Truth or Law, the hallmark of Justice!?!

-Prof. Dr. Mohan Rao B[1]

"*….Then was born the Law (Dharma), the doer of good. By the law the weak could control the strong."* Brihadaranyakopanishad [2]

"*…….When there is a conflict between law and equity; it is the law which is to prevail. Equity can only supplement the law when there is a gap in it, but it cannot supplant the law….",* [3]

Abstract : It may be stated that justice has been deviated in a very recent judgment of the Apex Court in Nandlal [4]case. The Apex Court passed a remark that 'Truth must triumph'-is the hallmark of justice.' The Court was anxious to render justice to an undeserving man deviating from the law. The Court has obviously, overruled its precedents which are binding on it.[5] The Court had also ignored to invoke purposive rule[6] of interpretation. The Court must have restrained itself from the deviation as it was done by the Naaz Foundation case.[7] The Court must have laudably and purposively deviated to render justice to deserving woman and child as was done in Badshah v. Sou. Urmila Badshah Godse [8] case. In Badshah case the Apex court has adopted purposive and liberal rule of construction in awarding maintenance under Section 125 of The Code of Criminal Procedure, 1973 (Crpc) without insisting on strict proof of marriage. It was reiterated that strict proof of marriage was not a condition precedent to grant maintenance under Section 125 crpc.

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[2] (I. IV, 14).

[3] Markandey Katju, Gyan Sudha Misra JJ., Supreme Court of India, *B. Premanand & Ors. v. Mohan Koikal* decided on 16 March, 2011, available at http://www.indiankanoon.org/doc/421654/

[4] *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr* decided by Chandramouli Kr. Prasad and Jagdish Singh Khehar JJ., decided on 6 January, 2014, 2014 SCW 506 also available at http://www.indiankanoon.org/doc/139951018/

[5] Article 141 of the Constitution of India.see also In The Keshav Mills Co. Ltd., Petlad v. The Commissioner of Income Tax, Bombay North, Ahmedabad, (AIR 1965 SC 1636) this Court held:"……When this Court decides questions of law, its decisions are, under Art. 141, binding on all Courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided. That is not to say that if on a subsequent occasion, the Court is satisfied that its earlier decision was clearly erroneous, it should hesitate to correct the error; but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair amount of unanimity amongst its members that a revision of the said view is fully justified. It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations:- What is the nature of the infirmity or error on which a plea for a review and revision of the earlier view is based? On the earlier occasion, did some patent aspects of the question remain unnoticed, or was the attention of the Court not drawn to any relevant and material statutory provision, or was any previous decision of this Court bearing on the point not noticed? Is the Court hearing such plea fairly unanimous that there is such an error in the earlier view? What would be the impact of the error on the general administration of law or on public good ? Has the earlier decision been followed on subsequent occasions either by this Court or by the High Courts? And, would the reversal of the earlier decision lead to public inconvenience, hardship or mischief? These and other relevant considerations must be carefully borne in mind whenever this Court is called upon to exercise its jurisdiction to review and revise its earlier decisions. These considerations become still more significant when the earlier decision happens to be a unanimous decision of a Bench of five learned Judges of this Court."

[6] See also A.K.Sikri,J., Supreme Court of India, *Badshah v. Sou. Urmila Badshah Godse & Anr* decided on 18 October, 2013, http://judis.nic.in/supremecourt/imgs1.aspx?filename=40886

[7] G.S. Singhvi, J., Supreme Court of India, *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors*. decided on 11 December, 2013, available at http://www.indiankanoon.org/doc/58730926/

[8] *Badshah v. Sou. Urmila Badshah Godse & Anr* decided on 18 October, 2013, http://judis.nic.in/supremecourt/imgs1.aspx?filename=40886

'Satyam Sarve Pratisthtam!' is the proverbial saying of our ancient and cultural significance. But, there are certain provisions of law such as section 112 of the Indian Evidence Act wantonly drafted by the eminent jurist like Sir James Stephen to render protective justice to vulnerable persons like women and child. The provision reads in effect that during the continuance of a valid marriage, if a child is born the child is presumed legitimate. The presumption extends to 280 days beyond the nullification of marriage. The provision disallows bastardization of child. The strong presumption under Section 112 of the Indian Evidence Act has been deviated by the Supreme Court in Nandlal Wasudeo Badwaik's case.[9] *The Apex Court has obviously, ignored to follow the law and deviated from the tendency of liberal and purposive rule of construction as has aptly been adopted in Badshah case.*[10]

