

Legal Presumption of Legitimacy in Section 112 of the Indian Evidence Act : In Light of DNA Evidence¹

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Introduction

Social conditions in India places much value on chastity of the woman and paternity of the child and are matters of respect and social honor. No person would like to be called a bastard nor will a woman like to be called unchaste². Section 112 of the Indian Evidence Act 1872 is based on presumption of public policy and public morality. ³It provides that, "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 child 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."⁴

This section is based on the principle that when a particular relationship such as marriage, is shown to exist, then its continuance must prima facie be presumed until the contrary is proved.⁵

Accordingly, the fact that any person was born-

- a) During the continuance of a valid marriage between his mother and any man, or
- b) Within two hundred and eighty days after its dissolution, the mother remaining unmarried,

Shall be conclusive proof that he/she is the legitimate child of that man unless the parties had no access to each other at any time when he could have been begotten, anyone of the aforesaid facts is sufficient to establish its legitimacy, and shift the burden of proof to the party, seeking to establish the contrary.⁶

The legislative intent behind Section 112 of the Evidence Act is that once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from the wedlock. The presumption of legitimacy is a presumption

of law, not a mere inference to be drawn by a process of logical reasoning from the fact of marriage and birth or conception during wedlock. This presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities. This legal presumption is based on the principle, 'odiosa et honest on sun in lege price sum end', which means that nothing odious or dishonorable will be presumed by the law. So the law presumes against vice and immorality. In a civilized society it is imperative to presume the legitimacy of a child born during continuation of a valid marriage and whose parents "have access" to each other. However, where illegitimacy seems as common as marriage and legitimacy, a presumption of legitimacy cannot be drawn and legitimacy or illegitimacy will have to be proved like any other fact in issue. In other words, the presumption of legitimacy is that a child born of a married woman is deemed to be legitimate, and the person who says it is illegitimate has the burden of proving it. Over the disputes of maternity this section has no application⁷.

This legal presumption has found its way into statutes all over the world, indicating that states assumed the responsibility to protect the dignity of the family as a social unit and to protect the child from being brandished as "bastard". The principal reason for this presumption was that in 1872 when the Act was enacted there were no means of ascertaining the biological paternity of a child. This position as to illegitimate children is also found in modern Hindu Law⁸.

Position of Legitimacy under English Law

The legitimacy is dealt by three statutes under the English law namely, Affiliation Proceedings Act, 1957; Family Reforms Act, 1969 and Family Reforms Act, 1987. In Affiliation Proceedings Act, 1957, it was assumed that, a man was the father once a sexual relationship with the mother at the time of conception was proven unless he could show another man had intercourse with her at that time. Failing the father's attempt, the mother's evidence had to be corroborated by facts such as blood test etc. Under this Act, both parties could ask for a blood test and either was entitled to refuse to take part, although only the mother can apply for maintenance. The Family Reforms Act, 1969 conferred powers on the court to direct taking a blood test in civil proceedings in paternity cases. Courts were able to give directions for the use of the blood test and taking blood samples from the child, the mother and any person alleged to be the father. Since the passing of 1969 Act, the general practice has been to use blood tests when paternity is in issue. However, it is to be stated that the court cannot order a person to submit to tests but can draw an adverse inference from a refusal to do so. Now under the Family Reforms Act, 1987 in keeping with modern thinking on the continuing and shared responsibility of parenthood, 'parentage' rather than paternity has to be determined by the court. Fathers, as well as mothers, can apply for maintenance. Therefore, contests can include mother's denial of paternity. This Act finally removed the legal aid for corroboration of mother's statement of paternity.⁹

Presumption of Conclusive proof

The law of evidence provides that a court can take into consideration certain facts even without calling for proof of them i.e. the court may presume certain things.¹⁰ Conclusive proof means that "when one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it"¹¹. The court has no discretion at all. It cannot call upon a party to prove that fact nor can it allow the opposite party to adduce evidence to disprove the fact.

