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LEGAL PRESUMPTION OF THE LEGITIMACY OF A CHILD UNDER SECTION 112 OF THE INDIAN EVIDENCE ACT, 1872 HAS NO RELEVANCE IN THE MODERN ERA

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Abstract

Section 112 of Indian Evidence Act, 1872 is a quite different section as on the one hand it establishes marriage as conclusive proof of the legitimacy of the child and on the flip-side states that "conclusive proof" of legitimacy can be dismissed by proving "non-access" between the parties at any time when a child could have been begotten. This section itself provides an escape path to a party who wants to escape from the rigour of that conclusiveness. The escape path is if it can be shown that the parties had no access to each other when the child could have been begotten, and then this could be dispelled. The legislative spirit of this section seeks to establish that any child born during a valid marriage must be legitimate. The law does not consider instances where paternity may be disputed while having access between the spouses. Thus, the exception to this law should be broader, covering all possible situations, and modern tools must be brought to hand to ascertain paternity.

Introduction

Occasionally, circumstances come to light in which people need concrete, scientific evidence for the determination of paternity. This situation usually occurs when the biological father of an individual is in doubt regarding his paternity. Our methods for investigation have always focused on ensuring that the innocents are protected. Though our system is to be honoured, it is not something infallible, and those with the administration of justice have a duty towards its refinements and upgradations.

Law and science as two different fields, today, have amalgamated themselves to an increasing extent just for the motive of justice being done. The legal system now has to handle scientific evidence frequently, which in turn seems to be creating extreme challenges for the law. These challenges mainly emerge from the primary distinctions between legal and scientific procedures. On the one hand, scientific evidence holds out the tempting probability of immensely accurate fact-finding and a decrement in uncertainty that frequently accompanies legal decision making. On the other hand, scientific methodologies often comprise the likelihood of risk that the judicial system is unwilling to tolerate.

One of the most significant developments that the scientific community has had is the studying of DNA in criminal cases which has substantial and mesmerizing outcomes in the legal field. Although, the court gladly accepts shreds of DNA evidence in cases of theft, rape, homicide and what not. Yet it is far beyond the reasonable understanding as to why the matter of legitimacy is left open, to be decided by legal interpretations and not by scientific techniques when it can play a crucial role in establishing the paternity of disputed offspring. Gone are the days when paternity could not be ascertained scientifically, unlike the dark ages. Today we have travelled a lot of distance ahead in science and technology that we can with

99.999% accuracy if conducted properly conclude about paternity.

In this paper, I describe why the revolutionary changes in science and technology have started shaking the foundation of sec 112 presumption of Indian Evidence Act, 1872 and why this may not live long in context with the modern era. To do so, I first describe sec 4 and sec 112 of Evidence Act, their relevance with each other. Part II of this paper would represent the only exception to rebut the presumption of sec 112 with some instances of presumption prevailing over the fact, i.e. sec 112 prevailing over DNA test results. I argue that nothing is more shocking than injustice being done based on legal presumption when justice can be done based on the truth by also stating the possible solution. Part III would describe modern scientific tools which are in the form of DNA and paternity tests. At last, the conclusion deals with the invalid nature of this law and examines why DNA witnesses should be given a chance.

The injustice of presumption prevailing over the justice of fact

While it's genuine that the judiciary needs to be the protector of people who cannot exercise their rights, it's very much unfair for the court to burden the father with fatherhood as well as traumatizing for the father due to the conclusiveness guaranteed under Section 112. The father, in such cases, often does not have an absolute right to be heard since the court prioritizes social welfare over a person's fundamental rights. There exists a sublime policy that children should not bear social disability on account of the lapses of the parents and hence any such act that may bring about the ostracization of the child shall be subject to a high level of scrutiny.[1] Even though the applicability of DNA tests is present, it must be taken into account that the court has chosen to resort to it as the last option. Although the court has admitted that the results of a DNA test have an absolute accuracy, it also added that this is not enough to escape from the conclusiveness guaranteed under Sec 112.[2]

Now before getting into Sec 112 of Evidence Act, Let's first dive into Sec 4 of Evidence Act.

