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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 14.12.2022
Pronounced on: 07.02.2023

+ **W.P.(CRL) 1729/2009**

SR.SEPHY

..... Petitioner

Through: Mr. Romy Chacko, Mr. Varun
Mudgal and Mr. Sudesh
Kumar, Advocates

Versus

CBI & ORS.

..... Respondents

Through: Mr. Ripu Daman Bhardwaj,
SPP for CBI with Mr.
Kushagra Kumar, Advocate

Mr. Kirtiman Singh, CGSC
with Mr. Waize Ali Nook, Mr.
Madhav Bajaj and Ms. Kunjala
Bhardwaj, Advocates for UOI

Mr. S. Nanda Kumar, Ms.
Deepika Nanda Kumar and
Mr. Anand Murthi Rao,
Advocates for R-4 (NHRC)

CORAM:

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

J U D G M E N T

Index to the Judgment

A. Factual Backdrop	4-7
B. Maintainability of Petition	7-17
i. Preliminary Objections of Respondents.....	7
ii. Contentions on behalf of Petitioner	10
iii. Findings of this Court	14
C. The Constitutional Validity of Virginity Test conducted upon a Female Accused under Investigation	17-53
i. The Case of Petitioner.....	17
ii. Submissions on behalf of Respondents	23
iii. Analysis and Findings.....	27
a. Indian Precedents.....	27
b. International Perspective on Virginity Test	34
c. Whether “Virginity Test” is covered under Section 53 of Code of Criminal Procedure, 1973	35
d. Custodial Dignity vs. Constitutional Validity of Virginity Test.....	43
e. Virginity Test: Victim vs. Accused	48
D. Conclusion and Directions	53-57

SWARANA KANTA SHARMA, J.

1. This Court *vide* this judgment examines the following grave question of law:

“Whether virginity test conducted on a female in police custody during investigation is in violation of her fundamental right under Article 21 of the Constitution of India”

2. The petitioner before this Court, by way of present petition, has sought the following prayers:

“a) issue a declaration that the conduct of ‘Virginity test’ on the Petitioner by the Respondent-CBI is unconstitutional and against the tenets of Fundamental Rights.

b) Punish the errant officials of the CBI who have subjected the petitioner to undergo Virginity test' against her own free will and for leaking the conduct and result of the test to the media.

c) Direct the respondents to pay exemplary compensation to the petitioner for the mental agony/torture/ humiliation undergone by the petitioner for having subjected her to undergo Virginity test'.

d) Quash the order dated 6/8.5.2009 issued by the fourth respondent.”

e) Pass such other orders of further orders, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the Petition...”

A. FACTUAL BACKDROP

3. An inmate of a Hostel in Kottayam, Kerala was found dead in the well on 27.03.1992 and the local police had registered the crime No. 187/92 as 'unnatural death' on the basis of the statement given by 'X'. Though the Central Bureau of Investigation had entertained reasonable doubt as to whether death of deceased was suicide or homicide as evident from the final report submitted before the Court on 29.11.1996, the Kochi unit of the very same investigating agency took a different stand in concluding that the death was homicide. The investigating agency arrayed the petitioner as the third accused with two other co-accused persons.

4. The petitioner was arrested on 19.11.2008 and was produced before the Court of Chief Judicial Magistrate, Ernakulam which remanded the petitioner to custody of Central Bureau of Investigation for further investigation.

5. On 25.11.2008 by afternoon, the petitioner was taken to Alapuzha Medical College without disclosing the destination or the purpose where two lady doctors from the Forensic Science Department and one Gynecologist of the Govt. Medical College were present. The petitioner was taken to a room and was asked to sign a document and upon her enquiring about the matter, she was told that it was the consent letter for a test. It is the case of petitioner that her consent was obtained forcefully by officers of Central Bureau of Investigation and the doctors therein under duress and coercion by subjecting her to severe mental torture. Thereafter petitioner was subjected to 'Virginty

test' and 'swab test' and about one hour thereafter she was taken back to the guest house.

6. It was later revealed that to the utter dismay of the Central Bureau of Investigation, the tests conducted by the doctors proved that the hymen of the petitioner was intact. As the result of the virginity test conducted on the petitioner proved counter-productive, officials of Central Bureau of Investigation with a view to save their face, fabricated a new story to the effect that the Petitioner has undergone surgery for suturing of hymen or "hymenoplasty".

7. On 28.11.2008 and the days that followed, the print and electronic media released the news of the virginity test conducted on the petitioner and the story of Central Bureau of Investigation of petitioner having undergone surgery for suturing of hymen. It is petitioner's case that the above reports were made public by the Central Bureau of Investigation even before the result of the test was submitted before the Court of Chief Judicial Magistrate on 02.12.2008.

8. As per petitioner, the Central Bureau of Investigation was carrying on a malicious campaign against her. Feeling extremely embarrassed and shocked by the conduct of the officials of Central Bureau of Investigation, the petitioner on 11.02.2009 preferred a representation before the Secretary to the Government of India, Public Grievances Department and the Director, Central Bureau of Investigation, stating the true facts and sought for their intervention in the matter and to redress the grievances of the petitioner. The above representation did not evoke any response.

9. Therefore, the petitioner approached the National Human Rights Commission seeking necessary intervention in the matter, and filed a petition/representation dated 17.03.2009. However, the National Human Rights Commission issued a communication to the counsel for the petitioner dated 06.05.2009 expressing that Commission was not inclined to proceed with the complaint in accordance with Regulation 9 of National Human Rights Commission (Procedure) Regulations, 1994 as amended. The National Human Rights Commission also granted liberty to the complainant to bring the allegations of violation of human rights to the notice of the Court.

10. The Central Bureau of Investigation filed the charge sheet before the Chief Judicial Magistrate on 24.07.2009 admitting the virginity test conducted on the petitioner and its result. However, in a bid to cover up their failure to prove that petitioner is not a virgin, it was alleged at para 53 of the charge sheet that the petitioner's hymen was subjected to hymenoplasty to conceal the evidence of rupture of hymen due to frequent sexual intercourse.

11. The case of petitioner is that she was forcefully subjected to undergo 'Virginity Test' by the Central Bureau of Investigation on 25.11.2008 against her consent. The said virginity test was conducted by the investigating agency under the pretext of an investigation to substantiate their case in relation to the death of deceased, who was found dead in a well on 27.03.1992. The result of the said test was allegedly leaked to the media by the Central Bureau of Investigation and it is the case of petitioner that the conduct of Central Bureau of

Investigation in subjecting the petitioner to virginity test forcefully against her free will and selective leakage of the test by the investigating agency to the electronic and print media even before submitting the result before the concerned Court amounts to violation of petitioner's fundamental rights.

B. MAINTAINABILITY OF PETITION

i. Preliminary Objections of Respondents

12. Mr. Ripu Daman Bhardwaj, learned Special Public Prosecutor for Central Bureau of Investigation states that since the appeal of the petitioner against her conviction in the present case is pending before the High Court of Kerala, the trial in the present case is still undergoing as an appeal against conviction is considered as continuation of trial court proceedings. Reliance in this regard is placed upon the decision of Apex Court in *Akhtari Bi v. State of M.P.* (2001) 4 SCC 355, wherein it has been held as under:

“5. ...Appeal being a statutory right, the trial court's verdict does not attain finality during pendency of the appeal and for that purpose his trial is deemed to be continuing despite conviction...”

13. It is stated that since the trial is pending before the High Court of Kerala, this Court has no jurisdiction to entertain the present petition and grant any relief as the same would amount to entering into the jurisdiction of the High Court of Kerala. It is further argued that any finding of this Court would invariably have an impact on the pending trial of the petitioner

14. Mr. Kirtiman Singh, learned counsel for Union of India, echoing the submissions made on behalf of Central Bureau of Investigation, states that since trial of present case is pending before the High Court of Kerala, this petition deserves outright rejection. It is also stated that petitioner has all the rights to raise the present issue in her appeal before the concerned High Court. It is stated that petitioner cannot be allowed to raise the same issue before two different High Courts and she must choose one forum. It is also stated that instant petition is not a Public Interest Litigation, and this Court cannot decide the issue of constitutional validity of virginity test, *de hors* the facts of the case. It is further stated that petitioner is bound by the facts that govern her and a declaration in vacuum is not otherwise permissible in law, and it is settled principle of law that Constitutional Courts should not answer hypothetical academic questions. In this regard, he places reliance upon the decision of Apex Court in *Sanjeev Coke Manufacturing Co. v. Bharat Coking Coal Limited* (1983) 1 SCC 147 and *Kusum Ingots & Alloys Ltd. v. Union of India* (2004) 6 SCC 254.