The expression "conclusive proof" shall have to be read along with Section 112 of the Evidence Act. It may be mentioned here that it is not a case of rebutting the presumption for the reason that conclusive proof is irrebuttable.¹² Therefore, no evidence can be permitted to be let in to disprove the conclusive presumption. It becomes a misconception to say that the person who is disputing the paternity of child can disprove the same or rebut the presumption by adducing any evidence of non-access in between the couple at the relevant time¹³. On the other hand, it appears to be correct view that the operation of the conclusive presumption can be avoided by proving non-access at the relevant time. But, certainly it is not case of rebutting the presumption¹⁴.

Judicial pronouncements on 'Non-access'

Under Section 112, the only way to rebut the presumption is the proof of "non-access" between the parties to marriage. The phrase "non-access" implies non-existence of opportunity for physical intercourse.¹⁵ It is rebuttable presumption of law under Section 112 that a child born during the lawful wedlock is legitimate and that access occurred between parents. This presumption can only be displaced by a strong preponderance of evidence, and not by mere balance of probabilities¹⁶.

The presumption of legitimacy will not be allowed to be rebutted by the proof that wife had adulterous relationship. Proof per se that the woman was living with the paramour is no evidence of non-access by the husband. Non-access could be established not merely by positive or direct evidence; it can be proved undoubtedly like any other physical fact by evidence either direct or circumstantial, which is relevant to the issue under the provisions of the Indian Evidence Act, though as the presumption of legitimacy is highly favored by law it is necessary that proof of non-access must be clear and satisfactory.¹⁷

The following observations have been made by the judiciary in reference to the circumstances under which non-access can be established or cannot be established based on medical examination through modern scientific techniques like DNA and RNA are hereinafter mentioned:

In Gautam Kundu v. State of West Bengal¹⁸, the Supreme Court summarized the law as follows :

1. That Court's 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 of blood test cannot be entertained.
3. There must be 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 consequences of ordering the blood test, whether it will have the effect of branding a child as bastard and the mother as an unchaste woman.
5. No one can be compelled to give sample of blood for analysis¹⁹.

In Kanti Devi v. Poshi Ram²⁰, The Supreme Court held 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 the contemplation of the Legislature. The result of a genuine DNA test is said to be scientifically accurate²¹. 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 favor of the innocent child 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-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above".

In Shradha v. Dharmal²², The Supreme Court of India summarized the following points :

- "1. A matrimonial Court has power to order a person to undergo medical test.
2. Passing of such an order by the Court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
3. The Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the Court, the respondent refuses to submit himself to medical examination, the Court will be entitled to draw adverse inference against him."²³

Thus from the above judgments it is pertinent that the Court has the power to order a person to undergo medical test and such an order would not be in the violation of Article 21 of Indian Constitution. However the Court should exercise such power with due care, only when it is expedient in the interest of justice and when the facts in a given case require the same²⁴.

In Dipanwita Roy Vs. Ronobroto Roy²⁵

The Hon'ble Apex Court has made the following observations as hereunder:

"DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so."²⁶

The aforementioned ratio of Dipanwita Roy case has been criticized for indirectly encroaching the embargo of Section 112 of the evidence Act against the bastardisation of child by allowing the DNA test in matters involving infidelity of mother. The author suggests that "carving out a distinction between two situations, namely, one for establishing paternity and the other one for proving adultery or infidelity as a ground for divorce, does not seem to be in good taste! In both situations, in the case of negative DNA report, the stigma that is bound to cause to the child would be of the same magnitude which cannot be totally ignored."²⁷

In Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Another²⁸,

The Honorable Apex court has made the following observations:

"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. 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 ²⁹fatherhood 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.³⁰

The court further held that validity of orders passed by court which have attained finality, cannot be gone into at this stage – Hence, Court herein would proceed on assumption that valid directions for DNA tests given – In any case, even if said issue had not attained finality against the wife, DNA test if establishing that man concerned is not biological father of the child, shall amount to rebuttal of presumption under S. 112.³¹