Sec 4 of Indian Evidence Act, 1872- "conclusive proof" -when one act is declared by this act to be conclusive proof of another, the court shall, on proof of the one-act, regard the other as proved, and shall not allow evidence to be given to disprove it.[3]

It means that if "A" factor is proved, then the other element is conclusively proved, and it should not be legal to produce any amount of evidence against that conclusive presumption whether it leads to grave injustice or untruth. Sometimes we also call it **''tyranny of a presumption''.**

Sec 112: The wording of Sec 112 is very much similar to the Latin maxim, "Pater est quem muptice demonstrat", meaning thereby, "he is the father whom the marriage indicates". According to this section, if a person is born during the continuance of a

[1] Shrishti Vatsa, *Critical Analysis of Section 112 of The Indian Evidence Act, 1872*, JOURNAL & SEMINAR COMMITTEE,DEPT. OF LAW,CalUniv (Oct 26,2019), https://medium.com/legis-sententia/critical-analysis-of-section-112-of-indian-evidence-act-1872-42948ab8790b(last accessed on 28th July 2020).

[2] Kanti Devi v Poshi Ram, (2001) 5 S.C.C. 331.

[3] Indian Evidence Act, 1872, Section 4.

valid marriage between his mother and any man, or within two hundred and eighty (280) 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 have no access to each other at any time when he could have been conceived.[4] If any of the two mentioned requirements are fulfilled, it will be enough to establish its legitimacy and transfer the burden of proof to the party, seeking to set up the contrary.

This section uses "conclusive proof" and thus Sec 4 and Sec 112 need to be examined together. However, section 112 makes a deviation from the rigour of the conclusive presumption of Sec 4, which is that there is one small window kept open in this section by which this presumption can be rebutted. It is the proof of non -access, i.e. if it can be shown that there was no possibility of access between the man and woman at the time when the conception could have taken place or the child could have begotten.

"Section 112 is based on the presumption of public morality and public policy".[5] The rule of presumed legitimacy as embodied in this section is instead found in morality, decency and policy.[6] This conclusive presumption can only be dismissed by non -access of the parties, and that non -access needs to be proved not on the balance of probabilities but the strong preponderance of the evidence.[7] None other than this evidence is admissible to dispel this conclusive presumption. Thus, this presumption is in favour of legitimacy and against bastardy.

The exception of non-access: high time to be revised

Sec 112 feels the necessity for the party disputing the paternity to prove non-access to dismiss the presumption. The law says if there is physical proximity or an opportunity to have sexual intercourse between the spouses, that itself is sufficient to establish access whether actual cohabitation took place or not is of no matter. Even using contraceptives won't be enough to disprove the presumption and legitimacy will be deemed whereas non -access is an absence of physical proximity or absence of opportunity to have sexual intercourse. This creates a legal lacuna in cases where paternity may be disputed even when the parties had access to each other. To be specific, adultery.

E.g., if a husband and wife were sharing the same roof during the time of conception, but the DNA test disclosed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable.[8] Here, the man, according to the law, cannot use the defending statement that he is not at all responsible for the fetus. Though this looks hard for the husband who would be compelled to undergo the fathership of a child of which he may be innocent, even in such a case, the law leans in favour of the innocent child being bastardized if his mother and spouses were living together during the time of conception. Furthermore, the same draconian law operates here, which says even

[4] Indian Evidence Act, 1872, section 112.
[5] Sham Lal v Sanjeev Kumar, (2009) 12 S.C.C. 454.
[6] Mahendra Agatrao Lomte & Dr.SR Katari, *A Critical analysis of legal presumption of legitimacy of child under section 112 of Indian Evidence Act,1872*, INTERNATIONAL JOURNAL OF LAW 50, 50-52 (2017).
[7] Gautam Kundu v State of West Bengal, (1993) 3 S.C.C. 418.
[8] Kanti Devi v Poshi Ram, (2001) 5 S.C.C. 331.

if there is an opportunity to have sexual intercourse, he cannot establish non-access whether he had or not is no defence.

Another instance can be, suppose, when some parents are genealogically English, but the child born to them is Black or parents who are Chinese, but the child born to them is an Indian. Even though the spouses may be morally convinced that he is not their child, the presumption will operate. In this situation, where it revokes against any person's common sense, knowledge and justice, the court needs to forget the presumption and switch to DNA tests for the determination of the paternity of a child. This invalid presumption cannot be just forcefully imposed on the father, thereby making the child a legitimate child of the man. A very commonsensical argument that can be made here is that if a potato is planted, potato is to come out. How come a potato be planted, and onion comes out. We cannot merely let the presumption prevail over the fact, which often leads to grave injustice. In a civilized society, it is quite strange to presume the legitimacy of an infant based on the continuation of a valid marriage and whose parents have access to each other.