The facts of the case in *Nandlal* are that the petitioner is the husband of respondent no. 1, the wife and the daughter,[11] respondent no. 2. The marriage between them was solemnized on 30th of June, 1990 at Chandrapur. The wife filed an application for maintenance under Section 125 of the Code of Criminal Procedure (the Code) which was dismissed by the Magistrate on 10th December, 1993. Thereafter, a fresh proceeding was initiated under Section 125 of the Code claiming maintenance for herself and her daughter. The wife inter alia, alleged that she started living with her husband from 20th of June, 1996 and stayed with him for about two years and during that period got pregnant. She was sent for delivery at her parents' place where she gave birth to a girl child, the respondent no. 2. Petitioner-husband resisted the claim and alleged that the assertion of the wife that she stayed with him since 20th of June, 1996 was false. He denied that respondent no. 2 as his daughter. After 1991, according to the husband, he had no physical relationship with his wife. The learned Magistrate accepted the plea of the wife and granted maintenance at the rate of Rs.900/- per month to the wife and at the rate of Rs.500/- per month to the daughter. The challenge to the said order in revision had failed so also a petition under Section 482 of the

[9] *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr* decided by Chandramouli Kr. Prasad and Jagdish Singh Khehar JJ., decided on 6 January, 2014, 2014 SCW 506 also available at http://www.indiankanoon.org/doc/139951018/

[10] *Badshah v. Sou. Urmila Badshah Godse & Anr* decided on 18 October, 2013, http://judis.nic.in/supremecourt/imgs1.aspx?filename=40886

[11] Name of the girl child is omitted by the author. Strangely, the Court did not omit to mention the real name. With due respects to the Hon'ble Court it is submitted that the Court had discussed about 'bastardising' of innocent girl child and in fact obviously did for no fault on her part -which is avoidable!

Code,[12] challenging those orders. It was against those orders; the petitioner preferred the special leave petition. Hence, the case.

The *Nandlal* [13]case raises several queries-

- Role of Judiciary vis a vis legislature (doctrine of separation of powers) – 'judges can only declare but cannot make law'- The Golden Rule of Interpretation provides that a statute has to be interpreted by grammatical or literal meaning unmindful of the consequences if the language of the statute is plain and simple. [14]
- 'judicial legislation'- If a judge goes contrary to the law in force, it tantamount to a judicial legislation. In the instant case the Court did neither follow the law nor the judicial precedents referred. It had deviated from the law and judicial precedents whereby the decision can be considered as *judicial impercuriam.*
- Jurimetrics-clash between the law and science and the reliability of science contrary to legal provisions.
- Presumption of conclusive proof under section 112 of Indian Evidence Act, 1872- reason quoted by the Court for deviating from the law;
- Protective Justice -whether courts can support the one who claims Truth based on the modern scientific evidence ignoring legal presumption meant for protecting the deserving and vulnerable persons such as an innocent that to a girl child which should be protected by all means.

The Apex Court had agreed to allow the petitioner's prayer for conducting DNA test for ascertaining the paternity of the child on deposit having been made of maintenance and arrears etc.,[15] In the light of the aforesaid order, the Regional Forensic Science Laboratory, Nagpur has submitted the result of DNA testing and opined that appellant was excluded to be the biological father of the respondent no. 2 herein. Respondents, not being satisfied with the aforesaid report, made a request for re-test. The said prayer of the respondents was accepted and the Supreme Court by order dated 22nd of July, 2011 directed, the Central Forensic Science Laboratory, Hyderabad to conduct re-test. The Lab submitted its report and on that

[12] Section 482. *Saving of inherent powers of High Court*. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. *The inherent power in this section could be invoked to render justice even deviating from the rule of law in deserving cases*.

