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# THE PRESUMPTION OF LEGITIMACY IN THE LIGHT OF DNA EVIDENCE

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## I. ABSTRACT

A rule of "conclusive proof" is enshrined in Section 112 of the Act on the legitimacy of a child born either (1) while the mother of the kid is still married to a man or (2) if the child was born 280 days after the marriage ended and the mother is still single. "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" is the only situation in which the criterion is not applicable. Nonetheless, technological advancements have enabled us to definitively establish a child's paternity. Considering this, the current research article examines the employability of forensic and scientific evidence in relation to the relevant portion of the Act.

## II. KEYWORDS:

*Conclusive Proof, Legitimacy, Paternity, Evidence*

## III. INTRODUCTION

*The live present cannot be allowed to be stunted by the lifeless hand of the past. The law must adapt to shifting social conceptions and ideals; it cannot remain static. The tree will either be choked or, if it is a live tree, it will lose its protective bark and sprout new living bark if the bark is unable to grow and expand with the tree. In a similar vein, if the law does not adapt to the demands of a changing society, it will either choke off society's progress and strangle its growth, or if society is strong enough, it will overthrow the law that impedes it. Thus, in order to keep up with the rapidly evolving society, law must always be evolving.<sup>2</sup>*

-THE HONOURABLE JUSTICE P. N. BHAGWATI

The legal system must be in sync with the scientific and technological advancements. However, neither the assertion nor the words of Justice P.N. Bhagwati mentioned

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<sup>2</sup> National Textile Workers' Union v. P.R. Ramakrishnan, (1983) 1 SCC 228.

above are included in the Indian Evidence Act<sup>3</sup> of 1872. Section 112<sup>4</sup> of the Act enshrines a rule of "conclusive proof" regarding the legitimacy of a child born either (1) while the mother of the child is still married to a valid man or (2) if the child was born 280 days after the marriage ended with the mother being still single. "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" is the only situation in which the criterion is not applicable.

Therefore, where a child's paternity is in doubt, the provision can only be overturned by a clear preponderance of the evidence, not by a simple balance of probabilities. The saying "*pater est quem numtioe demonstrant*," which translates to "he is the father whom the marriage indicates," is the source of the aforementioned clause. It is important to remember that this kind of legal conclusiveness only applies to the husband and not the wife, which may make it difficult from the latter's perspective.

The standard response to the satisfaction of such inquiries is that it is the outcome of a reasonable attempt by the legislature to stop the stigma created by labelling the mother as an unchaste woman and the kid as a bastard in the community. Therefore, the proposal would first eliminate the current judicial position that considers DNA tests when deciding cases involving paternity and validity. Thus, by systematic study of decided cases, statute at hand and other relevant material the author will try to find the existing contradictions and overcoming of the same through amendments in the said provision under discussion.

#### IV. JUDGE'S OPERATIONAL MODEL

This study is necessary since the judiciary's methodology for conducting medical tests and evaluating their findings varies. It is true that the Act was drafted by the legislature in the 19th century before the concept of forensic science, particularly DNA was even considered. As a result, the laws do not reflect this. However, the court cannot legitimately use this information to justify including DNA under Section 112<sup>5</sup>.

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<sup>3</sup> The Indian Evidence Act, 1872 (Act 1 of 1872).

<sup>4</sup> The Indian Evidence Act, 1872 (Act 1 of 1872).S 112.

<sup>5</sup> Id., s. 112.

### **A. What is the courts' praxis for ordering DNA tests?**

First of all, until one party disproves the marriage, the court may consider the marriage to be in existence if there is evidence of it between the parties on any given day. Second, the court has emphasised via several judicial decisions that the child's presumption of legitimacy cannot be eliminated unless "no access" is demonstrated. This has been the case since 1954. In the pertinent Section, "access" or "no access" refers only to the existence or non-existence of opportunities for married sexual relations between the parties and has nothing to do with real cohabitation. The husband, or the party contesting paternity, is responsible for providing evidence of the same.

When s. 112<sup>6</sup> of the Evidence Act is applicable and non-access is not pled and proven, even a negative result of a DNA test cannot serve to refute the inference made under s. 112 of the Act. In situations when the petitioner has established prima facie that he has not visited the respondent's residence and has been away, it is not difficult to issue an order for a DNA test to determine the child's paternity.