15. Learned counsel for Union of India further states that the submission of learned counsel for petitioner that he is challenging the virginity test independent of the petitioner's trial in High Court of Kerala is untenable. It is stated that the present petition is totally based on the cause of action that accrued to the petitioner and it will be wrong to say that present petition has nothing to do with the trial before High Court of Kerala. Learned counsel for Union of India points out that all the facts mentioned in the present petition are of trial in Kerala, for which an appeal is pending before the High Court of Kerala. It is

further pointed out that even the prayer in the present petition asks for declaration of virginity test conducted on petitioner as unconstitutional.

16. Learned counsel for Union of India further submits that it is not the case of petitioner that High Court of Kerala cannot decide the issue raised before this Court or that any declaration in favour of petitioner cannot impact the trial proceedings pending before the High Court of Kerala. Learned counsel for UOI relies upon the decision of this Court in *DCM Shriram Industries Ltd. v. HB Stockholdings Ltd. (2014) SCC OnLine Del 1572* to contend that parallel proceedings pursuing identical reliefs, based on the same cause of action, must not be allowed. In view of this decision, it is also averred that applying the doctrine of election presupposes, when there is choice of remedies which are inconsistent in character, the party has to elect one to the exclusion of the other. In present context, it is argued by learned counsel for Union of India that argument of learned counsel for petitioner that outcome of this Court qua unconstitutionality of conduct of virginity test will have no impact on trial before High Court of Kerala is misconceived.

17. It is argued that plea seeking compensation is also erroneous, in as much as if the petitioner seeks a declaration of unconstitutionality of virginity test conducted upon an accused in general, there would be no question of compensation in the given facts of the case. It is argued that if the plea qua compensation as well as declaration of virginity test conducted upon petitioner as unconstitutional is sought in reference to

petitioner herein, this Court would be required to appreciate the facts of the case, which are under consideration by the High Court of Kerala.

ii. Contentions on behalf of Petitioner

18. Mr. Romy Chacko, learned counsel for petitioner argues that the present petition is maintainable under both clause (1) and (2) of Article 226, which read as under:.

226. Power of High Courts to issue certain writs

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, **to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs**, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, **for the enforcement of any of the rights conferred by Part III** and for any other purpose

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person **may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power**, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(Emphasis supplied)

19. Learned counsel for petitioner states that instant writ petition is maintainable under Article 226(1) of Constitution because the relief prayed by the petitioner in prayer clause (b), (c) and (d) includes, *inter alia*, issuing directions to and quashing orders passed by the

respondents i.e. Union of India, Central Bureau of Investigation and National Human Rights Commission, all of which are located within the jurisdiction of this Court. It is, thus, stated that on the ground of territorial jurisdiction, the petition would be maintainable before this Court. It is argued that cause of action is irrelevant for the purposes of Clause (1) of Article 226, and that legislative history of Article 226 shows that initially clause (2) of Article 226 did not exist and so the High Court could issue writ only against an authority which is located within its territories. Reliance in this regard is placed upon the decisions of Hon'ble Apex Court in *Election Commission of India v. Saga Venkata Subba Rao AIR 1953 SC 210* and *Lt. Col. Khajoor Singh v. Union of India AIR 1961 SC 532*.

20. Learned counsel for petitioner submits that Article 226 was amended by the Constitution 15th Amendment Act, whereby clause (1A) was inserted into Article 226. Later by the constitution 42nd Amendment Act, clause (1A) was renumbered as clause (2). The effect of the amendment was that accrual of cause of action was made an additional ground to confer jurisdiction on a High Court under Article 226 of the Constitution. The jurisdiction under Article 226 (1) and Article 226 (2) is distinct and separate. Article 226 (2) confers an additional power on every High Court to issue writs throughout its territory within which the cause of action wholly or in part arises.

21. Mr. Chacko further states that even the petition would be maintainable under Article 226(2) of Constitution as the cause of action for filing the present petition arose within the jurisdiction of this Court.

It is stated that the reason for approaching this Court was lapse on the part of respondents herein, who are situated within the territorial jurisdiction of this Court, to take appropriate action and provide relief to the petitioner including compensation for violating her fundamental rights. It is also submitted by Mr. Chacko that since the representations filed before these authorities i.e. respondents were in connection with the conduct of an unconstitutional test upon the petitioner, the declaration qua same is also sought before this Court, which is essential to decide the other prayers.

22. Controverting the submissions of learned counsels for respondents, it is argued by learned counsel for petitioner that the issue before this Court, i.e. unconstitutionality of the virginity test conducted on the petitioner, is not an issue for consideration, directly or substantially, before any other court, and the matter pending before the High Court of Kerala is the appeal filed by the petitioner against conviction under Section 302 IPC. He also states that it is not his concern as to what is the outcome of the said case that is the criminal trial faced by the accused wherein she has already been convicted. He also states that his arguments is that there was no necessity to conduct this test in connection with the criminal case and is asking for disciplinary action and compensation to be paid to the victim as well as constitutional validity of this test being conducted on a female under interrogation, which is not an issue before the Trial Court in the concerned State.

23. He further contends that these two prayers are neither directly or substantially in issue before the criminal Court and rather they are not even remotely in issue before the criminal court where trial is taking place. It is also the contention of the learned counsel that the respondents in this petition abdicated their responsibility to safeguard the fundamental right of the petitioner and the representations which were given by her to National Human Rights Commission at its Headquarter in Delhi had passed illegal order, impugned before this Court, which are liable to be quashed and compensation be paid to the petitioner. He states that even this issue is not pending before the concerned criminal court in another State. It is stated that there is no rule similar to “res sub-judice”, as existing under Civil law, to bar such proceedings. However, in this regard, reliance has been placed upon the decision of *National Institute of Mental Health & Neuro Sciences v. C. Parameshwara* (2005) 2 SCC 256 to contend that even under civil law, the rules mandate that matter under consideration must be directly and substantially in issue before the court in contrast to incidentally or collaterally in issue.

24. Learned counsel for petitioner also submits that this Court, being a Constitutional Court, in a petition under Article 226 of Constitution, has ample powers to deal with the issues of fundamental rights of the citizens. It is stated that in the present case, the petitioner who was an accused in a criminal case was unnecessarily subjected to undergo the unconstitutional virginity test without her consent. He also argued that the victim though an accused in the criminal case cannot be denied the

constitutional remedy on the ground that the trial or an appeal is pending before the High Court.

iii. Findings of this Court

25. The petitioner has approached this Court by way of instant writ petition under Article 226 and 227 of Constitution of India. The arguments on the maintainability of this petition were heard *in extenso*.

26. Undoubtedly, as per mandate of Article 226 (1) of the Constitution, this Court has the jurisdiction to entertain the present petition since the relief sought as per prayer clause (b), (c) and (d) is against the respondents herein i.e. Union of India, Central Bureau of Investigation and National Human Rights Commission, whose headquarters are situated within the jurisdiction of this Court. Considering the arguments of learned counsel for petitioner, it is noted that in *Election Commission of India v. Saka Venkata Subba Rao (supra)*, the Hon'ble Supreme Court had reversed the decision of the High Court and had held that the Madras High Court did not have the power to issue a writ against Election Commission of India since the said Commission was located in New Delhi and not within the territories of High Court of Madras. Furthermore, the majority in decision rendered by a seven-judge bench of Apex Court in *Lt. Col. Khajoor Singh v. Union of India (supra)* approved the view taken by the Court earlier in *Saka Venkata Subba Rao (supra)* and held that the High Court of Jammu & Kashmir was right in not entertaining the writ petition filed by the Petitioner on the ground that it had no territorial jurisdiction.

