

THE IRREBUTTABLE PRESUMPTION OF LEGITIMACY IN THE AGE OF DNA TESTING

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Abstract:

Section 112 of the Indian Evidence Act, 1872 raises an irrebuttable presumption of the legitimacy of an offspring in two scenarios – *Firstly*, where such offspring was begotten during the subsistence of a valid marriage between the parents and *Secondly*, where the mother remains unmarried for 280 days after the dissolution of such marriage. Through the course of this paper, the author asserts that the aforementioned presumption of paternity is an archaic and gendered legal doctrine which perpetuates the notion that the status of an offspring is directly tethered to the nature of the relationship between the man and the woman who bore the child. As an alternative to the regressivity of the presumption of conclusive proof under Section 112 of the Act, the author proposes the introduction and admission of DNA mapping as a tool to neutralize the subjectivity of baseless presumptions and to conclusively determine paternity through the medium of scientific aptitude.

I. INTRODUCTION:

The Law of Evidence enjoys the position of being the purest and most unadulterated form of legal proof pertaining to any disputed fact that is alleged by one and denied by another, however, it is often supplemented through the instrument of ‘presumptions’. Presumptions arise when upon the proof of a certain fact, the court either *must*, *may* or *shall* assume the existence of certain other facts. Such inferences which affirm or deny the truth or falsehood of a fact in issue can be divided into two broad categories viz. *Presumption of Fact*, wherein the court has the discretion to assume a rebuttable presumption, and *Presumption of Law*. The latter can further be forked into Rebuttable Presumptions of Law and Irrebuttable Presumptions of Law. The scope of this paper is limited to one such Irrebuttable presumption pertaining to the legitimacy of a child enshrined in §112 of the Evidence Act, 1872 which reads as follows –

“Birth during marriage, conclusive proof of legitimacy - The fact person was born during the continuance of a valid marriage bet mother and any man, or within two hundred and eighty days a dissolution, the mother remaining unmarried, shall be conclusive that he is the legitimate son of that man, unless

it can be shown parties to the marriage had no access to each other at any time could have been begotten.”

“*Pater est quem nuptiatle demonstrant*” is a legal maxim which forms the bedrock of ascertaining legitimacy in the Indian paradigm by advocating the view that the father is he whom the nuptials indicate.¹ §112 of the Evidence Act, 1872 raises a presumption of the legitimacy of an offspring in two scenarios – *Firstly*, where such offspring was begotten during the subsistence of a valid marriage between the parents and *Secondly*, where the mother remains unmarried for 280 days after the dissolution of such marriage. Meaning thereby, it garners an irrebuttable presumption of paternity in favour of the man who was married to the mother at the time of birth which can only be disputed on the grounds of non-access of the husband and wife to one another. A presumption is deemed irrebuttable in the existence of conclusive proof which has been defined under Section 4 of the Act to mean proof of one fact which proves another such that the court shall not entertain any evidence to be given for the disproving of such latter fact. Thus, the moment the *factum* of a valid marriage or the mother’s singlehood in the event of dissolution is proved, it conclusively proves the legitimacy of the child within the meaning of Section 112.

The underlying principle behind this maxim is a legal bias of upholding the presumption in favour of the legitimacy of a child by postulating that when a marriage is shown to exist, then the continuance of such a marriage must *prima facie* be presumed.² What flows out of the continuance of a marriage has been presumed to be procreation. This legal presumption has received recognition by §112 of the Indian Evidence Act, 1872 coupled with §16 of the Hindu Marriage Act, 1955 and has become the general law on conclusively establishing the legitimacy of the child pertaining to the ascertainment of the legitimacy of the offspring vis-à-vis determination of rights of inheritance and maintenance.³

The narrow construction of §112 reveals its archaic roots and presumption of vice, immorality and chastity under the garb of seemingly neutral concerns of public morality and public policy.⁴

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¹ Alex Samuel and Dr. Swati Parikh, DNA TESTS IN CRIMINAL INVESTIGATION AND PATERNITY DISPUTES, 2nd ed. Allahabad, Dwivedi and Company, 2014. p.610.

² *Bhima v. Dhulappa* (1904) 7 Bom LR 95.

³ *Subamma v. Venkata Red* A.I.R. 1950 Mad 394.