[13] *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr* decided by Chandramouli Kr. Prasad and Jagdish Singh Khehar JJ., decided on 6 January, 2014, 2014 SCW 506 also available at http://www.indiankanoon.org/doc/139951018/

[14] ARIJIT PASAYAT, J., Supreme Court of India, Maulavi Hussein Haji Abraham ... vs State Of Gujarat And Anr decided on 29 July, 2004, available at http://www.indiankanoon.org/doc/699436/ quoted by (SMT.) RANJANA PRAKASH DESAI, J. , for the Constitution bench in *Sarah Mathew v Institue of Cardio Vascular Diseases* decided on 26 November, 2013, available at http://www.indiankanoon.org/doc/89575618/

[15] *Prima facie* the Supreme Court must not have ordered for the Test nor should it rule to allow any such test conducted deviating from the law. Even assuming that it had deviated from the law it could only be meant to render justice to the weak deserving person/s under section 125 Cr.P.C. i.e., the wife, child or the parents and not the husband keeping in view of the welfare of the wife and the child.

basis opined that the appellant could be excluded from being the biological father of respondent no. 2.

Arguments/ Submissions

Mr. Manish Pitale appearing for the respondents had submitted that the appellant having failed to establish that he had no access to his wife at any time when she could have begotten respondent no. 2, the direction for DNA test ought not to have been given. He had ***submitted that the result of DNA test was fit to be ignored.*** In support of the submission he had placed reliance on the judgment of the Apex Court in *Goutam Kundu v. State of W.B.,* [16] relevant portions whereof read as under:

> "24. *This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual "cohabitation*".
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> ….26. *From the above discussion it emerges—(1) That courts in India cannot order blood test as a matter of course; (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained. (3) there must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act. (4) the court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman. (5) no one can be compelled to give sample of blood for analysis. 27. Examined in the light of the above, we find no difficulty in upholding the impugned order of the High Court, confirming the order of the Additional Chief Judicial Magistrate, Alipore in rejecting the application for blood test…….*"

Yet another decision on which reliance has been placed was the decision of the Apex Court in the case of *Banarsi Dass v. Teeku Dutta,*[17] which is relevant for the purpose was as quoted below:

> "13. *We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-*

[16] (1993) 3 SCC 418
[17] Dr. Arijit Pasayat J., SC *Banarsi Dass v. Teeku Dutta,* (2005) 4 SCC 449, paragraph 13.

> *access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.* (See *Kamti Devi v. Poshi Ram*,[18].)"

Reliance has also been placed on a decision of the Supreme Court in the case of *Bhabani Prasad Jena v. Orissa State Commission for Women*,[19] in which it has been held as follows:

> "22. *In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test*."[20]

It is respectfully submitted that despite the above submissions, the Apex Court did not accede to invoke the judicial precedents viz., *Goutam Kundu v. State of W.B.*, [21] *Banarsi Dass v. Teeku Dutta* [22] and *Bhabani Prasad Jena v. Orissa State Commission for Women*,[23] nor did follow the law; The *Nandlal* Court had continued to deviate from the law. There being the strong presumption available under Section 112 of the Evidence Act, and the consequence of the suffering given to the child, especially the girl child, the Court must have avoided the order for conduction of the DNA test. ***It is for the legislature to take into consideration the change in the advancement of technology to amend the rule and allow such conduction of tests to decide the legitimacy of the child. As long as there is no amendment to the law, the Courts are to confine the interpretation of the letter of the law.*** The Apex Court has aptly relied upon the constitutionality presumption of the law in *Naaz Foundation* case.[24] The fact that the petitioner did not act to nullify his marriage and there is no claim of the wife living in adultery, the presumption shall apply. Moreover, the appellate Court might give the clarification and it is for the trial courts to consider and weigh the evidence. Unfortunately, the Apex Court had in fact acted contrary to the law and justice.