In Selvaraj vs Dhatchayani (2018)³²

The Hon'ble Madras High Court has made the following observations based on the Judgement of the Hon'ble Apex Court 2010 8 SCC 633 (Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women and another) wherein the court held that the Court cannot order blood test as a matter of fact and such a prayer cannot be granted to have a roving enquiry. It further held that there must be a direct prima facie case and the Courts must carefully examine the consequence of ordering blood test. In both the decisions of the Hon'ble Apex Court, the Courts were conscious of the fact that an innocent child should not be bastardised and that the order for DNA Test should be sparingly exercised.³³

In Mahendra v. Mamta, 2019³⁴

In the present case the petitioner had filed an application before the learned Civil Judge praying for conducting a DNA test of a son born to his wife on the ground that his wife (respondent herein) was pregnant prior to getting married and therefore, the child born was not his child. He pleaded that the sonography examination of his wife during pregnancy reported that she was pregnant for 35 weeks and 06 days. His application was rejected holding that as the petitioner was living as the husband with the respondent during the period of pregnancy, and their marriage was still subsisting, the child borne from her would be presumed to be the petitioner's son in terms of Section 112 of the Evidence Act, 1872. Aggrieved by the said order, instant petition was filed³⁵.

Petitioner's counsel contended that the Rajasthan High Court, in Dalip Singh v. Ramesh³⁶ held that, "If the factum or presumption of paternity is disputed by someone, more particularly by the alleged father, it is difficult nay impossible for the party alleging such paternity to prove it without any scientific investigation." The respondent contended that the application contained false averments. She asserted that the pregnancy and birth of her son were on account of marriage and relationship with the petitioner. There was no report from the hospital where she had been undertaking her treatment and the said report obtained was fictitious.³⁷

The Court relied on the judgments in Narayan Dutt Tiwari v. Rohit Shekhar, and Goutam Kundu v. State of W.B and concluded that the reasoning adopted by the trial court for rejecting the application was incorrect. Merely because of

presumption to be drawn under Section 112 of the Evidence Act, an application for seeking a DNA test could not be ousted.³⁸

However, deciding on the merits of the case, the Court observed, *"it would not be appropriate to allow a DNA test to be conducted at the stage merely on the basis of the bland statement of the husband making allegations without appropriate legal evidence on record."* It further held that the petitioner had to establish beyond reasonable doubt about his non-access to his wife during the entire period. Reliance was also placed on the recent judgment of this court in *Mahesh Chand Sharma v. State* (2019),³⁹ where the Court observed, "In the circumstances, an order of getting DNA test of a child goes contrary to the basic fundamental right of the said individual child."⁴⁰

The Court specified that in any case where such application for conducting DNA test of a minor is filed, it would be first examined, "(a) whether there is an imminent need to conduct such DNA test; (b) Whether such test would result in harming the status of the minor in any form; (c) such report is not to be made public." In the light of the above, the application moved by the petitioner was rejected, though on the different ground; and the writ petition was dismissed.⁴¹

In G.Vasanthi vs M.Muneeshwaran (2019)⁴²,

The Madurai bench of Madras High Court in paragraph 19 has laid down that:

"In the result, the order impugned in the Civil Revision Petition is sustained. But, it is always open to the revision petitioner / wife to disregard the order passed by the Court below, requiring the holding of the DNA test. In that event, the allegation against her would be determined by the concerned Court by drawing presumption of the nature contemplated in Section 114 of the Indian Evidence Act. In other words, the Court below will be justified in drawing adverse inference against the revision petitioner. But then, the issue of infidelity alone would be determined."⁴³