⁴ *Sham Lal v. Sanjeev Kumar* (2009) 12 SCC 454

Introduced at a time when polygamy was entrenched in the roots of Indian society, a presumption of legitimacy was believed by the lawmakers to be a good mechanism of protecting the chastity of the woman and preventing the bastardisation of such offspring.⁵ The conclusive presumption of legitimacy has been justified by the lawmakers and the judiciary by their reliance on the well settled principle *odiosa et inhonesta non sunt in lege praesumenda* which suggests that nothing odious or dishonourable shall be presumed by the law. By presuming the legitimacy of the child, the possibility of a reconciliation and reunion between the husband and wife becomes more highly achievable.⁶

Furthermore, Section 112 operates from a fundamentally flawed presumption that is expressed in its non-access clause that sexual intercourse is a necessary pre-requisite for the conception of a child. It disregards impregnation through modern techniques such as in-vitro fertilization, sperm banks and surrogacy. It furthermore assumes the mean value of 280 days as the ‘gestation period’ for a pregnancy however, this is subject to fluctuation since the date of coitus is not necessarily the date of impregnation. Common law has accepted a gestation period in excess of 300 days in a strong of cases including *Gaskill v Gaskill*⁷, *Hadlum v Hadlum*⁸, *Wood v Wood*⁹, *Preston Jones v Preston Jones*¹⁰ and *Lockwood v Lockwood*¹¹. Section 112 also negates the valid possibility of coitus between a wife and another man during the valid subsistence of her marriage.¹²

⁵ Caesar Roy, PRESUMPTION AS TO LEGITIMACY IN SECTION 112 OF INDIAN EVIDENCE ACT NEEDS TO BE AMENDED, Journal of the Indian Law Institute, Vol. 54, No. 3 (July-September 2012), pp. 382-399.

⁶ *Ram Kanya v. Bharat Ram* (2010) 1 see P.85

⁷ 1921 PC 425.

⁸ 1948 2 All ER 412.

⁹ 1947 2 All ER 95.

¹⁰ 1951 1 All ER 124.

¹¹ 62 NTS 2d. 910 (1946).

¹² *Tushar Roy v Shukla Roy* 1993 Cri LJ 1659 (Cal).

II. DNA MAPPING AND ITS JURISPRUDENTIAL PROGRESSION

Section 112 of the Evidence Act was introduced around a century and a half ago, a time when the advances of technology and scientific precision to objectively determine paternity could not have been envisaged by the legislators.¹³ This, coupled with the regressive and conservative orientation of the society which translated into a host of laws which systematically subjugated the woman to be objectified and glorified as a source of purity and chastity, set the ground for the introduction of this section.

DNA mapping unlike the conventional blood testing, is a conclusive test of paternity since the latter only ascertains that a certain blood type belongs to a blood group.¹⁴ It was held in *Bhartiraj v. Sumesh Sachdeo*¹⁵ that blood testing merely helps in narrowing the ambit of paternity to those persons belonging to the same person as the offspring, however, it does not precisely tether the paternity of the child to a particular individual.¹⁶ It merely ascertains whether a said individual could or could not be the biological parent of the offspring.¹⁷ DNA technology, on the other hand, is a reliable forensic technique stemming from genetic science and attributed to possess unprecedented accuracy in this regard, with the chances of error being one in three hundred million.¹⁸ In light of its striking accuracy in determining paternity of the offspring, the courts have commenced placing reliance on the same and recognising the holding of the Privy Council in *Damisetti Ramchendrudu v. Damisetti Janakiramanna*¹⁹ where it held that a mere presumption does not carry the weight to displace adequate evidence on record. This is furthered by the rule of evidence that requires the best evidence to be placed before the court in order to prove or disprove a fact in issue and the consequent onus on the court to play an active role to unearth the truth and administer justice.²⁰ In the 2003 Report of Committee on Reforms of Criminal Justice System (Malimath Committee Report) as also the 185th Law

¹³ *Bommi v. Munirathinam* 2004(5) CTC 182; (2004) 3 MLJ 537.

¹⁴ C.K. Parik Text book of Medical Jurisprudence, Forensic Medicine and Toxicology 7.9. (CBS Publishers and Distributors, New Delhi 2006).

¹⁵ AIR 1986 All HC 2591.

¹⁶ *Raghunath v. Shardabai* 1986 AIR Bom HC 388.

¹⁷ *Rayden on Divorce* 1983 Vol. 1 at 1054.