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[18] K.T.Thomas J., *Smt. Kamti Devi & Anr vs Poshi Ram* decided on 11 May, 2001 2001 (5) SCC 311
[19] (2010) 8 SCC 633
[20] R.M. Lodha, J. , *Bhabani Prasad Jena v. Orissa State Commission for Women* (2010) 8 SCC 633
[21] S Mohan J., *Goutam Kundu v. State of W.B* (1993) 3 SCC 418
[22] (2005) 4 SCC 449, paragraph 13.
[23] (2010) 8 SCC 633
[24] G.S. Singhvi, J., Supreme Court of India, *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors*. decided on 11 December, 2013, available at http://www.indiankanoon.org/doc/58730926/ The Court was considering the constitutional validity of Section 377 of the Indian Penal Code. It has aptly invoked the Constitutionality presumption and exercised restraint. It was held that it is for the legislature to take into consideration all the social phenomena and amend the law if it feels necessary.

The Apex Court had acceded to the submission of Miss Anagha S. Desai appearing on behalf of the appellant that the Court had ordered twice for DNA test and, hence, the question as to whether that was a fit case in which DNA profiling should or should not have been ordered was academic. **The Court had found substance in the submission** of Ms. Desai. But, it *is surprising to note that if mistakes are committed deviating from the law, such mistakes would override the law? It is respectfully submitted that the Hon'ble court must not have found substance in such submissions- in view of the law. When the law of the* ***strong presumption*** *requires the Court not to accept any evidence contrary to the* ***Conclusive Proof****, how could the Court permit for the conduction of the test at all? It should have restrained itself for the second time and must have corrected itself! However, it had deviated from the law, twice!*

According to the counsel for the appellant, *the DNA test could not rebut the conclusive presumption envisaged under Section 112 of the Evidence Act.* According to him, respondent no. 2, therefore, had to be treated to be the appellant's legitimate daughter.[25]

In support of the submission, reliance was placed on a decision of the Apex Court in the case of *Kamti Devi v. Poshi Ram*,[26] and reference has been made to paragraph 10 of the judgment, which reads as follows:

> "10. ……The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception……."[27]

Pertinently, at this juncture at least, the Court might have considered the binding nature of the judicial precedents. It must not have been carried away by the rival submissions to the contrary. The Court must have invoked the ***purposive rule of construction*** *as it did in* ***Badshah***[28] *case. When it invokes the rule, it is expected that it could have realized the significance of the provision! It could have gone into the purpose of extending protection to*

[25] At this juncture even, the Hon'ble court must have realized its mistake. Strangely, it did not do so!
[26] K.T. Thomas and R Sethi JJ., *Kamti Devi v. Poshi Ram* (2001) 5 SCC 311,
[27] *Badshah v. Sou. Urmila Badshah Godse & Anr* decided on 18 October, 2013, http://judis.nic.in/supremecourt/imgs1.aspx?filename=40886
[28] *Badshah v. Sou. Urmila Badshah Godse & Anr* decided on 18 October, 2013, http://judis.nic.in/supremecourt/imgs1.aspx?filename=40886

the needy deserving and vulnerable mother and girl child in the case carrying the name of Badwaik. The fact remains that the court shall not entertain such arguments when the respondent did not attempt to nullify his ties with the wife. Even if he wants to do so, the law requires him to pay maintenance! The court had also gone to refer to the earlier case law and had also expressed the cynical consequences of bastardizing a girl! Yet, it had decided in favour of the appellant!

The court had gone into the ['untenable'] issues of scientific accuracy of DNA test. It was observed:

> "….Before we proceed to consider the rival submissions, we deem it necessary to understand what exactly DNA test is and ultimately its accuracy. All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillion of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pair in 46 duplex threads of DNA. DNA consists of four nitrogenous bases – adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is about 5 billion, this test shall have accurate result. It has been recognized by this Court in the case of *Kamti Devi* (supra) that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl-child….."[29]

The apex Court has also considered as to whether the DNA test would be sufficient to hold that the appellant is not the biological father of respondent no. 2, in the face of what has been provided under Section 112 of the Evidence Act, which reads as follows:

"112. Birth during marriage, conclusive proof of legitimacy.- The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

The Court observed that from a plain reading of the provision, it was evident that a child born during the continuance of a valid marriage shall be a conclusive proof that the

[29] *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr* decided by Chandramouli Kr. Prasad and Jagdish Singh Khehar JJ., decided on 6 January, 2014, 2014 SCW 506 also available at http://www.indiankanoon.org/doc/139951018/

child is a legitimate child of the man to whom the lady giving birth is married. The provision makes the legitimacy of the child to be a conclusive proof, if the conditions are satisfied.