The presumption enshrined in Section 112 of the Indian Evidence Act, will not in any way be disturbed. Neither the result of the DNA test nor adverse inference can lead to dislodging the conclusive proof contemplated by Section 112 of the Evidence Act, so long as it remains in the current unamended form. The rights of the child shall remain insulated and protected. While the character of the mother may be exposed, the status of the child shall remain unsullied in law. If the results of the DNA test deny the paternity of the child, it shall not be published. Just as identity of a rape-victim and that of a juvenile in conflict with law is concealed, similar protective measures shall be taken in such cases".⁴⁴

Recommendation of the 185th Law Commission Report⁴⁵

The Indian Evidence (Amendment) Bill, 2003 has been prepared on the basis of the recommendation of the 185th Law Commission Report. In the Bill, Section 112 of the Indian Evidence Act, 1872 is in the revised form as follows:

"The fact that any child was born during the continuance of a valid marriage

between its mother and any man, or within two hundred and eighty days,

- (i) After the marriage was declared nullity, the mother remaining unmarried, or
- (ii) After the marriage was avoided by dissolution, the mother remaining unmarried.

Shall be conclusive proof that such person is the legitimate child of that man, unless

- (a) It can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten; or
- (b) It is conclusively established, by tests conducted at the expense of that man, namely, (i) Medical tests, that at the relevant time, that man was impotent or sterile, and is not the father of the child; or (ii) blood tests conducted with the consent of that man and his wife and in the case of child, by permission of the Court, that the man is not the father of the child; or (iii) DNA genetic printing tests conducted with the consent of that man and in the case of the child, by permission of the Court that the man is not the father of the child; and Provided that the Court is satisfied that the test under sub clause (i) or sub-clause (ii) or sub-clause (iii) has been conducted in a scientific manner according to accepted procedures, and in the case of each of these sub-clauses (i) or (ii) or (iii) of clause (b), at least two tests have been conducted".⁴⁶

Thus in case of child⁴⁷ the medical test or DNA test must be conducted with the permission of the court. However if he is major nothing has been provided under the proposed Bill of 2003. In the considered opinion of the author the word 'child' has different meanings and connotations in different fact and situations. However, in civil cases of paternity disputes it needs necessary to understand that if a child attains majority, it would be his right and discretion alone to put himself to such medical test / DNA test and in case of his refusal to do so, negative inference under no circumstances can be allowed to be drawn against his mother about paternity of such child.

Conclusion

The age old classical law envisaged under section 112 of the Indian evidence act 1872 is to protect the legitimacy of child born during the continuity of valid marriage and within 280 days in case of dissolution of marriage provided her mother remaining unmarried at the time when he have been begotten by mandating a legal presumption as conclusive proof of this fact which can only be rebutted if the non-access is established by the father with a clear and strong piece of evidence. The position of law and society has phenomenally changed with the development of science and technology especially DNA paternity test in relation to the aforementioned principle of law which is more than 147 years old.

As rightly observed by the Hon'ble Apex court in Nandlal Badwaik case that,

"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."

The law should also amend in the modern perspective for the proper cooperation between the society and technology effects. Failure of the legislature in implementing the recommendations of 185th Law commission of India report in 2003 has been accommodated by several judicial proclamations in this regard. If the recommendation of the Law Commission is accepted, the presumption under Section 112 will become a rebuttable presumption and not a conclusive proof under Section 4 of the Indian Evidence Act. In such an event, evidence will not be confined to the plea of non-access but also include any other proof including the proof obtained from scientific test or medical examination.

A famous Sanskrit proverb from Subhashitani says,

“सत्यस्य वचनं श्रेयः सत्यादपि हितं वदेत् ।
यद्भूतहितमत्यन्तमेतत्सत्यं मतं मम॥नारदमुनी”

Means telling the truth is recommended but more than that tell those things which are in the interest of all. According to narada muni, things which is beneficial to large community is truth.

Another Sanskrit shloka from subhshitani says,

“सत्यं ब्रूयात् प्रियं ब्रूयात्, न ब्रूयात् सत्यम् अप्रियम् ।
प्रियं च नानृतम् ब्रूयात्, एष धर्मः सनातनः॥”

Means speak truth, speak what is pleasant to other's do not tell truth which is not pleasant (which is harmful). Similarly even though pleasant do not speak false, this is dharmah.

