PRESUMPTION AS TO LEGITIMACY IN SECTION 112 OF INDIAN EVIDENCE ACT NEEDS TO BE AMENDED

Abstract

The conclusive proof of legitimacy of a child born during the continuance of a valid marriage is significantly analyzed under section 112 of the Evidence Act. The gravest problem with the section is that it presumes that sexual intercourse is an absolute essential for the conception of a child in a woman's womb. This presumption is expressed in the non-access clause of the section *i.e.* the section says if the man could not possibly have had sexual intercourse, it cannot be his child. Several modern scientific developments such as sperm banks, surrogacy, in vitro fertilizations *etc*. have done away with the necessity of sexual intercourse *i.e.* the physical presence of a man near a woman for the conception of a child. DNA technology can conclusively establish the truth in such disputes and, therefore, should be resorted to without any hesitation. In the wake of new scientific inventions the new available techniques should be adopted in the administration of justice. It is to be borne in mind that when section 112 was being drafted even the discovery of DNA was not contemplated and, therefore, this section should be amended. This is a developing area of the law in which changing technology may be expected to drive changes in the law.

Introduction

"Maternity is always certain. Paternity is a matter of inferences."

IN INDIA chastity of the woman and paternity of the child hold much value and are issues of honour. No person would like to be called a bastard nor will a woman like to be called unchaste. Section 112 of the Indian Evidence Act, 1872 deals with the legitimacy of a child. Section 112 of the Act was enacted at a time when the modern scientific advancements such as deoxyribonucleic acid (DNA), ribonucleic acid (RNA) tests, sperm bank or cryobank, in vitro fertilizations, surrogacy *etc.* were not even in contemplation of the legislature. Now the medical field is very much advanced and by having blood alone, the entire body system could be scanned to detect the defect. DNA technology comes in handy as a latest tool of forensic science, emanating from genetic science. In sorting out grave issues such as paternity claims, establishing identity from mutilated remains *etc.* DNA test is vey much efficient. The purpose of this paper is to highlight the importance of modern scientific developments in paternity claims and for which this section may have to be amended.

Presumption and its classification

Every fact, on the basis of which a party to a proceeding wants to take judgment, must be proved. No court can, while deciding a case, place reliance on a fact unless and until it has been proved according to the rules laid down in the Indian Evidence Act, 1872. But the law of evidence has provided that a court can take into consideration certain facts even without calling for proof of them *i.e.* the court may presume certain things. 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 '*praesumere*', it means to take before or to take for granted. The term presumption may be defined to be an inference, affirmative or disaffirmative, 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.[1] Human beings have a natural instinct to presume on the basis of past experience or knowledge. Sometimes certain facts are difficult or even impossible to prove and to test the veracity or otherwise of these facts, one often infers from experiences and knowledge. This logical deduction being inherent in the nature of human beings, has found its way into every facet of human behaviour including the administration of justice. A presumption is not itself evidence but only makes a *prima facie* case for the party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies.

Mainly, presumption is of two types:

1. Presumption of fact.
2. Presumption of law.

Again, Presumption of law can be divided into two categories –

1. Rebuttable presumption
2. Irrebuttable presumption

According to the Indian Evidence Act, there are three types of presumption. Section 4 of the Act describes these three types of presumption –

1. May presume.
2. Shall presume.
3. Conclusive proof.

May presume

Whenever it is provided that the court may presume a fact, the court may take notice of the fact without calling for its proof or may call upon a part to prove that fact. Whenever the expression may presume has been used in the Act, discretion has been given to the court to presume a fact or refuse to raise such a presumption.

1 *Izhar Ahmed* v. *Union of India*, AIR 1962 SC 1052.

In cases when discretion lies with the court and it refuses to exercise such discretion, then it may call upon the parties to prove the fact by leading evidence. The presumption raised under the expression 'may presume' is a presumption of fact.[2]

Shall presume

Whenever it is directed that the court shall presume a fact, the court cannot exercise its discretion. It is compelled to take the fact as proved *i.e.* it shall have to presume the fact. But in this case the court will be at liberty to allow the opposite party to adduce evidence to disprove the fact so presumed, and if the opposite party is successful in disproving it, the court shall not presume the fact. The presumption raised under the expression shall presume is a presumption of law.[3]

Conclusive proof

Whenever it is mentioned that a fact is a conclusive proof of another fact, 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. When one fact is declared by law to be conclusive proof of another, the court cannot allow evidence to be given to rebut.[4]

Presumption as to legitimacy and its significance

In India, section 112 of the Evidence Act embodies the irrebutable presumption of legitimacy. It reads:

> 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.