27. Secondly, even the cause of action for filing present petition i.e. inaction of respondents to provide relief to the petitioner and rejection of the representation of petitioner also arose within the jurisdiction of this Court. It has been expressly held by the Apex Court in *Kusum Ingots & Alloys Ltd. v. Union of India* (*supra*) as under:

“10. Keeping in view the expressions used in Clause (2) of Article 226 of the Constitution of India, indisputably even if a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter.”

28. However to decide the aforesaid three prayers of the petitioner, it is essential to first deal with prayer (a) as all the other prayers are interlinked with prayer (a). The first prayer before this Court relates to the unconstitutionality of virginity test conducted upon an accused who is in custody. Essentially, this is an issue which deals with the fundamental rights of a person, and without any iota of doubt, the Writ Courts have the mandate to deal with and decide such issues. Furthermore, this is not the case, or an issue which is directly or substantially before the matter pending before High Court of Kerala, which is an appeal against conviction under Section 302 IPC. Issue in question before the Court at Kerala trying the criminal offence is that as to whether the petitioner in this case who is an accused in a case pending at Kerala had committed an offence of murder or not. It is not the issue before this Court rather no prayer has been made before this Court through this Writ Petition which refers to any right or contention of the petitioner as an accused. Rather by this Writ Petition, the

petitioner though an accused of a murder case, during investigation of which the virginity test was conducted seeks a declaration that such test was unconstitutional which had infringed her right to personal equity, dignity and privacy and could not have been conducted. Even this question is not an issue before the concerned criminal trial court. In case the petitioner would have sought any relief regarding the investigation or striking down the outcome of any test conducted during investigation which could have bearing on the outcome or appreciation of evidence of that case, this Court would certainly not have entertained a prayer in that regard. In view thereof, this Court is unable to accept the contentions of learned counsels for respondents that the relief sought by the petitioner herein is also pending before the High Court of Kerala.

29. Under Article 227 of the Constitution of India, since the representations regarding the unconstitutionality of this test conducted on the petitioner were given at Delhi at the Central Bureau of Investigation Headquarter and to National Human Rights Commission having its Headquarter at Delhi and were dealt with by National Human Rights Commission and not dealt with by Central Bureau of Investigation at Delhi, this Court for the purpose of examining as to whether such commission or omission were constitutional or illegal or not has the requisite jurisdiction.

30. There is strength in the arguments of the learned counsel for the petitioner that the petitioner cannot be denied constitutional remedy of compensation which is available to her at a place where it was denied to

her, on the ground that a criminal trial is pending at some other place. This Court, therefore, holds that to decide the constitutional validity of the virginity test conducted on the petitioner as an accused under interrogation can be examined and adjudicated by this Court since her representation in this regard was not acted upon by Central Bureau of Investigation and NHRC having their Headquarters at Delhi.

31. This Court takes this view also in light of the fact that the learned counsel for petitioner is not challenging the outcome of the said test before this court as that can be only challenged as per law before the concerned Trial Court. It is *de-hors* the criminal trial, its proceedings, appreciation of evidence therein collected by the prosecution agency and outcome of the said trial, that this court has been approached to examine the process of an investigation in which the virginity test was conducted on the petitioner as an accused.

C. THE CONSTITUTIONAL VALIDITY OF VIRGINITY TEST CONDUCTED UPON A FEMALE ACCUSED UNDER INVESTIGATION

i. The Case of Petitioner

32. It is submitted on behalf of petitioner that there is no nexus between the above Virginity test and the death of the deceased. As the incident of death of deceased had taken place 16 years prior to the date of conducting the virginity test, the test so conducted on the petitioner 16 years thereafter is malafide and was intended to humiliate the petitioner and substantiate the false case in which the petitioner was

implicated. However, when the attempt made by the Central Bureau of Investigation to disprove the virginity of the petitioner proved counter-productive, to cover up the same, Central Bureau of Investigation had invented the new story of hymenoplasty having been undergone by the petitioner. It is, thus, clear that the intention of the Central Bureau of Investigation was to malign the petitioner.

33. It is further the case of petitioner that to the understanding of the petitioner and from the opinion gathered from the Medical Practitioners and the medico-legal experts, the facility for conducting of 'hymenoplasty' was not available in India or in any other Asian country at the relevant point of time, and the petitioner did not even have a passport and that she has not traveled abroad till date. This further disproves the allegation that the petitioner had undergone hymenoplasty and that it amounts to adding insult to injury.

34. Further as per case of the petitioner, even assuming without admitting that the motive attributed to the accused for committing the alleged murder is true, there is no justification for subjecting the petitioner to virginity test as the outcome of the test will not prove the motive or the offence in question. This is so since petitioner's virginity has no nexus with the alleged murder of the deceased.

35. It is further averred on behalf of petitioner that the officials of Central Bureau of Investigation had knowingly and forcefully subjected the petitioner to undergo the 'Virginity test' against her free will on the pretext of proving the false story and are liable to be punished in accordance with law. This is so since the damage caused to the

petitioner is unexplainable and undeterminable and can never be measured in terms of money. Apart from this, it is averred that it is necessary to prevent torture of any other innocent victims in future in the name of virginity test by any investigating agency.

36. It is argued on behalf of petitioner that Central Bureau of Investigation has violated the fundamental rights of petitioner under Article 14, 19, 20 (1), 21 and 22 guaranteed under the Constitution of India and that petitioner has been subjected to gender based discrimination by being subjected to undergo the virginity test under the pretext of proving the case of a murder.

37. It is submitted that the conduct of the Central Bureau of Investigation in subjecting the petitioner to virginity test violates petitioner's the right to live with basic human dignity, right to honour, reputation and privacy enshrined under Article 21 of the Indian Constitution.

38. It is stated on behalf of petitioner that as held in *D.K. Basu v. State of West Bengal (1997)1 SCC 416*, the precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under-trials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law. As there is no law permitting virginity test, the impugned conduct of the Central Bureau of Investigation amounts to gross violation of the fundamental rights of the petitioner under Articles 14, 19, 20 (3) and 21 of the Constitution.

39. It is submitted that the Central Bureau of Investigation subjected the petitioner to virginity test without obtaining the permission of any Court. For this reason also, the impugned conduct of the Central Bureau of Investigation is illegal, arbitrary and therefore, unconstitutional. It is further submitted that India is a signatory to Universal Declaration of Human Rights and International Covenant on Civil and Political Rights, hence, bound to abide by the Covenants.

40. It is further the case of petitioner that the National Human Rights Commission erred in failing to consider petitioner's complaint on the ground of pendency of case before the Court. The Commission has not specified as to which court is seized of the matter nor the petitioner was aware of the source of this information as no notice was issued to the petitioner by the commission nor was the petitioner given any opportunity to be heard. It is submitted that the petitioner has not challenged the virginity test conducted by the Central Bureau of Investigation before any Court and that the committal proceedings pending before Chief Judicial Magistrate has nothing to do with the relief sought by the petitioner before the National Human Rights Commission. In fact as per Section 12 (a) of the Protection of Human Rights Act, 1993, the Commission is bound to enquire on a petition filed by a victim into complaint of violation of human rights and since the Commission has abdicated its function in this regard, the impugned order issued by National Human Rights Commission is ultra vires the aforesaid provision.

41. The petitioner has also stated that the order passed by National Human Rights Commission dated 06/08.05.2009 is ultra virus since no notice was issued to the petitioner before the impugned order was passed and that it is vague, non-speaking and arbitrary. It is also stated that Commission was not justified in relying on Regulation 9 of National Human Rights Commission Regulations 1994 for the purpose of dismissing the complaint filed by the petitioner. It is argued that Regulation 9 (xi) only says that the complaint which is sub judice may not be entertained. It is argued that Regulation 9 (xi) of National Human Rights Commission Regulation 1994 is similar to Section 10 of CPC and, therefore, National Human Rights Commission has abdicated its statutory function under Section 12 of the Protection of Human Rights Act, 1993 in taking the stand that the proceedings of issued of consent to the test as well as the violation of rights are issues that were best adjudicated by competent courts of law. It is argued that the issues raised before National Human Rights Commission were not raised before the Court of Chief Judicial Magistrate or any other Court and the relief sought by petitioner before National Human Rights Commission had nothing to do with the relief sought by the petitioner before the Chief Judicial Magistrate concerned.

