



The Presumption Of Legitimacy*¹

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The law has always been concerned with paternity. Paternity was critical to the succession of monarchs and the inheritance of property. Paternity was a moral issue because of the church's insistence on fidelity in marriage and celibacy outside marriage. Infidelity could mean disgrace for a man and death for a woman. The moral taint was so strong that law punished the child as well as the mother:

All the disabilities of bastardy are of feudal origin. With us it is of Saxon origin. The term bastard being derived from a Saxon word, importing a bad, or base, original. The disabilities of bastardy are the same under the civil as under the common law, and in all ages and nations. He has no ancestor; no name; can inherit to nobody, and nobody to him; can have no collaterals nor other relatives except those descended from him. He can have no surname, until gained by reputation. (Stevesons's Heirs v. Sullivant, 1820)

The stigma of bastardy lasted a lifetime and could blight the lives of the next generation, as witnessed by the heraldic bend (or bar) sinister on the family crest, designating bastardy. In addition to inheritance, a bastard was denied entrance into several callings and certain civil rights. These harsh laws persisted until relatively recent times in England and the United States. The stigma of bastardy was such that the common law developed legal presumptions in favour of legitimacy.

Section 112 of the Indian Evidence Act, 1872 (hereinafter referred to as the Act) relates to the legitimacy of a child born during wedlock. The law presumes that if a child is "born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty (280) days after its dissolution, the mother remaining unmarried..."², it is conclusive proof of its legitimacy unless it can be proven that the parties to the marriage did not have any access to one another. The legislative spirit behind this section seeks to establish that any child born during a valid marriage must be legitimate. The law does not presume dishonourable or immoral actions unless conclusive proof can be produced for the same. Therefore, section 112 is based on the presumption of public morality and public policy³.

"CONCLUSIVE PROOF"

Section 4 of the Act, lays down three degrees of presumption – 'May presume', 'Shall presume', and 'Conclusive proof'. It must be noted that section 112 of the Act uses 'conclusive proof' and thus section 4 and section 112 must be read together. Therefore, if the two requirements of section 112 are proven, it shall be considered as conclusive proof of legitimacy, which means that further evidence to disprove said fact may not be given⁴. The legitimacy of such a child cannot be rebutted unless non-access can be proved. This creates problems for the party disputing the paternity of the child.

The section is based on the presumption of morality and may, in certain circumstances, hold the party disputing paternity unjustly accountable. Since the question of legitimacy is an extremely important one in cases of custody, maintenance etc., it is impractical for the section to provide such a limited exception.

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² Indian Evidence Act, 1872, section 112.

³ *Sham Lal v. Sanjeev Kumar*, (2009) 12 SCC 454

⁴ Indian Evidence Act, 1872, section 4

Loopholes in Section 112 of the Evidence Act

The establishment of paternity under both, civil and criminal law, is extremely important. The law presumes the legitimacy of a child born during a valid marriage as conclusive. The only exception under the law is non-access between the parties. This “non-access” refers to the non-existence of opportunities for sexual intercourse. This creates a legal lacuna with respect to cases where paternity may be disputed even when the parties had “access” to each other, for example, in cases of adultery. In such a case, due to the standard of “conclusive proof”, a party with a legitimate case trying to dispute paternity will find themselves without remedy due to the inability to produce evidence. The exception to this law, i.e. “non-access” is not wide enough to cover all possible situations under the ambit of this law. Thus, the law is a draconian law based on morality with no relevance in the modern era.

EXCEPTION OF “NON-ACCESS”

Section 112 of the Act provides a very limited exception to the presumption of legitimacy. A valid marriage may not be conclusive proof if it can be shown that the parties to the marriage had no access to each other during time of conception. This has to be proved beyond reasonable doubt and not just mere balance of probabilities⁵.

The section is based on a presumption of moral behavior. However, one cannot completely disregard the possibility of such behavior, in which case the party disputing the paternity is being held unjustly accountable. The purpose of law is to provide justice in a fair and efficient manner. When moral principles become the basis for a law, it defeats this basic purpose.

this can be illustrated with the help of an example. When two people are getting a divorce, one of the parties may be unjustly compelled to pay child support even though there is no biological relation between the party and the child. Thus, the scope of this exception is too restrictive and limited for the proper implementation of law.

SEPARATION OF LAW AND MORALITY

Justice A.M. Khanwilkar recently said that “Social morality cannot violate the rights of even one single individual”⁶.