So this section deals with law as to the proof of legitimacy as it stands today. It says that the fact that a person was born during the continuance of a valid marriage or within 280 days after its dissolution but before the woman remarried someone else is itself a conclusive proof that the person to whom the mother of the child

2 For example, see ss. 86 to 88, 90, and 114 of the Evidence Act.

3 For example, see ss. 79 to 85, 89, 105, and 107 to 111 of the Evidence Act.

4 For example, see ss. 41, 112, 113 and 115 to 117 of the Evidence Act.

was married is the biological father of the child born.

Now it is very important to know the necessity of the presumption of legitimacy. This legal presumption is based on the principle, '*odiosa et inhonesta non sunt in lege prae sumenda*', which means that nothing odious or dishonourable will be presumed by the law. So the law presumes against vice and immorality. One of the strongest illustrations of the principle is the presumption in favour of legitimacy of children in a civilized society. But, 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. It is also based on the well known maxim '*pater est quem nuptioe demonstrant*' which means 'he is the father whom the marriage indicates'. 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. The section has no application over the dispute of maternity. 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 branded a "bastard". The principal reason for this presumption was that in 1872 when the bill was enacted there were no means of ascertaining the biological paternity of a child. The common law did recognize that moral justice demanded that none but the biological son of a man, begotten upon his wedded wife, shall inherit his rank and lands. On account of practical impossibility of ascertainment, a policy was laid that society merely requires that property shall have an owner and a bastard may be as competent to hold, and to perform all the duties annexed to it, as the true heir. This position as to illegitimate children is also found in modern Hindu Law.

One more reason as to why section 112 was enacted in its present form is that in 1872 when the bill was enacted, polygamy was deep rooted in the Indian society. Men had several wives and extra marital relations. Women could be easily exploited and discarded. By making a presumption as to legitimacy in all cases as long as the man had an opportunity and the ability to have sexual intercourse with his wife, the wife's chastity was protected from being doubted and she was protected from being harassed in the society. This position has now changed. Polygamy is now illegal and monogamy is the rule.

Under the English law, there are three special statutes governing legitimacy. They are Affiliation Proceedings Act, 1957; Family Reforms Act, 1969 and Family Reforms Act, 1987. In Affiliation Proceedings Act, 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 the Act either party 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 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 before 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.

Legitimacy under Hindu law and Muslim law

The Hindu law and Mohammedan law raise similar presumptions as stated in the section, regarding legitimacy, but while English law gives importance to the time of birth, Hindu law and Mohammedan law give importance to the time of conception.

Section 16 of the Hindu Marriage Act, 1955, stood amended vide Amendment Act of 1976 and the amended provisions read as under:-

> Legitimacy of children of void and voidable marriages - (1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate…
>
> (2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be theirs would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

As far as section 16 of the Act is concerned, it was enacted to legitimise children who would otherwise suffer by becoming illegitimate. At the same time it expressly provide in sub-section (3) by engrafting a provision with a non-obstante clause stipulating specifically that nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage, which is null and void or which is annulled by a decree of nullity under section 12, 'any rights in or to the property of any person, other than the parents, in any case where, but for the

passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of him not being the legitimate child of his parents'. In light of such an express mandate of the legislature there is no room for according upon such children who but for section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in sub-section (3) of section 16 of the Act but also would attempt to court relegislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself.