42. It is stated that in case the National Human Rights Commission will take shelter under the said section, it will dilute the statutory powers vested in National Human Rights Commission under Section 12 of the Protection of Human Rights Act, 1993. It is also argued if the stand taken by National Human Rights Commission is accepted, detenués and undertrial prisoners will be deprived of fundamental rights

and will be left with no remedy. It is stated that the petitioner was taken to a room at Alleppy Medical College where she was made to sign some papers, however, her signatures were obtained by force and without her free consent.

43. It is stated that the virginity test conducted on the petitioner violates Article 21 of the Constitution. Reliance has been placed on the case of *Nilabati Behra v. State* (1993) 2 SCC 746 and *D.K. Basu v. State of West Bengal* (*supra*) that the doctrine of sovereign immunity has no application to State's liability for contravention of fundamental rights and is no defence to the constitutional remedy under Article 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights.

44. It is argued that in the case of *S. Nambi Narayanan v. Siby Mathews & Ors.* (2018) 10 SCC 804, after quoting with approval the judgment in the case of *D.K. Basu v. State of West Bengal* (*supra*), the Hon'ble Supreme Court has held that pendency of civil suit for compensation will not bar the constitutional court to grant compensation under the public law remedy. It is further held that reputation of an individual is an insegregable facet of his right to live with dignity.

45. It is stated that Respondent Nos. 1 to 3 are bound to compensate the petitioner for the custodial torture suffered by her at the hands of the Central Bureau of Investigation and to take disciplinary action against the Investigating officer in the light of the law declared by the Supreme Court in the aforesaid judgments.

ii. Submissions on behalf of Respondents

46. Respondent no. 1, Central Bureau of Investigation, filed reply by way of counter affidavit, wherein it was stated that the virginity test conducted upon the petitioner was necessary for investigation of the murder case. It is also stated that during the visit for medical examination, two women constables had escorted the petitioner and she had consented and had accompanied the women constables to the medical college, as well as the medical officer and Central Bureau of Investigation had taken utmost care not to expose any information of her in media and public. It is stated that there was no presence of any male officer inside or outside the consulting room or the department of Gynaecology where the petitioner was medically examined. It is also stated that before the medical examination, the medical officers had again ensured that informed written consent of the petitioner was in place. It is stated that the petitioner was not subjected to any force and compulsion to undergo the medical examination, and to solve the murder case under investigation, it was essential to find out the past sexual history of the petitioner. It is stated that it is only after the test was conducted on 26.11.2008 and when the petitioner was produced before the concerned Chief Judicial Magistrate on 02.12.2008, that the counsel for petitioner had alleged that the medical test was conducted without her consent.

47. It is stated that since the matter was reported in the media by the persons of media, and because other public persons were present in the court of Chief Judicial Magistrate where the arguments in this regard

were addressed by counsel for the petitioner, the Central Bureau of Investigation cannot be held responsible for the reporting of this case by media. It is also stated that the medical examination report of the petitioner by two lady doctors had revealed the surgical interference which was opined by them as ‘hymenoplasty’ (in the statement recorded under Section 161 Cr.P.C.). It is stated that the Central Bureau of Investigation has not maligned the petitioner and that the medical examination of the petitioner cannot be construed as violation of fundamental right of the petitioner and that permission of the court was not required and Section 53 Cr.P.C. empowers the Investigating Officer to refer the accused for medical examination. It is, therefore, stated that since no damage has been caused to the petitioner, no compensation can be allowed to be given to her. It is also stated that the National Human Rights Commission had considered the matter carefully and had closed the matter.

48. Learned counsel for Central Bureau of Investigation states that the test so conducted was conducted as the investigation had necessitated it on the accused to solve the case in question and at that time, the constitutional validity of such a test being conducted on an accused had not been declared unconstitutional and there is at present, no finding of any Court that such a test could not have been conducted on an accused, though there are numerous judgments that such a test cannot be conducted on a victim of sexual assault.

49. In the rejoinder filed by the petitioner, the averments made in the counter affidavit of the respondent no.1 were denied and it was

reiterated that the High Court of Kerala *vide* order dated 01.01.2009 had observed in its paragraph 88 that the virginity test conducted by respondent no. 1 was totally unnecessary, unfortunate and did not serve any purpose other than making an attempt to throw mud on the petitioner in public.

50. Learned counsel for National Human Rights Commission states that the Commission had considered the matter carefully, and the case of petitioner was closed with the following observations:

“...The Hon'ble Court had already seized the matter. Hence, the Commission is not inclined to proceed with the complaint in accordance with Regulation 9 of the NHRC (Procedure) Regulations, 1994 as amended. The complainant may, if so advise, bring the allegation of violation of human rights to the notice of the Court. The case is closed with these observations...”

51. Learned counsel for National Human Rights Commission argues that the Commission was not in a position to consider the representation of the petitioner in view of Regulation 9 of the National Human Rights Commission(Procedure) Regulations, 1994, which is as under:

“9. The commission may dismiss in limini complaints of following nature-
(xi) Matter is sub-judice before a Court/Tribunal”

52. In support of this, reliance has been placed upon the decision in *State of Sikkim v. National Human Rights Commission 2021 SCC OnLine Sikk 183*, wherein it was observed as under:

“...18. The National Human Rights Commission (Procedure) Regulations, 1994 as amended, provides in

Regulation 9 that in certain cases complaints are not ordinarily entertainable. It provides that the Commission may dismiss in limini complaints of various nature as enumerated below:-

- "(i) illegible;
- (ii) vague, anonymous or pseudonymous;
- (iii) trivial or frivolous;
- (iv) barred under section 36(1) of the Act;
- (v) barred under section 36(2) of the Act;
- (vi) allegation is not against any public servant;
- (vii) the issue raised relates to civil dispute, such as property rights, contractual obligations and the like;
- (viii) the issue raised relates to service matters;
- (ix) the issue raised relates to labour/industrial disputes;
- (x) allegations do not make out any specific violation of human rights;
- (xi) matter is sub judice before a Court/Tribunal;
- (xii) matter is covered by a judicial verdict/decision of the Commission;
- (xiii) where it is only a copy of the complaint addressed to some other authority;
- (xiv) the matter is outside the purview of the Commission on any other ground."

19. Regulation 9(xi) relates to matter which are sub judice before the court or tribunal. The admitted facts as pleaded do not reflect that the NHRC entertained the complaint when the matter was sub judice before this court. Regulation 9(xii) relates to matter which is covered by the judicial verdict or decision of the Commission. The arguments made by the learned counsel for the petitioner relates to the dismissal of the writ petition in limine which has already been discussed in detail above. Therefore, even this ground does not help the petitioner's case..."

iii. Analysis and Findings

53. The present writ petition was filed in the year 2009, and during the pendency of this writ petition, several judgments of the Hon'ble Supreme Court and other High Courts were passed wherein the constitutional validity of the "virginity" or the "two-finger" test has been adjudicated upon and the test has been declared unconstitutional. These precedents, along with foreign decisions and international law, will be discussed in the succeeding paragraphs.

a. Indian Precedents

54. In *Lillu v. State of Haryana* (2013) 14 SCC 643, the Hon'ble Supreme Court has held the "two-finger test" to be violative of right to dignity, integrity and privacy of victims of sexual assault., with the following observations:

"7. So far as the two finger test is concerned, it requires a serious consideration by the court as there is a demand for sound standard of conducting and interpreting forensic examination of rape survivors.

13. In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount

consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.

14. Thus, in view of the above, **undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent...**

(Emphasis supplied)

55. The Supreme Court in *Re: Assessment of The Criminal Justice System in Response To Sexual Offences (2020) 18 SCC 540* called for the status report from all states and union territories in the country on the question, among others, as under:

“17. Thus, we consider it appropriate to call for status report with regard to the following: -

...(5) whether the medical experts have done away with the Per-Vaginum examination commonly referred to as ‘Two-finger test’ and whether any directions have been issued by the states in this regard?...”