Under both the examples stated above, the court can't arrive at a conclusion regarding parenthood only based on the fact that the husband and wife were having access to each other. Here, there is a requirement to broaden our mentality while analyzing this point. The act of living together or sharing the same room or even the same bed cannot be concluded as an act of intercourse. Mere living together can be out of love, affection and understanding they share. It can also be highly probable when the spouses are living together only due to social restrictions or some obligations but do not have any commitment to each other. Possible is the case when they are living together just for the sake of the continuance of their wedlock, avoiding any kind of social taboo or might be for the welfare and proper upbringing of their child. There can be many many other reasons too. If under such circumstances, a child is born, utilization of unpredictable growth of scientific temperament must be done. Introduction to safe scientifically accurate DNA test results into evidence as permitted under Sec 112 and Sec 4 must be done in which "access" in a modern context where it can be easily determined that this person is the fusion of this man's sperm and this woman's ovum, should be interpreted as *access of the sperm to the ovum and not to the man's hand to the wife's hand, with this accepting DNA reports as evidence of non-access.*

DNA and paternity tests

The introduction and admission of DNA technology can be advantageous to meet the ends of justice. DNA (deoxyribonucleic acid) is the strands of identity that we living beings inherit from our ancestors. Every individual has a unique strand of DNA except in case of identical multiple births. DNA determines the structure and function of every part of the body. Each person inherits 50% genetic material from their biological father and 50% from their biological mother. It is this that guarantees DNA is unique.[9] Features of the child that are not found in the mother are

[9] Dr.Himanshu Pandey & Ms Anhita Tiwari, Evidential Value of DNA: A Judicial Approach, BHARATI LAW REVIEW 12, 12-35 (2017).

inherited from the father. Comparison of the DNA sequence of one person to that of another person can help determine whether one of them is derived from the other or not.

Paternity tests through DNA are recognized as the most extensive and accurate form for determining the existence of any biological relationship between individuals.[10] The testing is solely based on the study of genetic materials of two people (for example a child and alleged father). When the DNA of the child is contrasted with an alleged parent's DNA, and there exists no match, then the alleged father is debarred as the biological father of the child whereas if there exists a match between the DNA patterns, a probability of 99% or higher is estimated thus establishing a biological relationship.[11]

We must remember that Sec 112 of the Evidence Act was enacted at a time when the modern scientific advancements with DNA as well as RNA tests were not even in the contemplation of the legislature.[12] Having known that and also being well-versed with the fact that DNA profiling's probability of giving an exact result is 99.9% as well as with the law being considered as a dynamic one and not static, there must be necessary changes in law according to the needs and advancements of the society without compromising its fundamental principles. All laws are geared up to maintain harmony in the nation and if a person lives with this seething discontent that the law makes him the father of the child of which he is not, won't be conducive to harmony and justice means justice anyhow even to him.

Conclusion

It is a widely accepted truth that the law has to flourish to fulfil the need of the fast-developing society keeping alongside the scientific advancements taking place. Consequently, section 112 should be revised in light of contemporary developments taking place in science and technology. So far, in cases where the man and woman have accessed each other, and still one of them wants to dispute paternity, DNA testing is not authorized because of the mild scope of exceptions to this regulation and the typical standard of conclusive proof.[13] An opportunity to rebut the presumption must be there on all possible evidence. Although the law may have been preservative of women and children in a time when society was not kind to either, with the developments of social morality and the distance science has travelled, it no longer holds logic. In sharp contrast, the law is, in fact, more confining and unjust than protective. With this weak legislation that has numerous ambiguities within it, it is necessary to delve into the scope and extent of Sec 112 today, keeping in consideration the reliable evidential value DNA tests have.

The only caution that is required to be remembered is that neither law can sway to the tune of science nor can the law or legal jurisprudence segregate itself from the practical understanding science can provide us to resolve the problem at hand. How long

[10] Hongbao Ma et al., *Paternity Testing*, 2 JOURNAL OF AMERICAN SCIENCE 76, 76-91 (2006).
[11] *Id.* at 78.
[12] Kanti Devi v Poshi Ram, (2001) 5 S.C.C. 331.
[13] Anushna Satapathy, *Presumption as to legitimacy of a child under section 112 of the Indian Evidence Act*, IPLEADERS (Oct 4, 2018), https://blog.ipleaders.in/legitimacy-of-child/ (last accessed on 3rd July 2020).

it takes for DNA evidence to be universally welcomed as reliable evidence depends on us, the legal and scientific fraternity, to develop a standard for adducing such evidence in court.[14] Till then, DNA evidence will not be silenced by disagreements on protocols, methods, admissibility and other barriers. The DNA "witness" is unstoppable, let's give it a chance, and it will speak the truth and only the truth which is, at last, the ultimate goal.

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