The Supreme Court in *PEK Kalliani Amma* v. *K. Devi*[5] examined subsection (1) of section 16 and observed that by virtue of the words 'notwithstanding that a marriage is null and void under section 11', this section stands independent of section 11. The amended provision which intended the conferment of legitimacy on children born of a void marriage, will operate despite the provisions in section 11 which has the effect of nullifying only those marriages held after the Act came into force and which are performed in contravention of section 5. By virtue of the legal fiction, children born of a void marriage would have to be treated as legitimate for all purposes including succession to the property of their parents. The net effect being that the benefit of legitimacy is conferred upon any child born either before or after the date of amendment. That would mean that even if a marriage had been contracted at the time when there was a legislative bar to such a marriage, the offspring of such a marriage would be treated as legitimate. Such a child would be entitled to succeed to the property of his or her parents.

Subsection (2) relates to children of a voidable marriage in respect of which a decree of annulment may be granted by section 12. Even when the validity of the marriage is challenged by either party and still the marriage is not annulled, it would be a void marriage, and the children of the parties to such a marriage would undoubtedly be legitimate. If, on the other hand, the marriage is annulled at the instance of either party, the children born of such marriage are, by operation of subsection (2), to be deemed to be their legitimate children for all interests and purposes, except that by virtue of subsection (3) such children cannot claim any rights in or over property of any person other than parents.

Actually, section 16(2) requires conception before a decree to be proved first, before the deeming provision can apply. The position, it was stated, was different under the Evidence Act under which the date of conception need not be proved, and proof of the date of birth is sufficient to legitimacy.

5 AIR 1996 SC 1963.

Under Muslim law the putative father is not recognized for any purpose. It clings to the concept of "filius nullis". Under Islamic law, conception during lawful wedlock determines legitimacy of the child .There is no process recognised under the Muslim law which confers legitimacy on an illegitimate child. However Mohammedans have adopted measures like "acknowledgement of paternity" which are preventive measures to save the children from being bastardised. Mohammedan law has made a special provision for conferring legitimacy on or rather recognizing the legitimacy of a child, whether a son or daughter by the doctrine of acknowledgement of *ikrar*. It is an acknowledgement of paternity by his putative father. The person acknowledged must not be the off-spring of *zina* , which is adultery in Muslim law, as he would be if his mother could not possibly have been the lawful wife of the acknowledger at any time when he could have been begotten, as where the mother was at that time the wife of another man. Adoption or any equivalent of the same is not recognized under Mohammedan law. It is conclusively presumed that a child born within less than six months after the marriage of the mother cannot have been begotten by her husband in lawful wedlock.[6]

Anatomy and interpretation of section 112

This section consists of two parts. The first part deals with the birth of a child during the continuance of a valid-marriage between a man and a woman; and the second part deals with the birth of a child during 280 days after the dissolution of that marriage. The section establishes the fact of marriage as conclusive proof of legitimacy. The only way to rebut the legitimacy is to prove 'no access' *i.e.* he could not possibly have had sexual intercourse with the mother of the child at any time during which she could have conceived the child born. This can be proved either by showing that the man was away in some other city or at a distance from which he could have had no possible opportunity of having sexual intercourse with the mother or by proving that he was impotent at all times at which the child could have been conceived. If however, the husband fails to prove any of these, he shall be deemed to be the father of the child born. The word 'begotten' used in section 112 of the Act means 'conceived' and not 'born'. The emphasis on birth during wedlock as against conception is there in section 112 of the Act for the reason that as a general rule, it is the birth after marriage, which confers legitimacy on a child until its contrary is not proved.

Under the second part of the section, a child born within 280 days from the dissolution of a valid marriage will be presumed to be legitimate. So in the case of widowhood, though cohabitation is not possible, the law will presume in favour of

6 Sir Roland Wilson, *Anglo–Muhammadan Law* 159 (Fifth edn.).

chastity of a woman and legitimacy of a child. The presumption of a child born within 280 days of the dissolution of the marriage, being legitimate is subject to the condition that the woman remains unmarried. If the woman remarries before the birth of the child, the second part of the section would have no application. The child would be presumed to be the legitimate child of the second husband under the first part of the section unless it is shown that the second husband had no access to the woman at any time when the child could have been begotten.

The words "at any time" and "could have been begotten" are very significant. The requirement of the section for rebutting the conclusive presumption is not to show 'non-access' exactly 'at the time when the child was begotten', but the requirement is still more onerous and pervasive so much so that the contending party will have to show non-access 'at any time' when the child 'could have been begotten' which means non-access not at any particular moment but during the whole span of the time when the conception according to the ordinary course of nature possibly could have taken place.