56. Recently, the Hon’ble Apex Court in *State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai 2022 SCC OnLine SC 1494*, relying upon the decision in *Lillu v. State of Haryana (supra)* and the ‘Guidelines & Protocols: Medico-legal care for survivors/victims of sexual violence’ issued by Ministry of Health and Family Welfare, Government of India in year 2014, observed that any person who conducts the “two-finger test” shall be in contravention of directions of

the Apex Court and guilty of misconduct. The observations are as under:

“...64. While examining the victim, the Medical Board conducted what is known as the **“two-finger test”** to determine whether she was habituated to sexual intercourse. This Court has time and again deprecated the use of this regressive and invasive test in cases alleging rape and sexual assault. This so-called test has no scientific basis and neither proves nor disproves allegations of rape. It instead re-victimizes and re-traumatizes women who may have been sexually assaulted, and is an affront to their dignity. The **“two-finger test”** or pre-vaginum test must not be conducted.

66. Whether a woman is “habituated to sexual intercourse” or “habitual to sexual intercourse” is irrelevant for the purposes of determining whether the ingredients of Section 375 of the IPC are present in a particular case. The so-called test is based on the incorrect assumption that a sexually active woman cannot be raped. Nothing could be further from the truth - a woman's sexual history is wholly immaterial while adjudicating whether the accused raped her. Further, the probative value of a woman's testimony does not depend upon her sexual history. It is patriarchal and sexist to suggest that a woman cannot be believed when she states that she was raped, merely for the reason that she is sexually active.

67. The legislature explicitly recognized this fact when it enacted the Criminal Law (Amendment) Act 2013 which inter alia amended the Evidence Act to insert Section 53A. In terms of Section 53A of the Evidence Act, evidence of a victim's character or of her previous sexual experience with any person shall not be relevant to the issue of consent or the quality of consent, in prosecutions of sexual offences.

68. The **Ministry of Health and Family Welfare issued guidelines for health providers in cases of sexual**

violence. These guidelines proscribe the application of the “two-finger test”:

“Per-Vaginum examination commonly referred to by lay persons as ‘two-finger test’, must not be conducted for establishing rape/sexual violence and the size of the vaginal introitus has no bearing on a case of sexual violence. Per vaginum examination can be done only in adult women when medically indicated.

The status of hymen is irrelevant because the hymen can be torn due to several reasons such as cycling, riding or masturbation among other things. An intact hymen does not rule out sexual violence, and a torn hymen does not prove previous sexual intercourse. Hymen should therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, edema etc.) are to be documented.”

69. Although the “two-finger test” in this case was conducted over a decade ago, it is a regrettable fact that it continues to be conducted even today.

72. Any person who conducts the “two-finger test” or per vaginum examination (while examining a person alleged to have been subjected to a sexual assault) in contravention of the directions of this Court shall be guilty of misconduct...”

(Emphasis supplied)

57. In *State of Gujarat v. Rameshchandra Ramabhai Panchal*, 2020 SCC OnLine Guj 114, the ‘two-finger test’ or ‘virginity test’ was declared as unconstitutional, with the following observations:

“...25. The contents of the medical certificate, Exh.10 are quite disturbing. It appears that in the course of the medical examination of the victim, the two-finger test was conducted.

26. The two-finger test also known as the PV (Per Vaginal) refers to an intrusive physical examination of a woman's vagina to figure out the laxity of vaginal muscles and whether the hymen is distensible or not. In this, the doctor puts two fingers inside the woman's vagina and the ease with which the fingers penetrate her are assumed to be in direct proportion to her sexual experience. Thus, if the fingers slide in easily the woman is presumed to be sexually active and if the fingers fail to penetrate or find difficulty in penetrating, then it is presumed that she has her hymen intact, which is a proof of her being a virgin.

29. The test itself is one of the most unscientific methods of examination used in the context of sexual assault and has no forensic value. Whether a survivor is habituated to sexual intercourse prior to the assault has absolutely no bearing on whether she consented when the rape occurred. Section 155 of the Indian Evidence Act, does not allow a rape victim's credibility to be compromised on the ground that she is “of generally immoral character.

30. The two-finger test is unconstitutional. It violates the right of the victim to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, give rise to presumption of consent.....

36. Undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent. **The Medical procedures should not be carried out in a manner that constitutes cruel, inhuman or degrading treatment and health should be**

of paramount consideration while dealing with the gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with her privacy. Keeping in mind the International Covenant on Economic, Social, and Cultural Rights 1966 and the UN Declaration of Basic Principles of Justice for victims of Crime and Abuse of Power 1985, the apex Court said, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medial procedures conducted in a manner that respect their right to consent

(Emphasis supplied)

58. In *Rajivgandhi v. State* 2022 SCC OnLine Mad 1770, the Division Bench of Madras High Court has directed the Government of Tamil Nadu to immediately ban the practice of the ‘two-finger’ test conducted by medical professionals on survivors of rape, by observing as under:

“20. Before parting with this case, we feel that it is necessary for us to put an end to the practice of the two finger test. We find that the two finger test is being used in cases involving sexual offences, particularly, on minor victims. As early as in 2013, the Hon'ble Supreme Court had held that the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity...

24. In view of the above judicial pronouncements, we have no doubt that the two finger test cannot be permitted to be continued. Therefore, we issue a direction to the State Government to ban the practice of two finger test on

victims of sexual offences by the medical professionals forthwith.”

59. On similar lines as aforesaid, the “*Report of the Committee on Amendments to Criminal Law, 2013*”, headed by Justice (Retd.) J.S. Verma, had made the following observations and suggestions qua the conduct of virginity tests:

“9. The issue of whether sexual assault occurred is a legal issue and not a medical diagnosis. Consequently, doctors should not, on the basis of the medical examination conclude whether rape had occurred or not. Only findings in relation to medical findings should be recorded in the medical report.

10. It is crucial to underscore that the size of the vaginal introitus has no bearing on a case of sexual assault, and therefore a test to ascertain the laxity of the vaginal muscles which is commonly referred to as the two-finger test must not be conducted. On the basis of this test observations/ conclusions such as 'habituated to sexual intercourse' should not be made and this is forbidden by law.

11. Routinely, there is a lot of attention given to the status of hymen. **The “finger test” is also conducted to note the distensibility of the hymen. However it is largely irrelevant because the hymen can be torn due to several reasons. An intact hymen does not rule out sexual assault, and a torn hymen does not prove previous sexual intercourse.** Hymen should therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual assault. Only those that are relevant to the episode of assault (findings such as fresh tears, bleeding, oedema etc.) are to be documented...”

(Emphasis supplied)

b. International Perspective on Virginity Test

60. The ‘Convention on the Elimination of All Forms of Discrimination Against Women, 1979’, ratified by India, provides as under:

“Article 5 -

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women...”

61. The a joint statement, titled “*Eliminating Virginity Testing: An Interagency Statement*”, issued in year 2018, by UN Human Rights Office, World health Organization and UN Women calls for a ban on all forms of virginity testing, the same being unscientific, medically unnecessary and unreliable. The concluding part of the statement is as under:

“...This statement establishes that **virginity testing is unscientific, medically unnecessary and unreliable; it violates a woman’s human rights and is associated with short and long-term adverse health outcomes.** The statement expresses a commitment to support efforts to **eradicate all forms of virginity testing, thereby upholding the human rights of women and girls across the globe.**

The statement calls on governments; health professionals and their associations; international, regional and national health agencies; and communities at large **to take the**

initiative to ban virginity testing and create national guidelines for health professionals, public officials and community members, particularly in countries where virginity testing is widely practised.

Specific strategies to eliminate virginity testing from medical practice:

Medical providers and their associations should be aware of the research that shows that virginity testing has no scientific merit and cannot determine past vaginal penetration or virginity. They should also know the health and human rights consequences of virginity testing, and never perform or support the practice.

Communities should lead in awareness campaigns that challenge myths related to virginity, and harmful social norms that perpetuate the practice of virginity testing.

Governments and health authorities should enact supportive legislative and policy frameworks for the sustained elimination of virginity testing.

The World Health Organization and endorsing agencies confirm their commitment to supporting all women and girls, communities, organizations and national governments in the elimination of virginity testing....”