In light of aforementioned wisdom quotes the authors concludes that whether wisdom of the legislature or the wisdom of the judiciary would prevail in the given circumstances of the paternity disputes in civil matters where the legislative intent an age old classical law prevents and protects the bastardisation of child and on the otherhand judicial acumen give way to the upholding of DNA test as a rebuttal of the conclusive proof of the legitimacy of the child without declairing the said piece of legislation invalid. In the considered opinion of the author's there is famous Sanskrit proverb from subhashitani that even if hundred lies are to be told against an unpleasant truth it is good to do in the interest of all and in the given case which protects the child from mental and social stigma.

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2. Available at <https://itsmehappening.wordpress.com/2017/06/28/presumption-of-legitimacy-under-sec-112-of-evidence-act-and-nandlal-badwaik-case/>, last visited on 18 November 2019.
3. *Sham Lal v. Sanjeev Kumar*, (2009) 12 SCC 454
4. Section 112 of the India Evidence Act, 1872.
5. *Bhima v. Dhulappa*, (1904) 7 Bom LR 95
6. Section 112 of the Indian Evidence Act, 1872
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8. *Ibid.*
9. *Supra* note 6.
10. To 'presume' means to 'accept something as true in the absence of evidence to the contrary'. The term has been derived from the Latin word 'presumere', it means to take before or to take for granted. The term presumption may be defined to be an inference, affirmative or is affirmative, of the truth or falsehood of a doubtful fact or proposition drawn by a process of probable reasoning from something proved or taken for granted.
11. Section 4 of the Indian Evidence Act, 1872 provides that:
"May presume.—Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.
Shall presume.—Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.
Conclusive proof.—When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."
12. The other presumption mentioned in Section 4 of the Indian Evidence Act 1872, namely, 'may presume' and 'shall presume' are rebuttable presumptions
13. *Mahendra Agatrao Lomte and Dr. SR Katari*, "A Critical analysis of legal presumption of legitimacy of child under section 112 of Indian Evidence Act, 1872". Available at www.lawjournals.org, Last visited on 22November 2019.
14. *Ibid.* Alex Samuel and Dr. Swati Parikh, *DNA Tests in Criminal Investigation and Paternity Disputes*, 2nd ed. Allahabad, Dwivedi and Company, 2014. p.610.
15. In other words, "Access" and "non-access" means the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation.
16. *Gautam Kundu v. State of West Bengal*, 1993 Cri LJ 3233.
17. *Babita Devi v. State of Jharkhand*, 2012 (1) DMC 108 at 110: 2011 Cri LJ 3645 (Jhar).
18. AIR 1993 SC 2295.
19. Batuk Lal, "The Law of Evidence", 2016, Pg.522
20. AIR 2001 SC 2226
21. In paternity testing, DNA now allows positive determination of parenthood, rather than the statistical likelihood or exclusion offered by blood typing in former years. Further, there is one more recent technique whose probability of giving exact result is 99.9%. It is HLA testing. Blood group antigens, serum proteins, erythrocyte enzymes and salivary proteins are of importance in ascertaining the parentage with certainty and all of them are heritable characteristics, followed accepting genetic principles. When conventional blood group systems like ABO, Rh, MN, etc. are used in disputed parentage cases; the possibility of fixing the parentage cases, the possibility of fixing of HLA testing is used along with the conventional blood group systems in disputing parentage cases, the probability of fixing the parentage is about 99.9%
22. 2003 (3) ALD 1 (SC): (2003) 4 SCC 493
23. *Supra* note 15. Section 114 of the Indian Evidence Act, 1872.
24. It is apparent from these judgments that DNA test cannot rebut the conclusive presumption of the legitimacy of the person born or conceived during wedlock. The parties can avoid the rigor of such conclusive presumption only by proving non-access which is a negative