The party who wants to dislodge the conclusiveness has the burden to show that not merely did he not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative.

Problems and inconsistency in section 112

The main problem with the section is that it presumes that sexual intercourse is an absolute essential for the conception of a child in woman's womb. This presumption is expressed in the non-access clause of the section *i.e.* the section says if the man could not possibly have had sexual intercourse, it cannot be his child. Several modern advancements such as deoxyribonucleic acid (DNA), ribonucleic acid (RNA) tests, sperm bank or cryobank, in vitro fertilizations, surrogacy *etc.* have done away with the necessity of a sexual intercourse *i.e.* the physical presence of a man near a woman for the conception of a child.

The average period of pregnancy is 40 weeks or 280 days (this period is called gestation period), which is only a mean value taken from the first missed menstrual period. Even where the pregnancy occurs as a result of a single act of intercourse, the resulting length of pregnancy may vary by a number of days.[7] The date of coitus is not necessarily the same as that of conception, as viable spermatozoa may remain in the female genital tract for a number of days. The maximum number of

7 P.C Dixit, *HWV Cox Medical Jurisprudence & Toxicology*, (LexisNexis, New Delhi,2002).

days for which they retain their potency is not known, but is probably in excess of five or six days. Spermatozoa retrieved from the female genital tract up to two weeks, probably are no longer viable.[8] Another factor is the time of ovulation, which though normally about the fourteenth day between menstrual periods, may vary considerably in different women or in the same woman at different times.[9] Under Indian law, as in the UK, there is no legally defined range of gestation period and each case is argued on its merits. A number of cases in excess of 300 days are on record, all of which seem reasonably defined. In *Gaskill* v. *Gaskill*[10] case, the 331 days was accepted as gestation period. Similarly in *Hadlum* v. *Hadlum*[11] and *Wood v. Wood*,[12] it was 349 days, in *Preston Jones* v. *Preston Jones*,[13] it was 360 days, in *Lockwood* v. *Lockwood*,[14], and it was 355 days and so on.

In this rule, 'access' and 'non-access' mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation. The section has to be applied with reference to the facts and circumstances of each case. So it differs from one case to another. The word 'access' in this section means 'effective access'. Physical incapacity to procreate, if established, amounts to non-access within the meaning of this section. The presumption under this section is the conclusive presumption of law. It can be displaced only by the proof of non-access between the parties to the marriage when the child could have begotten. One can prove non-access saying that he had no intercourse with his wife and he is impotent.

In a case where a widow uses her dead husband's donated sperm to get pregnant 280 days after her husband's death, since this section require 'continuance of a valid marriage' and the child, in this case will unfortunately be born after the marriage has ceased, it can easily be proved to be illegitimate. Also in a case where a divorced lady remarried another man then delivered a baby within 280 days of the dissolution of the first marriage but during the continuance of the second marriage, the child was declared to be a legitimate child of the second husband.

Now, applying section 112 of the Indian Evidence Act to surrogacy, whereby a woman agrees to become pregnant and deliver a child for a contracted party as a gestational carrier to deliver after having been implanted with an embryo. For example Z is the surrogate mother of A, and X is his mother. Then according to section 112, A would be legitimate child of Z's husband who is nowhere involved. In modern context when there are varied options like surrogacy, sperm banks, in vitro

8 *Ibid.*
9 *Ibid.*
10 1921 PC 425.
11 (1948)2 All ER 412.
12 (1947)2 All ER 95.
13 (1951)1 All ER 124.
14 62 NTS 2d. 910 (1946).

fertilizations and DNA testing, how can section 112 be logical? The problem is modern scientific developments are shattering these principles. The problem is that this ancient law as to legitimacy can yield absurd results in modern times. The gravest problem with the section is it presumes that sexual intercourse is an absolute essential for the conception of a child in a woman's womb.