(Emphasis supplied)

c. **Whether “Virginity Test” is covered under Section 53 of Code of Criminal Procedure, 1973**

62. It is the contention of the learned counsel for Central Bureau of Investigation that under Section 53 of Cr.P.C. the investigating agency was well within its right to get the medical examination of the petitioner conducted as she was accused under investigation.

63. In this regard, it will be useful to refer to the present context, it will also be relevant to discuss the provisions of law with respect to medical examination of accused persons, in order to ascertain as to whether any statutory law permits the conduct of virginity or two-finger test upon a female accused in custody.

64. **Section 53 of Cr.P.C.** contemplates the medical examination of a person who has been arrested for committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence. Such an examination can be done at the request of a police officer. Section 54, on the other hand, provides a general rule that every person so arrested is required to be medically examined soon after the arrest. Explanation to these provisions, inserted in the Cr.P.C. by way of an amendment in the year 2005, provides the scope for medical examination. The said provisions are reproduced as under for a quick reference:

“53. Examination of accused by medical practitioner at the request of police officer. -

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably

necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation. - In this section and in sections 53-A and 54, -

(a) **‘examination’ 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 the use of modern and scientific techniques including DNA profiling and such other tests** which the registered medical practitioner thinks necessary in a particular case;

(b) ‘registered medical practitioner’ means a medical practitioner who possesses any medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act , 1956 (102 of 1956) and whose name has been entered in a State Medical Register.

54. Examination of arrested person by medical officer.—(1) When any person is arrested, he shall be examined by a medical officer in the service of Central or State Government, and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made:

Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.

(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of

such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person

(Emphasis supplied)

65. The Hon'ble Apex Court in *Selvi & ors. v. State of Karnataka (2010) 7 SCC 263* while dealing with the constitutional validity of narco-analysis of an accused person *sans* consent, examined the scheme of Sections 53 and 54 Cr.P.C., the relevant observations of which have been reproduced as under:

“145. At this juncture, it should be noted that the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973 was amended in 2005 to clarify the scope of medical examination, especially with regard to the extraction of bodily substances.....

146. The respondents have urged that the impugned techniques should be read into the relevant provisions - i.e. Sections 53 and 54 of CrPC. As described earlier, a medical examination of an arrested person can be directed during the course of an investigation, either at the instance of the investigating officer or the arrested person. It has also 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. Furthermore, Section 53 contemplates the use of 'force as is reasonably necessary' for conducting a medical examination. This means that

once a court has directed the medical examination of a particular person, it is within the powers of the investigators and the examiners to resort to a reasonable degree of physical force for conducting the same.

147. The contentious provision is the Explanation to Sections 53, 53-A and 54 of the CrPC (amended in 2005) which has been reproduced above. 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 was argued that even though the narcoanalysis technique, polygraph examination and the BEAP test have not been expressly enumerated, they could be read in by examining the legislative intent. Emphasis was placed on the phrase 'and such other tests' to argue that the Parliament had chosen an approach where the list of 'modern and scientific techniques' contemplated was illustrative and not exhaustive. It was also argued that in any case, statutory provisions can be liberally construed in light of scientific advancements. 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.

148. On the other hand, the counsel for the appellants have contended that the Parliament was well aware of the impugned techniques at the time of the 2005 amendment and consciously chose not to include them in the amended Explanation to Sections 53, 53-A and 54 of the CrPC. It was reasoned that this choice recognised the distinction between testimonial acts and physical evidence. While bodily substances such as blood, semen, sputum, sweat, hair and fingernail clippings can be readily characterised as physical evidence, the same cannot be said for the techniques in question. This argument was supported by invoking the rule of 'ejusdem generis' which is used in the interpretation of statutes. This rule entails that the meaning of general words which follow specific words in a statutory

provision should be construed in light of the commonality between those specific words. In the present case, the substances enumerated are all examples of physical evidence. Hence the words 'and such other tests' which appear in the Explanation to Sections 53, 53-A and 54 of the CrPC should be construed to include the examination of physical evidence but not that of testimonial acts.

149. We are inclined towards the view that the results of the impugned tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination. **Therefore, it would be prudent to state that the phrase 'and such other tests' [which appears in the Explanation to Sections 53, 53-A and 54 of the CrPC] should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. In pursuance of this line of reasoning, we agree with the appellant's contention about the applicability of the rule of 'ejusdem generis'.** It should also be noted that the Explanation to Sections 53, 53-A and 54 of the Cr.P.C. does not enumerate certain other forms of medical examination that involve testimonial acts, such as psychiatric examination among others. This demonstrates that the amendment to this provision was informed by a rational distinction between the examination of physical substances and testimonial acts.

152. In light of this discussion, there are some clear obstructions to the dynamic interpretation of the amended Explanation to Sections 53, 53-A and 54 of the CrPC. **Firstly, the general words in question, i.e. 'and such other tests' should ordinarily be read to include tests which are in the same genus as the other forms of medical examination that have been specified.** Since all the explicit references are to the examination of bodily substances, we cannot readily construe the said phrase to include the impugned tests because the latter seem to involve testimonial responses. Secondly, the compulsory administration of the impugned techniques is not the only

means for ensuring an expeditious investigation. Furthermore, there is also a safe presumption that Parliament was well aware of the existence of the impugned techniques but deliberately chose not to enumerate them. Hence, on an aggregate understanding of the materials produced before us we lean towards the view that the impugned tests, i.e. the narcoanalysis technique, polygraph examination and the BEAP test should not be read into the provisions for ‘medical examination’ under the Code of Criminal Procedure, 1973...”

(Emphasis supplied)

66. A bare perusal of aforesaid provisions reveal that *firstly*, virginity test finds no mention in the ‘explanation’ to Section 53 as a technique to be used in the medical examination of an accused person to ascertain the facts which may afford evidence. Apart from techniques to be used in examination relating to sexual offences, certain methods and techniques such as examination of sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling are mentioned. *Secondly*, the Indian Parliament, while introducing the ‘explanation’ to Section 53 Cr.P.C. by the Code of Criminal Procedure (Amendment) Act, 2005, and listing several forms of medical examination, left the scope for more techniques to be included within its ambit. However, as held by the Apex Court in *Selvi & ors. v. State of Karnataka (supra)*, the said scope would be governed by the rule of ‘ejusdem generis’. As per the Apex Court in, the words “such other tests” should construe to mean and include those tests which are in the same genus as the other forms of medical examination that have been specified. Briefly stated, the rule

of ‘ejusdem generis’ commands that meaning of general words following the specific words in a provision of law should be construed in light of the meaning and intent of those specific words. A reading of ‘explanation’ to Section 53 shows that the same mandates medical examination of an accused person by “*use of modern and scientific techniques*”. It would not be out of context to state here, that, by no stretch of examination, ‘virginity test’ can presumably fall under the said provision. Virginity test is neither modern nor scientific, rather archaic and irrational. Modern science and medical law disapproves the conduct of such tests on women, as already discussed in the preceding paras.

67. In this context, a reference can also be made to one of the authoritative reference books on medical jurisprudence i.e. “**A Textbook of Medical Jurisprudence and Toxicology**”, authored by **Jaising P Modi**, as revised in the year 2018, which highlights the need to move away from insensitive and degrading medical practices, in the manner as under:

“...It is demeaning to the status of a woman to be forced by orders of Court to carry out test of virginity of woman and must be taken as a grave threat to privacy, a cherished fundamental right. The testimonial compulsions for DNA testing described elsewhere the book with reference to judgments of the Supreme Court shall apply, a fortiorany virginity tests also. Unlike a DNA test which is scientific and assures 99.99 percent accuracy, virginity test, where there is no pregnancy or child birth, could never be conclusive. While Section 53 Cr.PC which allows for taking samples of blood or urine the course of criminal investigation, there is no scope for clinical

violation of a women body on specious grounds of unraveling truth. Another instance where Courts have refused any medical practice that is invasive of privacy and regarded as despicable, requiring to be discarded is ‘the two finger test’ to assess past sexual conduct of the woman in cases of sexual abuse. For the same reason, virginity test shall also be discarded...”