The Apex Court ruled that '…**it can be denied only if it is shown that the parties to the marriage have no access to each other at any time when the child could have been begotten.'** [30]

Accordingly, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had or had not any access to his wife at the time when the child could have been begotten**.** *The Court was expressing concern about the unfortunate disregard of the plea of the husband about the inaccessibility. But, it is respectfully submitted that the Courts below had an apt disregard in view of the efficacy and 'welfare-ism' embodied in the provisions under section 112 of the Indian Evidence Act and Section 125 Crpc. The combined effect of reading the provisions together and the very fact that the petitioner did not initiate to dissolve the marriage, the wife and the child deserve to get the maintenance. They deserve to get maintenance as per the law even if the marriage is dissolved. Unfortunately, the Court has ignored the efficacy of the legislative intent under the provision in section 112 of the Indian Evidence Act which is meant to protect the child from being bastardized. Besides, the welfare of the child as well as the wife has been provided under Section 125 of the Crpc. The decision in Nandlal has fare reaching consequences. It is heartening and painful to note that an innocent child is bastardized due to the decision of the Court despite the fact that there is law to protect such children***.***

Pertinently the following points need consideration-

- The question must have been whether there was continuation of a valid marriage. **If there was continuation of valid marriage, the strong presumption would arise.**
- **Even in case if there was dissolution, the presumption extends to 280 days.** *There being no dissolution all other issues whether there was access or not should not arise.*

[30] *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr* decided by Chandramouli Kr. Prasad and Jagdish Singh Khehar JJ., decided on 6 January, 2014, 2014 SCW 506 also available at http://www.indiankanoon.org/doc/139951018/

- *The Hon'ble court might give the liberal construction to the remedial and beneficial provision like Section 125 Crpc as was done by the Badshah court.* ***Unfortunately, the Hon'ble Court has continued to rely upon the scientific evidence may be with a passion****!*

The *Nandlal* Court has observed

" ….As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl- child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us.…."[31]

" We may remember that Section 112 of the Evidence Act **was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature**. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former…."[32]

It is supplicated with due respects that the Supreme Court must have conceded that it cannot go beyond its function of legal interpretation and accept scientific evidence! Appreciation of evidence is the function of the lower courts. The social conditions, scientific advancement and such other things must be taken into consideration by the legislature and the court shall stick to the law. The Hon'ble court had in a different occasion did not accede to the contentions of change in the social conditions in *Suresh Kumar Kaushal* [33]case despite the fact that the rights of LGBTs are at stake! [34]

[31] *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr* decided by Chandramouli Kr. Prasad and Jagdish Singh Khehar JJ., decided on 6 January, 2014, 2014 SCW 506 also available at http://www.indiankanoon.org/doc/139951018/

[32] Ibid. Nandlal case

[33] G.S. Singhvi, J., Supreme Court of India, *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors*. decided on 11 December, 2013, available at http://www.indiankanoon.org/doc/58730926/

[34] However, in a recent decision K.S. Radhakrishnan, J. SC., *National Legal Ser.Auth v. Union of India & Ors* decided on 15 April, 2014, available at http://indiankanoon.org/doc/193543132/, has recognized the rights of the third gender and directed the government to recognize them as Socially and Educationally Backward Classes of citizens and to take steps to for framing various social welfare schemes for their betterment.

But, the *Nandlal* Court had in fact to support its deviation has differentiated between legal fiction and the presumption and observed:

"We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice."[35]

It is submitted that the hall marks of justice are meant to render justice to the deserving persons. When the law provides for the protection of such deserving and vulnerable persons in the form of a girl child, the Apex Court need not trouble itself to interpret and express its opinions on legal fiction. The law is prima facie evident to protect the child and not to bastardize the child by disallowing evidence to the contrary. In *Nandlal* the Apex Court's conscious bastardization of an innocent child by all means is respectfully refutable. When the question comes for the protection of the child and consciously if the decision of the Court might lead to bastardizing an innocent girl child it is surely, 'the law' which should triumph despite the 'scientific truth' but to render social justice!

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[35] Ibid. Nandlal case