By showing on the preponderance of probabilities, that the husband could not be the father and since there was no legal bar as to the manner in which that could be shown provided it could be shown by adducing any sort of admissible evidence, there was no difficulty for the court to allow the husband to avail himself of the evidence of blood test for showing that he was not the father of the child in spite of the fact that the husband admittedly had access to and sexual intercourse too with the wife at the relevant time. Under Indian law, however, in a similar situation the husband is debarred from disputing the legitimacy and paternity of the child in spite of the fact that another man also had regular sexual intercourse with his wife at the time when the child was conceived. The husband is debarred under the Indian law in such a situation from challenging the paternity and legitimacy of the child because he having had access to his wife at the relevant time has no opportunity to take the plea of non-access which is the only permissible plea for dislodging the presumption of legitimacy under section 112, although it is quite possible that the other man who also had sexual intercourse with the woman was the biological father of the child.[15]

Now it may generally be accepted that the existence of the presumption as to legitimacy is a necessity, but certain important questions are rising which are as follows:-

1. Can such a conclusive presumption be called a good presumption?
2. Should this presumption be allowed to remain conclusive and can such a presumption be continued in section 112 of the Act, when conclusive scientific methods to prove the paternity of the child are available?
3. Whether this presumption should continue considering the extensive change which society has undergone in terms of accepting new rules of morality and ethics?
4. The important question raised by Law Commission in its 185th Report (Part IIIA),[16] whether questions of paternity under section 112 should include cases arising out of void marriages which are declared void but where, children of such marriages are made legitimate by any law, and whether a provision deeming

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

16 *Available at*: http://lawcommissionofindia.nic.in/reports/185thReport-PartIIIA.pdf , last visited on 03.04.2012.

such marriages also valid for the limited purposes of sec. 112, should be introduced?

Scientific advancements and presumption of legitimacy

Blood test is an important piece of evidence to determine the paternity of the child. Though by a blood test it cannot positively establish the paternity of the child, it can certainly exclude a certain individual as the father of the child. Therefore, while the negative finding in a blood test is definite, the positive finding only indicates a possibility. At the beginning of the century scientists established that human blood had certain characteristics which could be genetically transmitted. The first recognised system was ABO blood group. The blood group of a child is determined by the parents' genetic make- up but the number of possibilities is such, that it is not possible to prove that certain individual is the father on the basis of comparing blood groups only. What can be proved is that he is not the father.

As regards blood groups, the 69th Law Commission Report gives the following example. As a scientific principle, a child will inherit the blood group of one or other of his parents. If O is the blood group of the mother and A is that of the child, a person with blood group B cannot be the father. But, if the blood of the male in question is also A, like the child's, it is not possible to say that the person is the father. This is the position in Europe and the USA.[17]

However, medically it is quite possible that the pregnancy may last for more than 280 days. There may be instances when the husband and wife may be living together and the wife may have gone astray and conceived the child through illicit relationship. But in view of section 112 of the Evidence Act, the legal presumption is in favour of the child being legitimate and the husband has to bear fatherhood of the child. Due to the aforesaid provision contained in the Evidence Act, such anomalous situation exists in our country; although science and technology has advanced so much that it can be accurately ascertained with the help of DNA testing as to whether parties to dispute have to be given. Now the DNA fingerprinting test has been much advanced and resorted to by the courts of law to resolve the dispute of paternity of the child.

The Evidence Act came into field in the year 1872, when there was no appreciable development or progress in the scientific field, especially to find out the classification of genes, its effect and co-relation of the same with genetically identical person. Now the medical field is very much advanced and by having blood alone, the entire body system could be scanned to detect the defect. DNA technology comes in handy as a latest tool of forensic science, emanating from genetic science.

17 *Available at*: http://lawcommissionofindia.nic.in/51-100/Report69.pdf, last visited on 03.04.2012.

A sperm bank or cryobank is one kind of facility that collects and stores human sperm mainly from sperm donors. The sperm bank then supplies the donor sperm directly to the recipient to enable a woman to perform her own artificial insemination. Artificial insemination is the process by which sperm is placed into the reproductive tract of a female for the purpose of impregnating the female by using means other than sexual intercourse. Now the pregnancy achieved using donor sperm is no different from a pregnancy achieved by sexual intercourse.

Suppose a husband who has donated his sperm goes away from his wife at a distance from which sexual intercourse with her is impossible. During this time if the wife uses his sperm from the bank and conceives a child, according to this section, the husband may easily prove the child born is illegitimate.

