Disputed Paternity and the pertinnence of DNA Testing - Priyanka Munsi

The Indian Judiciary seem to be slowly but steadily coming in terms and acceptance with the conclusiveness of the advanced modern technology like DNA Test in the matters of disputed Paternity[1] cases. Recently, the Delhi High Court rightly availed itself of the benefit of this modern technology, in the administration of civil justice, with respect to a maintenance case filed by wife, where paternity of a child was in question. A land mark judgment[2] was given by the honorable high court whereby Vipin Sanghvi, J observed that the, “The parentage of the child can only be determined by a DNA test. The liability to pay maintenance under section 125 CrPC[3] can be avoided by the petitioner with respect to this child only if it is established that he is not the biological son of the petitioner”

Scientific evidence is accepted all over the world for clear proof and ascertainment of disputed paternity. The ascertainment of legitimacy/illegitimacy of a disputed child cannot be restricted to be determined by Section 112 of the Indian Evidence Act, 1872. In the wake of new scientific inventions the new available techniques should be adopted in the administration of justice.

Current gold standard of evidence provided by forensic science is DNA testing. It is the biological blueprint of life. DNA fingerprinting is unique to each individual and does not match with any other person. DNA test is by far the most effective subject for determining whether two or more individuals are biologically related or not and it is of vital importance in solving crime and determining paternity. But before we move on to the pertinence of DNA fingerprinting in Paternity Issues let us briefly answer the basic question with respect to what is DNA, where does it come from and what are the various DNA testing procedures in brief.

WHAT IS DNA?

DNA is deoxyribonucleic acid, which is a double stranded long molecule and appears like a twisted rope ladder or double helix. Alternating phosphate and deoxyribose sugar units comprise the sides of the ladder, while the connectors of the ladder are composed of bases known as adenine (A), thymine (T), Guanine (G) and Cytosine (C). DNA is essentially made up of amino acids and it is matched with the so-called bases which provide the key to determining the genetic blueprint. Each and every cell in the human body has a sample of the DNA. Each human nucleus contains almost 5 picograms of DNA and an average human being contains about 250 grams of DNA. For DNA
fingerprinting the desired quantity is in micrograms. DNA can be extracted from a wide range of sources, including samples of hair, cigarette butts, blood, razor clippings or saliva. Thus it is relatively easy to obtain samples, which can then be tested in a laboratory to determine any genetic relationships that may be present.

WHERE DOES DNA COME FROM?

DNA is made up of one half of our biological mother’s DNA and one half of our biological father’s DNA. 50% of our DNA is passed down to our biological children. It is this that ensures DNA is unique, and allows for accurate testing of parentage and direct descendants through a DNA paternity test.

TYPES OF DNA TESTING PROCEDURES

Although, there are numerous types of procedures adopted for forensic matching and identification of an individual, there are two main types of such testing systems. They are called Restriction Fragment Length Polymorphism, (RFLP) and Polymerase Chain Reaction (PCR) testing.

Generally RFLP testing process requires larger amounts of DNA and for proper results the DNA must be uncontaminated. Small amounts of DNA sample is not suited for RFLP testing whereas PCR testing require smaller amount of DNA sample. However this test is highly sensitive test and the slightest contaminants at the scene of crime can alter or influence the results.

With the development of newer and more efficient DNA analysis techniques, RFLP is not used as much as it was once used because it requires relatively larger amount of DNA. In addition samples degraded by environmental factors, such as dirt or mold, do not work well with RFLP[4]. Now the RFLP has been replaced by the PCR based testing. It is basically an amplification technique since a tiny amount of sample may be increased to the required quantity by amplification. It involves replication of the target region[5] in multiples.

USES OF DNA TESTING

In criminal context such test can be required following sexual assaults, for example, to identify the father of a child conceived as a result of an alleged assault. Similarly, this test can be used to confirm that the two individuals are genetically related in cases involving concealed births, abandoned children, child swapping or infanticide. DNA Test is very useful in civil litigation involving claims by an estranged partner for financial support and maintenance of a child.
Paternity and Role of DNA

In civil litigations the main area where DNA profiling and matching is used, is related to Paternity or Parentage matters. In Paternity disputes there are two primary prominent issues involved. Firstly, the effects of Section 112 of the Indian Evidence Act in the context of the developments in the DNA testing process. And secondly, if the courts in India could direct a person to give sample of his or her DNA and the consequences of the refusal to provide the same. We shall deal with the above issues in the context of the judicial approach to paternity disputes in India.