Morality has no place in Law. Law may reflect the moral principles of the time, but it cannot be solely based on them. Law is a mechanism which governs society through rules and sanctions. These rules facilitate the peaceful existence of society by maintaining law and order. Morality on the other hand, is a subjective concept about ‘good’ and ‘bad’ which differs from person to person. Some may argue that law is the protection of the ‘good’ and punishment of the ‘bad’. But this is a very narrow understanding. The Law does indeed protect the good and punish the bad, but not always. For the simple reason that one cannot define this ‘good’ or ‘bad’. What may be good for some may be bad for others. Taking the contemporary example of homosexuality, many oppose it as immoral but even so, sexual orientation is an individual right and morality cannot be allowed to outweigh any person’s rights. Similarly, Section 112 of the Act violates the right of the party disputing paternity to a fair trial by not allowing them to present evidence for the same. And since moral considerations cannot be put above the rights of people or fairness in the justice system, it stands to reason that the section must be amended.

The Indian Evidence Act was passed in the year of 1872 and since then, section 112 has neither been amended nor revised. At the time, there was little knowledge of forensic techniques and the concept of DNA had not yet been discovered. Further, legislators could not foresee the existence of such scientific techniques as DNA Testing. Thus, at the time, section 112 was a valid section which protected a woman’s chastity and ensured that legitimate children may not be labelled as ‘bastards’. However, science and morality both have changed by leaps and bounds since then and in today’s day and age, section 112 is no longer valid. The section must be revised to allow DNA testing when a prima facie case can be made to dispute paternity.

⁵ *Gautam Kundu v. State of West Bengal*, 1993 Cri LJ 3233.

⁶ *Navtej Singh Johar & Ors. v. Union of India*, W. P. (Crl.) No. 76 of 2016.

PRESENT LEGAL SCENARIO

Before the law is criticized for not allowing DNA tests under section 112 of the Act when there exists a valid marriage, a question must be answered. Can the Court direct one of the parties to submit himself for the DNA test? The answer to this question can be traced through a series of judicial decisions.

Gautam Kundu v. State of West Bengal⁷

The Supreme Court held in this case that (a) Courts cannot order a blood test as a matter of course, (b) There should exist a prima facie case in that the husband must establish 'non-access' in order to dispel the presumption arising under section 112 before a test can be ordered, and (c) The Court should carefully analyze with respect to what might be the outcome of requesting the blood test; whether it will have the impact of marking a child as a bastard and the mother as an unchaste woman.⁸

Sharda v. Dharmpal⁹

A three Judge bench of the Supreme Court held that (a) A matrimonial court has the authority to direct a person to submit to medical tests, (b) Such an order of the Court will not violate a person's Right to Personal Liberty under Article 21 of the Indian Constitution, and (c) The Court must exercise this authority only if the applicant has a strong prima facie case and there is sufficient material before the Court.¹⁰ The Court also stated that if despite the order of the Court, the respondent does not submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

Thus, presently, the Court has the power to demand a person to undergo medical tests. However, under section 112 of the Act, the Court can only give such orders if non-access is proved.

Conclusion

In conclusion, there exists a lacuna in the law which leaves many people looking for remedy without any. Till now, in cases where there is access between the parties and yet one of the parties wants to

dispute paternity, DNA testing is not allowed because of the limited scope of exceptions to this law and the standard of conclusive proof. Even though the law may have been protective of women and children in a time when society was not kind to either, with the advances in social morality and science, it no longer holds valid. In stark contrast, the law is now more constrictive and unjust than protective. It needs to be revised to provide relief via medical testing in cases where there is "access" as well as a legitimate dispute over paternity.

Credit must be given to the Law Commission of India which made suggestions for the amendment of section 112 of the Act in the Indian Evidence (Amendment) Bill, 2003. The bill proposes to expand the scope of exceptions to section 112 to include tests which can conclusively prove paternity at the expense of the disputing party. It also lays down certain procedures to ensure that the test is conducted in a scientific and safe manner. The proviso to the amendment also states that if the man refuses to undergo such tests, he will be deemed to have waived his defence to any claim of parentage made against him¹¹. This is a much needed reform which adequately addresses the lacuna while also making it subject to stringent conditions thereby preserving the spirit of protectionism of the law. Unfortunately, this bill has not yet been passed. It is the need of the hour and must be enacted at the earliest possible.

⁷ AIR 1993 SC 2295.

⁸ Ibid.

⁹ (2003) 4 SCC 493.

¹⁰ Ibid.

¹¹ THE INDIAN EVIDENCE (AMENDMENT) BILL, 2003, <http://lawcommissionofindia.nic.in/reports/185threport-partv.pdf>, accessed 15th September 2021, para 62.