(Emphasis supplied)

d. Custodial Dignity vs. Constitutional Validity of Virginity Test

68. The question regarding constitutional validity of virginity test in cases of victims of sexual assault is no more *res integra*, as it already stands decided by the Hon’ble Apex Court in *Lillu v. State of Haryana* (*supra*) and *State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai* (*supra*). However, one of the questions raised before this Court was that the aforesaid judicial pronouncements have been in connection with conducting virginity test on the victims of sexual assault so that their dignity is not compromised and their fundamental rights to privacy and dignity are not infringed and not qua a female under custody or interrogation.

69. **The issue, now, before this Court is as to whether the test of virginity will also be unconstitutional in case such a test is conducted on a female accused during investigation of a crime.**

70. The laws relating to fundamental rights of a person have been dealt with in a catena of judgments which are well known. This judgment will not be burdened with describing in detail every such

judgment pronounced till date. Furthermore, the position regarding fundamental rights of accused persons and prisoners have also been dealt with by the Hon'ble Apex Court, and since the petitioner herein was subjected to virginity test as an accused in a criminal case, it will be appropriate to briefly refer to these judicial pronouncements.

71. The Hon'ble Supreme Court in *D.K. Basu v. State of West Bengal* (*supra*), while laying down guidelines and procedures to be followed for arrest, detention and interrogation of any person, had observed as under:

“17. Fundamental rights occupy a place of pride in the India Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. **The expression "life of personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries...**

22.**Any form of torture of cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise.** If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. **Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal court of human rights jurisprudence. The answer, indeed, has to be an**

emphatic 'No'. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenues and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by law.

23. In *Neelabati Bahera v. State of Orissa* [1993 (2) SCC, 746], (to which Anand, J. was a party) this Court pointed out that **prisoners and detenues are not denuded of their fundamental rights under Article 21 and it is only such restrictions as are permitted by law**, which can be imposed on the enjoyment of the fundamental rights of the arrestees and detenues. It was observed:

"It is axiomatic that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and its is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of the State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, exact according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.

(Emphasis supplied)

72. In *State of Andhra Pradesh v. Challa Ramkrishna Reddy* (2000) 5 SCC 712, it was held by the Hon'ble Supreme Court that right to life enshrined under Article 21 of Indian Constitution is guaranteed to every person, including a prisoner, whether a convict, an under trial or a detenu. The relevant observations are as under:

“22. Right to Life is one of the basic human rights. It is guaranteed to every person by Article 21 of the Constitution and not even the State has the authority to violate that Right. **A prisoner, be he a convict or under-trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his Fundamental Rights including the Right to Life guaranteed to him under the Constitution. On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights.**

24. Thus, according to the definition under the Prisoners Act, there is a convict, there is an under- trial and there is a civil prisoner who may be a detenu under preventive detention law. None of the three categories of prisoners lose their Fundamental Rights on being placed inside a prison. The restriction placed on their right to movement is the result of their conviction or involvement in crime. Thus, a person (prisoner) is deprived of his personal liberty in accordance with the procedure established by law which, as pointed out in *Maneka Gandhi vs. Union of India*, (1978) 1 SCC 248 = 1978 (2) SCR 621 = AIR 1978 SC 597, must be reasonable, fair and just.

27. In *Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi*, (1981) 1 SCC 608 = AIR 1981 SC 746 = 1981 (2) SCR 516, the Court held that Right to Life means the right to live with basic human dignity.....

28. Thus, the Fundamental Rights, which also include basic human rights, continue to be available to a prisoner and

those rights cannot be defeated by pleading the old and archaic defence of immunity in respect of sovereign acts which has been rejected several times by this Court...”

(Emphasis supplied)

73. In *X v. State of Maharashtra* (2019) 7 SCC 1, it was held by the Hon’ble Supreme Court that right to dignity is an indispensable part of right to life. The right to dignity of an accused was highlighted by the Apex Court as under:

“58.An irreducible core of right to life is ‘dignity’. [Refer Navtej Singh Johar v. Union of India, AIR 2018 SC 4321]. Right to human dignity comes in different shades and colours. [Refer Common Cause v. Union of India, AIR 2018 SC 1665]. For our purposes, the dignity of human being inheres a capacity for understanding, rational choice, and free will inherent in human nature, etc. **The right to dignity of an accused does not dry out with the judges’ ink, rather, it subsists well beyond the prison gates and operates until his last breath...**”

(Emphasis supplied)

74. Since the virginity test was conducted in this case during the investigation of a murder case, and this Court is not deciding the question as to whether it was essential or not but is only examining the constitutional validity of the same, it will be essential to note that even as an accused, the fundamental rights available to an accused/ prisoner/ detainee are not suspended so far as the question of their privacy and dignity is concerned and this has been elaborately discussed in the case of *D.K. Basu v. State of West Bengal* (*supra*) and other precedents cited hereinabove.

75. A consideration of the aforesaid precedents, undoubtedly, point out that the “right to dignity” of a person as available under Article 21 of Constitution of India is not suspended even when the person is accused of committing an offence or is arrested. The right to life and personal liberty under Article 21 can be suspended only as per procedure established by law, and such procedure must be just, fair and reasonable and not arbitrary, fanciful and oppressive [*Ref: Maneka Gandhi v. Union of India (1978) 1 SCC 248*]. Right to personal liberty of an accused gets suspended the moment one is arrested as the same might be necessary for the State security. However, the right to dignity is not suspended or waived even of an accused, undertrial or a convict.

e. **Virginity Test: Victim vs. Accused**

76. There cannot be two sets of views regarding the test of virginity being in violation of fundamental right of a victim of sexual assault and a woman under investigation. It is not the issue of a person being a victim or an accused but the vital issue is such a test being in violation of fundamental right if conducted on a female, whether a victim or an accused.

77. To hold that conducting virginity test on a woman who is victim of sexual assault and on a woman who may be an accused of an offence will be on different footing or that the earlier will be unconstitutional and the later constitutional, will be a perverse finding and against the intent of the Constitution of India and Article 21.

78. In light of the same, it can also be observed and reiterated that there is no procedure, under any law for the time being, which provides for “virginity test” of a female accused. Virginity testing is a form of inhuman treatment and the same violates the principle of human dignity. The test, being violative of right to dignity of an individual, cannot be resorted to by the State and the same shall be in teeth of the scheme of Indian Constitution and the right to life enshrined under Article 21.

79. This Court has to be guided by values and Constitutional principles essential to establish rule of law in a democratic society that lays stress on respect for inherent dignity of all citizens. The respect for human dignity cannot be questioned and it has been recognised as human right by the Hon’ble Apex Court as part of fundamental right under Article 21. In this regard, Apex Court’s decisions make it clear that notion of dignity may not be so worded in the Fundamental Constitutional right under Article 21, but it has been held to be part of it and also has been held to be of immense value.

80. Most shockingly, in the present case the virginity test was used to determine the truth of the accusation of murder against the petitioner. Undoubtedly, the test in itself is extremely traumatic for a victim of sexual assault as well as upon any other women in custody and is bound to have devastating effect on the psychological as well as physical health of the person.

81. Strangely, though the word “virginity” may not have a definite scientific and medical definition, it has become a mark of purity of a

woman. The intrusive testing procedure, as been held in several judgments of the Hon'ble Apex Court, does not have a medical standing. Despite being inaccurate and their being definite studies that in some women hymen may not tear during vaginal intercourse, while in others they may tear even without vaginal sexual intercourse due to sports and other activities and some women may not even have one, such test has been conducted.

82. Further, without an iota of doubt, the same rests on gender bias and society's view and obsession with the false concept of virginity being equated with purity of a woman. Needless to say, it also amounts to controlling women's body, their sexual behavior and the view that a woman with the hymen is pure and innocent. The Hon'ble Apex Court, in the most recent case of *State of Jharkhand v. Shailendra Kumar Rai (supra)*, has gone to the extent of holding that in case such tests are conducted on victims of sexual assault, it will amount to misconduct and thus, has tried to do away with this misogynistic practice.

83. This Court, therefore, holds that this test is sexist and is in violation of human right to dignity even of a female accused if she is subjected to such a test while being in custody. The long term and short term negative effects of such a test have been reported in many reports.