In our country, initially the judges took very conservative views regarding the application of DNA evidence in resolving the paternity dispute cases. The journey from non-acceptance of DNA test by calling it a “mere balance of probabilities”[6] to the current situation of acceptance based on the merits of the case in paternity matters has been a fairly long one spanning over almost one and half decade. The Honourable Supreme Court in Goutam Kundu v. State of West Bengal[7] and Kamti Devi v Poshi Ram[8] had rejected the blood grouping and DNA test on the ground that the child may be stigmatized as a bastard in the society as a result of DNA test. This explanation of the honorable Supreme Court, with due respect, may be humbly submitted, has caused utmost hardship to innocent husband who has committed no wrong and is forced to bear the fatherhood of a illegitimate child. Further, the explanation of possible stigmatization of the child also appears vacant in the presence of Section 112 of the Indian Evidence Act, by which the illegitimacy of a child can still be determined by the application of the “no access” logic between the husband and wife. The explanation also does not hold good in the presence of provision of maintenance vide Section 125, CrPC, to an illegitimate minor child or an illegitimate major child with physical and mental abnormality. If the intention of the Supreme Court in rejecting DNA test in the above decision is to really do away with the taboo and stigma attached with illegitimacy of a child then the word illegitimate should be removed or struck out from all legislations in India. Again, Medical Jurisprudence evidences that there is a lot of chance that a maximum period of pregnancy can be over 280 days[9]. Section 112 does not apply to all those critical situations where even after 280 days of dissolution of marriage a mother remaining unmarried can claim legitimacy of the child born to her. In such a situations DNA test is the only method to establish the legitimacy of the child and solve the dispute with respect the paternity of the child[10].

The “no access” criterion becomes meaningless and absurd in situations where the wife although has access to the husband also leads a promiscuous lifestyle and gets impregnated by an outsider. However, due to the presumption of law under Section 112 of the Indian Evidence Act, the innocent husband is cast with the responsibility of fatherhood, and the child is recognized as his legal child. In this case the innocent husband is heavily penalized simply because the “no access” criterion cannot be proved.

However, as stated earlier, the Courts are slowly considering the importance of DNA test and in many instances have deviated from the decision in Kundu’s case. For example in Kanchan Bedi v Gurpreet Singh Bed[11], a DNA test of the child was directed where the
defendant was denying any marriage had taken place between him and the plaintiff and therefore he was not the father of the child. A DNA test was also conducted in the sensational Premanada Swami’s case, a godman who was charged with the rape of several teenage girls in his ashram. A DNA test established that 45 year old Swami Premanand as the biological father of the foetus as a result of rape of 19-year-old Arul Jyothi. The recent Delhi High Court judgment has also given a positive direction to the applicability and acceptance of DNA tests in disputes involving paternity.

In order to understand the situation with respect to the second primary issue we have to see another important Supreme Court decision. In Dwarika Prasad Satpatty v. Bidyut Parva Dixit[12] it was held that the refusal to paternity (DNA) test would bar a party from challenging the paternity of the child. This decision was followed in K. Salvaraj v P. Jayakumari[13] and it was also stated that an adverse inference can be drawn if a party refuses to undergo a DNA test. This seems to be a preferable interpretation and strikes a balance where although the court does not have the power to direct the giving of sample, it may draw an adverse inference if it is not given.

CONCLUSION

The justice administration system needs to assimilate the scientific advancements of genetic profiling and develop procedural techniques for harnessing the emerging juridical challenges. The significant paradigms of DNA fingerprints cannot be left alone to the courts to adjudicate with temporary tailor made solutions. Therefore in matters of disputed paternity, the legitimacy or illegitimacy of the child cannot be determined solely by Section 112 of the Indian Evidence Act, 1872. DNA technology can conclusively establish the truth in such disputes and therefore should be resorted to without any hesitation. It is to be borne in mind that when Section 112 was being drafted even the discovery of DNA was not contemplated and therefore this section should be amended. An ideal solution could be to provide another outlet apart from the proof of non-access (as discussed earlier) to be provided in the form of evidence of DNA test to rebut the conclusive proof provision in Section 112[14].

[1] Legal relationship father and the child is paternity.
[5] Segment of the DNA which has to amplified or replicated.
[6] In Gautam Kundu v State of West Bengal
[8] AIR 2003 SC 2226
[9] Section 112 of the Indian Evidence Act states that birth of a child within 280 days of dissolution of a marriage is a conclusive proof of legitimacy.
[10] Modi’s Medical Jurisprudence, 22nd Edn. at pg. 540 to 542
[14] In Sadashiv Mallikarjun Kheradkar v Nandini Sadashiv Khedarkar, 1995 Cri LJ 4090 at 4093 (Bom), the court lamented the absurdity of having only proof of non-access when DNA evidence decide the matter in a more scientific manner.