a psychotherapist-patient privilege. Still, in such Court proceedings, it has been held by US Courts that no privilege is absolute specially when it relates to determining the fitness of the parents to have the custody of the child. The privilege can seriously impact the child custody and dissolution of the marriage proceedings. In Re Matthew R., 113 Md. App 701, 715, 688 A2d. 955, 961 it was held that such privilege if granted can seriously impact the child custody and dissolution of marriage proceedings.

75. If the nature of the information relates directly to the well-being of the child or to the parent's ability to adequately care for child, and the court believes the child is potentially in danger, courts are likely to admit the information despite a patient's expectation of confidentiality. There are two competing interests involved when a

court determines whether to compel discovery of a patient-litigant's mental health records over his objection in a child custody dispute. The first involves the privacy, confidentiality and privilege expectation of both the patient and the treating mental health professional in those communications. The second involves the application of the best interests of the child(ren) standard. Virtually every jurisdiction in the United States makes a child custody determination based upon the 'best interest of the child'.

76. 'Privacy' is defined as 'the state of being free from intrusion or disturbance in one's private life or affairs'. mental health treatment involves disclosure of one's most private feelings. In sessions, therapists often encourage patients to identify 'thoughts, fantasies, dreams, terrors, embarrassments, and wishes'. To allow these private communications to be publicly disclosed abrogates the very fiber of an individual's right to privacy, the therapist-patient relationship and its rehabilitative goals. However, like any other privilege the psychotherapist-patient privilege is not absolute and may only be recognized if the benefit to society outweigh the costs of keeping the information private. Thus if a child's best interest is jeopardized by maintaining confidentiality the privilege may be limited.

77. In Zuniga v. Pierce, (1983) 714 F.2d 632 the court reconciles these competing interests by balancing the interests involved. The court stated: 'This is necessarily so because the appropriate scope of the privilege like the privilege itself, is determined by balancing the interests protected by shielding the evidence sought with those advanced by disclosure.' The tripartite test states that a 'legitimate need' must be present for the evidence to exist, the relevancy and materiality to the issue before the court, and the moving party must demonstrate that the information to which they are seeking access 'cannot be secured from any less intrusive source'. Allowing the court to order independent examination of a parent's mental faculties without piercing the confidentiality of the patient-psychotherapist relationship avoids thwarting the psychotherapeutic process as well as allows the court to have all relevant evidence before it in order to make the best decision regarding the best interests of the children.

78. Laznovsky v. Laznovsky 74.5 A.2d 1054 (Md. Ct. App. 2000) is the most recent case addressing the admissibility of mental health records of a parent in a child custody proceedings. The court utilized the same balancing test used by most jurisdictions. It weighed the best interest of the child standard and the important interest in placing the child in the most safe, stable, and nurturing environment possible versus protecting confidential information revealed in the course of therapy compromising the psychotherapist-patient privilege and a basic right to privacy. The court concluded that 'the benefits to society of having confidential and privileged treatment available to troubled parents for outweighs the limitations placed upon the court by not having such information revealed against a parents' wishes.'

79. At this stage we may observe that taking of a genetic sample without consent may in some countries e.g. Canada be viewed as a violation of the person's physical integrity although the law allows such forced taking of sample. But even this practice was held to be valid when the sample is collected by a health care professional. Collecting samples from the suspects for DNA tests in some countries have not been found to be violative of right of privacy.

80. In the response of the Privacy Commissioner of Canada to Department of Justice consultation paper Obtaining and Banking DNA Forensic Evidence, it is stated:

'3. Collecting DNA from suspects

DNA evidence should not be collected from a suspect unless the information is relevant to a specific crime in question. For example, it would be appropriate to obtain a DNA sample from a suspect where DNA evidence is left at the scene of the crime and the suspect's DNA is needed to prove the suspect's involvement.

DNA evidence should not be collected from suspects as a matter of routine. To do so cause an unnecessary privacy intrusion; in the vast majority of criminal cases DNA evidence will contribute nothing to the investigation. Thus, it would not be appropriate for Parliament to give blanket authority to collect DNA samples from all persons suspected of indictable offences. DNA should also not be collected from a

suspect of investigators have no DNA evidence with which to compare the suspect's sample.

Nor would a DNA sample from the suspect be necessary if the suspect admitted guilt. However, as a practical manner, the DNA evidence might be critically important in getting the suspect to admit guilt in the first place.

As well, there should be reasonable grounds for suspecting that the person committed the offence before taking the DNA sample. It would not be acceptable to require all men in a given community to submit DNA samples to solve a specific crime.

Broadly-based testing of whole groups within a community would represent an unjustifiable intrusion into the lives of too many innocent people. As a further privacy safeguard, DNA evidence should be collected from a suspect only if a judge authorizes the collection.

In our 1992 report, Genetic Testing and Privacy, we discussed limiting the collection of DNA samples to cases involving criminal violence. The types of violence crimes for which DNA samples might be collected should be set out in legislation. The list of violent crimes set out in New Zealand's recently introduced Criminal Investigations (Blood Samples) Bill offers an example of the types of crimes for which DNA testing might be considered in Canada. It may also be appropriate to allow the collection of samples for other crimes, such as conspiracies to commit offences involving violence. For example, it should be lawful for samples to be taken if DNA evidence could help convict someone suspected of planning a terrorist act or murder (perhaps the suspect had left DNA on a stamp he licked and attached to a letter implicated in the crime).'

81. 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 mattes 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.

82. 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.

83. It is, however, axiomatic that a Court shall not order a roving inquiry. It must have sufficient materials before it to enable it to exercise its discretion. Exercise of such discretion would be subjected to the supervisory jurisdiction of the High Court in terms of Section 115 of the Code of Civil Procedure and/or Article 227 of the Constitution of India. Abuse of the discretionary power at the hands of a Court is not expected. The Court must arrive at a finding that the applicant has established a strong prima facie case before passing such an order.

84. If despite an order passed by the Court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out Section 114 of the Indian Evidence Act also enables a Court to draw an adverse inference if the party does not produce the relevant evidences in his

power an possession.

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

86. To sum up, our conclusions are

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

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

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

87. Subject to the observations made hereinbefore we are of the opinion that the High Court cannot be said to have committed a jurisdictional error in passing the impugned judgment. This appeal is, therefore, dismissed. However, in the facts and circumstances of the case there shall be no order as to costs.

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