¹⁸ *Gautam Kundu v. State of West Bengal* AIR 1993 SC P.2295

¹⁹ AIR 1920 PC 84.

²⁰ *Mohanlal Shamji Soni v. Union of India* 1991 Supp (1) SCC 27.

Commission Report,²¹ it was recommended that DNA profiling must be incorporated within Section 112 of the Evidence Act as a means to resolve paternity claims.²²

The Supreme Court has taken cognizance of this new and developed mode of ascertaining the paternity of a child and in the landmark case of *Gautum Kundu v State of West Bengal*, it opined certain norms giving²³ an insight into the application of DNA testing jurisprudence in India. In the aforementioned case, the father demanded a DNA Testing to prove paternity in order to avoid maintenance of the child sought by the mother. The Apex court addressed the issue of a court-directed DNA profiling against the consent of the individual and his/her Right to Personal Liberty, Right to Privacy²⁴ and the Right to Dignity of the mother and the offspring and held that the presumption under Section 112 can be rebutted by the high threshold of ‘strong preponderance of evidence’ and not mere ‘balance of probabilities’. The court concluded that if a strong *prima facie* case of non-access between the parties could be made out in order to satisfy the court, then the refusal by either party to subject themselves to such DNA testing would lead to an adverse inference to be drawn against them by the court. In *Nandlal Wasudeo Badwaik v. Lata Nanlal Badwaik*²⁵ the Supreme Court upheld its decision in *Gautum Kundu* by placing reliance on a factual serological test that was conducted during trial and held that due to the non-availability of any precedent to the contrary or in support, reliance ought to be placed on such a medical test that stands in contravention to the presumption of legitimacy raised under Section 112 of the Evidence Act.²⁶

Furthermore, in *Sharda v Dharmpal*²⁷, the court clarified that matrimonial courts are vested with the discretionary power to make the parties undergo medical tests in order to determine disputes arising out of such matrimony and that such an order of the court shall not be deemed to violate the parties’ Right to Privacy within the meaning of Article 21. Article 21 not being a right of absolute nature, the court may order any medical test against a person if there is

²¹ 185th Report of the Law Commission, Available at - <http://lawcommissionofindia.nic.in/reports/185thReport-PartIIIA.pdf>

²² Report of Committee on Reforms of Criminal Justice System (Malimath Committee Report), March 2003, Government of India, Ministry of Home Affairs.

²³ AIR 1993 SC P.2295.

²⁴ *K.S. Puttaswamy (Retd.) v. Union of India* (2018) 4 SCC 651; *Joseph Shine v Union of India* 2019) 3 SCC 39

²⁵ 2014 2 SCC 576.

²⁶ *Banarsi Das v. Teeku Dutta* (2005) 4 SCC 449; *Kamti Devi v. Poshi Ram* 2001 (5) SCC 311; *Bhabani Prasad Jena v. Orissa State Commission for Woman* (2010) 8 SCC 633.

²⁷ AIR 2003 SC P.3450.

sufficient material before the court to cull out a *prima facie* case. The courts are obligated to strike a balance between the ascertainment of the fact in issue and the individual's fundamental Right to Privacy by convincing themselves that the need for DNA testing is 'imminent' and that it would be impossible for the court to determine the dispute in the absence of such medical evidence.²⁸

The court, however, is not empowered to forcibly compel a person to undergo any medical test and in the event that a person so ordered refuses to take the test, an adverse inference may be drawn by the court against him.²⁹ Such an inference is based on a presumption that no truthful person would deny taking a DNA Test which would only strengthen their denial of paternity unless they are in fact, the biological parent, in which case, such denial only speaks to their predicament of deliberately disowning the offspring.³⁰ In a recent decision of the Supreme Court in *Dipanwita Roy v Ronobroto Roy*³¹, the court held that the wife may be directed to undergo DNA mapping if the fidelity of the wife is challenged by the husband and an adverse presumption may be drawn against her by the court if she refuses to undergo such a test.