Consider another case where a husband donates his sperm and then becomes impotent from some disease, if his wife has used the donated sperm for conceiving a child even after their marriage, the husband may easily prove that the child is illegitimate.

In surrogacy, a woman agrees to become pregnant and deliver a child for a contracted party as a gestational carrier to deliver after having been implanted with an embryo. So here the biological mother and the woman giving birth to the child through her womb are two different women.

Now, if a Mr. and Mrs. Y for instance contracted a Mrs. Z for delivering their baby, according to this section the child would be presumed to be a legitimate child of Mr. Z i.e. Mrs. Z's husband who may have nothing whatsoever to do with the transaction. It will be deemed to be his child simply if and because he had an opportunity to have sexual intercourse with his own wife. He will have no defence.

Judicial observations on DNA test

There is no provision either in Hindu Marriage Act or in Indian Evidence Act or in any other law, empowering the court, to issue a direction, upon a party to matrimonial proceedings or in any other proceedings, to compel them to submit to blood test. The contending party cannot he permitted to say that he will rebut the conclusive presumption of law regarding paternity by proving directly by blood test that the husband is not the biological father of the child which will virtually be an abrogation of the existing provision of section 112.

In view of the provision section 112 of the Indian Evidence Act, there is no scope of permitting the husband to avail of blood test for dislodging the presumption of legitimacy and paternity arising out of this section.[18] Blood group test to determine

18 *Gautam Kundu* v. *Shaswati Kundu*, Criminal Revision No. 800 of 1992, Calcutta High Court.

the paternity of a child born during wedlock is not permissible.[19] The Supreme Court in *Gautam Kundu* v. *State of West Bengal*[20] laid down the following guidelines regarding the permissibility of blood tests to prove paternity:

1. That the courts in India cannot order blood tests as a matter of course.
2. Whenever applications made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
3. There must be a strong *prime 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 would have the effect of branding a child as a bastard and his mother as an unchaste woman.
5. No one can be compelled to give the sample for analysis.

The apex court in *Gautam Kundu* [21] further held that the object of section 112 of the Act was to overcome the evil of illegitimacy and save blameless children from being 'bastardized'.

The apex court in yet another case of *Smt.Kanti Devi* v. *Poshi Ram*[22] while accepting the accuracy of the test held that the result of genuine DNA test is said to be scientifically true but that is not enough to escape from conclusiveness of section 112 of the Indian Evidence Act. It was further observed therein that this may look hard from the point of view of the father, but in such cases the law leans in favour of the innocent child. Thus, it is submitted that there is a serious lacuna in the law and DNA evidence should be made a part of the statute book so as to conclusively and accurately prove the parentage of the child.

In *Sadashiv Mallikarjun Khedarkar* v. *Nandini Sadasiv Khedarker*,[23] the Bombay High Court held that there may be instances where the husband and wife are living together and the wife may have gone astray and then delivered a child through illicit connection. But in the view of the legal presumption under section 112 of the Indian Evidence Act,1872 the husband cannot be allowed to prove that the child is not born to him since husband and wife are living together, even if it is proved that wife had some illicit relationship with another person. If one goes by rigor or presumption under section 112 of the Evidence Act no husband can be permitted to prove that the child born to the wife is not his, if the husband and the wife are together even if wife is proved to be living in adultery. Bombay High Court in this case, held that the

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

20 AIR 1993 SC 2295.

21 *Ibid.*

22 AIR 2001 SC 2226.

23 1995 Cri LJ 4090 (Bom).

court has power to direct blood examination but it should not be done as a matter of course or to have a roving inquiry, the court even felt that there should be a suitable amendment by the legislature and after noting that no body can be compelled to give blood samples, it held that the court can give direction but cannot compel giving of blood sample.