84. It will be difficult for this Court to hold being guided by the Constitutional principles of fundamental rights that a person in custody of the authorities surrenders right to bodily integrity and submits to bodily intrusion for the prosecution to find evidence through its body. The feeling of being demeaned by such treatment in custody by bodily

invasion through conducting a virginity test also brings forth the undesirable and abhorable **notion of differentiation on the basis of gender and stereotypes.**

85. The concept of **custodial dignity** i.e. ensuring dignity of an individual while in custody, whether police or judicial, has been discussed at length in the case of *Sunil Batra (II) v. Delhi Administration* (1980) 3 SCC 488, which dealt with the torture of persons while in judicial custody. The Hon'ble Apex Court has also held in several judgments regarding violence in police custody. The present case draws the attention of the Court to take note of the important issue of dignity of a female in police custody. This Court holds that the concept of custodial dignity of a female will include her right to live with dignity even while in police custody. Conducting a virginity test on the pretext of reaching truth regarding allegations against her will amount to infringement and violation of her right enshrined in Article 21 and explained in the judgment of *D.K. Basu v. State of West Bengal* (*supra*).

86. This Court is not impressed with the argument of the law enforcement agency that the virginity test was necessary to uphold the laws since this argument itself flouts basic principles that a person's dignity even in custody has to be upheld. The conducting of virginity test not only amounts to interference of the investigating agency with the bodily integrity but also psychological integrity of a woman which will have serious and profound effects on the mental health of a woman.

87. Some fundamental rights cannot be suspended or infringed or abridged even when a person is in custody and right to dignity is one such fundamental right which falls within the ambit of Article 21.

88. This Court, however, makes it clear that right of dignity in custody does not refer to the ordinary stresses and anxieties that a person may feel as a result of being in custody and under interrogation but the right for constitutional protection even while being in custody i.e. right to dignity. However, this should not mean to be taken to be a shield for the detainee from legitimate interrogation by police as per procedure established by law.

89. While our country has made positive and definite strides by way of several judgments of Hon'ble Supreme Court in this regard as far as victims of sexual assault are concerned, this Court holds that on the same analogy as laid down in the judgment of *Lillu v. State of Haryana* (*supra*) and *State of Jharkhand v. Shailendra Kumar Rai @ Pandav Rai* (*supra*), conducting such tests on a female accused in custody will also amount to violation of her right to dignity and, therefore, in violation of Article 21 of the Constitution of India. Needless to say, rights of an accused in custody are also to be safeguarded even if some rights have to yield to the safety of the State.

90. Under the constitutional system, the Court stands guard against any such practice which may cause unexplainable suffering of human dignity. A higher duty is cast on a Constitutional Court and its solemn responsibility to ensure that the fundamental rights granted by the

Constitution of India remain living law at all times and act as constitutional shield for the benefit of every Indian citizen.

D. CONCLUSION AND DIRECTIONS

91. In view of the aforesaid discussion, this petition is disposed of with the observations and directions as stated in the succeeding paragraphs.

92. **Prayer (a):** The virginity test conducted on a female detainee, accused under investigation, or in custody, whether judicial or police, is declared unconstitutional and in violation of Article 21 of the Constitution which includes right to dignity.

93. **Prayer (b):** As far as prayer for taking action against Central Bureau of Investigation is concerned, it is not disputed that in the year 2008 when this test was conducted upon the petitioner, there were no guidelines of the Hon'ble Apex Court or otherwise to have declared such tests to be unconstitutional or in violation of fundamental right of a female even qua the victims of sexual assault, and such tests were being conducted in cases of victims of sexual assault all over the country. Therefore, at the relevant time, it was not barred in law or by any judgment to have got it conducted, howsoever despicable or deplorable the practice may have been.

93.1. The contention of the petitioner that selective leaking of the report of the virginity test by Central Bureau of Investigation and introducing false theory of hymenoplasty has amounted to defamation cannot be examined by this Court and the petitioner has

other remedies available in law after conclusion of trial, to take recourse to. Needless to say, the right to dignity in custody and actions considered defamatory of the investigating agency are rights independent of each other. The protection of reputation can be in context of a defamation case.

93.2. The anxiety, stress and sense of being stigmatized suffered by the petitioner in this case cannot be held to be constitutionally protected human right but remedy against the same may lie elsewhere under the law of defamation.

94. **Prayer (c):** The question regarding grant of compensation or as to whether custodial torture had been caused to the petitioner or not has to be decided by National Human Rights Commission, and since the appeal against conviction filed by petitioner is pending before the Hon'ble High Court of Kerala, which is continuation of Trial, the National Human Rights Commission will as per mandate of law and its Regulations i.e. National Human Rights Commission (Procedure) Regulations, 1994, will consider afresh the representation filed by the petitioner regarding custodial torture or compensation once the criminal trial against the petitioner concludes.

95. **Prayer (d):** With regard to prayer (d), it is not in dispute that at the time when representation dated 17.03.2009 was filed before the NHRC and when the impugned order dated 6/8.05.2009 was passed, the trial of the petitioner was pending before the concerned Court in Kerala. Taking into account the same, National Human Rights Commission had dismissed the representation of petitioner relying upon

Regulation 9 of the National Human Rights Commission (Procedure) Regulations, 1994, which provides that the Commission can dismiss the complaints, in limini, relating to matters which are sub-judice before a Court or Tribunal.

95.1. The contention of petitioner that the delay in human right proceedings before National Human Rights Commission has resulted into denial of natural justice and has caused further psychological and sociological harm to the petitioner is without merit as under Regulation 9 of the National Human Rights Commission (Procedure) Regulations, 1994, the Commission was bound by its own rules and could not have given the relief sought for due to bar of the same, however the doors are still not closed as at the end of trial, the petitioner may again approach National Human Rights Commission.

96. Considering the importance and sensitivity of the issue involved in the present case, this Court is also inclined to pass the following directions:

- (i) It is declared that the **virginity test conducted on a female detainee, accused under investigation, or in custody, whether judicial or police, is unconstitutional** and in violation of Article 21 of the Constitution which includes right to dignity
- (ii) The necessary **information** regarding unconstitutionality of virginity test as above **be circulated** to all investigating agencies/stakeholders through **Secretary, Union Ministry of Home Affairs, Secretary, Union Ministry of Health and**

Family Welfare and Secretary, Department of Health and Family Welfare, Govt. of NCT of Delhi.

(iii) The **Delhi Judicial Academy** is directed to include in its curriculum and in the workshops conducted for investigating officers, prosecutors and other stakeholders, the information regarding this issue.

(iv) Similarly, the **Delhi Police Academy for Training** shall also include the necessary information regarding this issue in its training curriculum.

(v) The **Commissioner of Police, Delhi** is also directed to ensure that the investigating officers are informed and sensitized in this regard.

97. It was clarified during the course of arguments that this Court is examining the question as to whether the virginity test conducted on the petitioner was in violation of her fundamental right to live with dignity and not regarding its outcome and its bearing or admissibility before the Court before whom the trial of the criminal case is pending. It is also clarified that the issue before this Court was only regarding the infringement of fundamental right of the petitioner and the dismissal of representation of the petitioner before National Human Rights Commission having its Headquarters at Delhi and regarding the plea for taking action against officers of Central Bureau of Investigation who were instrumental in getting the test conducted during the course of investigation having its Headquarters in Delhi, and the decision

rendered by this Court will have no bearing on the criminal case pending before the concerned courts.

98. In view of the above terms, the petition stands disposed of.

99. A copy of this judgment be forwarded by learned Registrar General of this Court to (i) Secretary, Union Ministry of Home Affairs, (ii) Secretary, Union Ministry of Health and Family Welfare, (iii) Secretary, Department of Health and Family Welfare, Govt. of NCT of Delhi, (iv) Director (Academics), Delhi Judicial Academy, (v) Commissioner of Police, Delhi, and (vi) Director, Delhi Police Academy, for taking note of its contents and ensuring compliance.

100. Before parting with this case, this Court wants to place on record its appreciation for the assistance rendered by the learned counsels who appeared in this case – Mr. Romy Chacko, Mr. Ripu Daman Bhardwaj, Mr. Kirtiman Singh and Mr. S. Nanda Kumar.

SWARANA KANTA SHARMA, J

FEBRUARY 7, 2023/ns