However, the courts have been quick to distinguish the factual matrices in the aforementioned cases from cases where the offspring has attained majority and him/herself seeks a test of paternity. Such cases lack the stigmatisation of the offspring and a violation of their Right to Dignity as addressed in *Gautum Kundu* since the offspring him/herself seeks a declaration on the paternity. In *Rohit Shekhar v Narayan Dutt Tiwari*³² the court held that non-compliance with an order to subject oneself to medical testing where the offspring approaches the court for his declaration as the biological child of the respondent shall not merely lead to an adverse inference, but rather, would empower the court to compel such individual to give the blood sample. In *Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria*³³ the court reiterated the onus of the court to deploy the best evidence to ascertain the truth and minimize factual controversy while determining the facts in issue. In light of this burden on the judicial process, the court held that a comparatively weak adverse inference stemming from non-

²⁸ *B.P. Jana v Convenor Secretary, Orissa State Commissioner for Women* AIR 2010 SC P. 2851.

²⁹ *Nandlal Wasudeo Badwaik v. Lata Nanlal Badwaik* (2014) 2 SCC 576.

³⁰ Mukund Sarda, DNA Tests: A Study In The Light Of Supreme Court's Decision In B.P. Jena's Case, 2012

³¹ AIR 2015 SC 418.

³² AIR 2012 Del. 151 at para 34.

³³ 2012 3 SCALE 550

compliance with an order directing medical testing cannot be a substitute to the enforceability of a direction for DNA Testing.

In *Sadashiv Mallikarjun Khedarkar v Nandini Sadasiv Khedarkar*³⁴, the courts have recognised the lacunae present in the law and highlighted the incongruity of the law with the practicality of matrimony. Section 112 fails to envisage a scenario where the husband and wife are co-habiting but the wife delivers a child borne out of an illicit relationship with another man. In such a scenario, the husband is not allowed to rebut the conclusive presumption that establishes him to be the father of the child. Following this, the court in *Kanchan Bedi v Gurpreet Singh Bedi*³⁵ and *Dwarika Prasad Satpathy v Bidyut Prava Dixit*³⁶ allowed DNA profiling where the husband disputed the presumption of paternity under Section 112. However, the court has also been quick to uphold the interest of the mother by holding that no DNA tests should be prescribed without giving the mother a fair hearing in accordance with the principles of natural justice.³⁷ Furthermore, such tests should not be administered liberally and must be ordered in exceptional and deserving cases in alignment with the interest of the offspring.

A jurisprudential analysis of the court's acceptance of DNA Testing and reliance on other modern medical techniques verifies the assertion that Section 112 of the Evidence Act was introduced around a century and a half ago, a time when the advances of technology and scientific precision to objectively determine paternity could not have been envisaged by the legislators.³⁸ DNA technology is a reliable forensic technique stemming from genetic science and attributed to possess unprecedented accuracy in this regard, with the chances of error being one in three hundred million.³⁹ In light of its striking accuracy in determining paternity of the offspring, it is clear to see that courts have commenced placing reliance on the same.

³⁴ 1995 Cri LJ 4090 (Bom).

³⁵ AIR 2003 Del. 446.

³⁶ AIR 1999 SC 3348.

³⁷ *Sunil Eknath Trambake v Leelavati Sunil Trambake* AIR 2006 Bom. 140.

³⁸ *Bommi v. Munirathinam* 2004(5) CTC 182; (2004) 3 MLJ 537.

³⁹ *Gautam Kundu v. State of West Bengal* AIR 1993 SC P.2295

III. CONCLUSION

The Evidence Act was enacted at a time when it was beyond the scope of the legislature to envisage the scientific nuance and precision of the advancements in genetic testing such as DNA Mapping. In the 21st century, however, DNA profiling has made appreciable advancements in ascertaining paternity with striking precision and classifying genes and determining their co-relation with a genetically identical individual. In light of such developments, the Evidence Act ought to account for the rebuttable nature of the presumption of paternity and not deem such a presumption to be conclusive in the face of medical evidence to the contrary. Such a presumption should be discontinued in light of the extensive change that the Indian society has undergone over the years and the courts must aim to foster a progressive application of the law rather than relying on regressive and conservative notions of morality, chastity, honour and ethics. Furthermore, given the onus of the courts to peruse the best evidence available in order to ascertain the truth, they must not disregard objective medical evidence which facilitates the journey to truth with regard to the paternity of an offspring. Accordingly, courts ought not to promote the imposition of such fictional liability on persons and must allow for rebuttability of the presumption within the meaning of Section 112 on the grounds of objective and scientific merit. DNA evidence must be made admissible and reliance ought to be placed on the advances that medical jurisprudence is making in order to conclusively determine the paternity of an offspring.