Again, in *Banarsi Dass* v. *Teeku Datta*[24] the Supreme Court while reiterating its view in *Kamti Devi*[25] case held that DNA test is not to be directed as matter of routine and only in deserving cases such as direction can be given. Though there are other courts which have deviated from the above observation. In *Kanchan Bedi* v. *Gurpreet Singh Bedi*,[26] the Delhi High Court ordered DNA test for determination of paternity of a child whose father disputed his paternity. In *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit*,[27] the Supreme Court held that the refusal of paternity (DNA test) would bar a party from challenging the paternity of the child. In *Sunil Eknath Trambake* v. *Leelavati Sunil Trambake*,[28] the Bombay High Court observed that ordering DNA test is the proof of paternity of the child but without hearing mother and child (through his or her natural guardian) would be violative of natural justice. The court further held that DNA test to determine paternity should be ordered in exceptional and deserving cases when such tests are in the interests of the child. In *Bommi and another* v. *Munirathinam*,[29] the Madras High Court held that advancement in science and technology must be used instead of merely relying upon presumption under section 112 of the Indian Evidence Act, as such technological advancement was not available at the time of enacting the Evidence Act.

Settling the provision relating to legitimacy

The, Evidence Act, 1872 and section 112 of the Act at the time of eactment never contemplated the momentous scientific advancement which has taken place in the recent past. Moreover, it may also be contested that the section did not propose to impose fictitious liability on any person, but in fact relieved him of liability if 'non access', the best, the only and the most scientific defence available at that time, was proved, notwithstanding the fact that it might have led to the 'bastardization' of the child. Today, science has taken giant leaps and made tremendous progress: DNA evidence can now conclusively determine the paternity of a child.

24 (2005)4 SCC 449.
25 *Supra* note 22.
26 AIR 2003 Del. 446.
27 AIR 1999 SC 3348.
28 AIR 2006 Bom. 140.
29 2004(5) CTC 182: (2004)3 MLJ 537.

Again, medical jurisprudence evidences that there is a lot of chance that a maximum period of pregnancy can be over 280 days. Section 112 does not apply to all those critical situations where even after 280 days of dissolution of marriage a mother remaining unmarried can claim legitimacy of the child born to her. In such situations DNA test is the only method to establish the legitimacy of the child and solve the dispute with respect the paternity of the child.[30] DNA profiling is fool-proof. It provides absolute certainty rather than a probable exclusion as in other systems.[31]

It may further be argued that the social system has undergone an extensive change since the enactment of the Act. Societal norms have now restructured themselves. The various advantages of the modern technological and scientific advancements, especially DNA technology, should be taken into consideration by the legal system, and suitable modifications and amendments should be brought about to keep the law attuned to the changing socio-cultural scenario. In the Indian context, such a change in scientific temper and social outlook is manifest in the Malimath Committee Report on Reforms of the Criminal Justice System[32], which recommended that section 112 of the Act should incorporate DNA testing as a scientific means to resolve any dispute pertaining to paternity.

The genetic science established the belief that the pattern of chemical signals *i.e.* the genetic structure which may be discovered with the DNA molecule in the cells of each individual, is unique and different in every individual. This new accurate technology should be made available to the court, in order to determine paternity or maternity disputes, to reach a correct conclusion, regarding succession cases, maintenance proceedings, matrimonial disputes, *etc.* In case of disputed paternity of a child, mere comparison of DNA obtained from the body fluid or body tissues of the child with his father and mother can offer infallible evidence of biological parentage. Even DNA testing may be used to rebut the statutory presumption arising under the Act, if available, or to establish evidence, where no presumption arises, as in the case, since, marriage is disputed. No other evidence of corroboration may be required, if the medical examination is conducted properly, taking proper sampling of body fluids followed by quality forensic examination.

DNA test by the experts may not only reveal the truth but may also remove the misunderstanding between the husband and wife and help them in reconciliation. For the propriety and accuracy of the parentage of the minor child, technical and

30 Modi *Medical Jurisprudence* 540-42. (22nd edn.).

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

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

expert investigation in the form of DNA test is necessary. The allegation of the husband regarding immorality and promiscuity against the wife can also he revealed by the DNA test.

DNA tests, however, have little relevance in a proceeding to determining the legitimacy of a child in India. In the case of *Banarsi Dass*[33], it was 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 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. For example, 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 irrefutable. 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. The court emphasized that DNA test is not to be directed, as a matter of routine and only in deserving cases could such a direction can be given.

The Law Commission of India in its 185th Report further made certain observations in this regard and recommended modifying section 112 as follows: [34]

> Birth during marriage conclusive proof of legitimacy except in certain cases
> 112 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,

a. after the marriage was declared nullity, the mother remaining unmarried, or
b. 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

33 (2005)4 SCC 449.

34 *Available at*: http://lawcommissionofindia.nic.in/reports/185thReport-PartIIIA.pdf last visited on 03.04.2012.

case of the child, by permission of the Court, that that 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 that 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, and they resulted in an identical verdict that that man is not the father of the child. Provided further that where that man refuses to undergo the tests under sub clauses (i) or (ii) or (iii), he shall, without prejudice to the provisions of clause (a), be deemed to have waived his defence to any claim of paternity made against him.

Explanation I: For the purpose of sub clause (iii) of clause (b), the words 'DNA genetic printing tests' shall mean the tests conducted by way of samples relatable to the husband and child and the words "DNA" mean 'Deoxyribo-Nucleic Acid'.

Explanation II: For the purposes of this section, the words 'valid marriage' shall mean a void marriage till it is declared nullity or a voidable marriage till it is avoided by dissolution, where, by any enactment for the time being in force, it is provided that the children of such marriages which are declared nullity or avoided by dissolution, shall nevertheless be legitimate.

Now, as per the above discussion it can be easily said that there is an urgent need to amend section 112 of the Indian Evidence Act by inserting the DNA or blood test of the husband (after taking consent), child (after getting permission from the court) and also wife instead of no access criteria. The main argument is given that the husband has to suffer if he fails to prove 'no access' to wife and no court will declare the child illegitimate as such. DNA technology can conclusively establish the truth in such disputes and therefore should be resorted to without any hesitation. It is to be borne in mind that when section 112 was being drafted the scientific advancement of this kind was not contemplated and therefore this section should be amended.

It is submitted that section 112 does not draw the comparatively weaker presumption falling within the ambit of the expression 'shall presume' as defined in section 4 of the Evidence Act. In section 4, it is stated that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless and until it is disproved. Section 112 could very well have been so drafted as to provide that where a person was born during the continuance of a valid marriage between his mother and any man the court shall presume that he is the legitimate son of that man. In that case in view of the definition of the expression 'shall presume" as

given in section 4 it would have been open to the contending party to disprove the presumption by adducing evidence in disproof of the presumed fact, for example, by blood test. Had it been a matter falling within the ambit of 'shall presume' the contending party would have been at liberty to rebut the presumption by evidence, whatever may be the nature of the evidence provided it is admissible. Instead, section 112 employs the language of a stronger presumption, the language of 'conclusive proof' leaving only a very narrow and defined margin about the manner in which that conclusive presumption of law can be dislodged.

The presumption of law of legitimacy of a child will not be lightly rebutted. It will not be allowed to be broken or shaken by a mere balance of probability. The evidence of non-access for the purpose of rebutting it must be strong, distinct, satisfactory and conclusive. The standard of proof in this regard is similar to the standard of proof of guilt in a criminal case. The proof of legitimacy or illegitimacy can now be established by preponderance of probabilities rather than beyond all reasonable doubt. An adverse inference should be drawn if the party refuses to have a blood test or DNA test.

Conclusion

It is a well accepted fact that the law has to grow in order to satisfy the need of the fast changing society and keep abreast with the scientific developments taking place. Accordingly, section 112 of the Indian Evidence act should be amended in light of present developments in science and technology. The time has now come when the law needs to make a specific distinction between child born as a result of sexual intercourse and child born by other medical procedures. It should be remembered that the law directly deals with basic complex human problems, which are not of mathematical precision, and the fate of every case depends upon its own factual matrix. Thus, scientific evidences like DNA testing are one of the means to achieve the main goal *i.e.* the "truth" and it is not an end in itself. However, administration of justice system needs to be modified by remaining in the existing framework to the effect that one can effectively utilise the benefit of modern scientific and technological advancement. There must be a unique balance between scientific evidence and human evidence. Therefore, existing value-based administration of justice cannot be done away with and as such, a susceptible balance has to be struck between the modern system based on scientific and technological knowledge and the existing value-based system.

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