### **B. Can DNA testing be made mandatory for an individual?**

In the case of *Goutam Kundu v. State of West Bengal and Anr*<sup>7</sup>, the Supreme Court rendered a decision that addressed this issue. The Court held that the order to conduct a D.N.A. test does not violate an individual's right to personal liberty under Article 21<sup>8</sup> of the Constitution and that even if a party refuses to submit to the test, the Court may find adverse evidence against them, which would have legal ramifications.

### **C. What does a DNA test's positive result value?**

In the case of *Joseph v. State of Kerala*<sup>9</sup>, a lady sought a declaration stating that she was the appellant's lawfully married wife and that the kid in question was his legitimate daughter; the child's legitimacy was shown by a positive DNA test.

### **D. What implications do a DNA test's negative result have?**

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<sup>6</sup> Ibid.

<sup>7</sup> *Goutam Kundu v. State of West Bengal* (1992) 2 CALLT 130 HC, 96 CWN 751.

<sup>8</sup> The Constitution of India, art. 21.

<sup>9</sup> *Joseph v. State of Kerala*, 1963 Supp (2) SCR 389

The Supreme Court made a historic ruling in the Kamti Devi v. Poshi Ram<sup>10</sup> case, declining to accept the results of a DNA test and ruling that the only method to increase the presumption against legitimacy under section 112<sup>11</sup> of the Evidence Act<sup>12</sup> is if a man and woman do not have access to each other. Additionally, it said that even if the test's accuracy was acknowledged and the results of a legitimate DNA test were declared to be scientifically true, section 112<sup>13</sup> of the Indian Evidence Act would still apply conclusively. There was also an observation made that, although the father may think this is difficult, the law generally favours the defenceless child in these situations. Therefore, it is argued that to precisely and definitively establish the child's parentage, a significant legal gap should be filled, and DNA evidence included in the statute book.

Additionally, in Shanmugam v. Samundeeswari<sup>14</sup>, the conclusion in law would remain irrebuttable if the husband and wife were living together at the time of conception but the DNA test showed that the kid was not born to the husband.

#### **E. Can the husband who refuses to undergo DNA test face adverse inference?**

The Court stated in Goutam Kundu v. State of West Bengal and Anr<sup>15</sup> that the order to conduct a D.N.A. test does not violate an individual's right to personal liberty under Article 21<sup>16</sup> of the Constitution. If an individual refuses to undergo the test, the Court may find adverse evidence against them, which would have legal ramifications. The Supreme Court ruled in Dwarika Prasad Satpathy v. Bidyut Prava Dixit<sup>17</sup> that an individual cannot contest the child's paternity if they refuse to take a DNA test.

Furthermore, in Dharmpal v. Sharda<sup>18</sup>. In this case, the Supreme Court's three-judge panel held that: (a) a matrimonial court can order someone to undergo medical testing;

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<sup>10</sup> Civil Appeal Number; - 3860 of 2001, DOJ 11 May 2001

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> (2007) 1 MLJ (CrL) 386 (Mad).

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> 14 October, 1999.

<sup>18</sup> ALT 2003 SC 3450, 2003 (3) ALT 41 SC, 2003 (2) AWC 1534 SC, 2003 (2) BLJR 1420, 2003 (2) CTC 760, I (2003) DMC 627 SC, 2004 (1) JCR 98 SC, JT 2003 (3) SC 399, 2003 (2) KLT 243 SC, RLW 2003 (3) SC 379, 2003 (3) SCALE 475, (2003) 4 SCC 493, 2003 3 SCR 106, 2003 (2) UJ 870 SC

(b) the court's order won't infringe on the individual's right to personal liberty as stated in Article 21<sup>19</sup> of the Indian Constitution<sup>20</sup>; and (c) the court can only use this authority if the applicant has a strong case on its own and has enough evidence to support it.

## V. DISAGREEMENTS IN SUPREME COURT DECISIONS

According to the author, Indian Courts have made several statements that seem inconsistent when it comes to using DNA tests as a means of refuting the conclusive presumptions under Section 112<sup>21</sup> of the Act. By highlighting the contradictions, the author emphasises on need to bring clarity to the statute as far as the section is concerned.

### A. The Need For A DNA Test Is Implied

It has been decided in *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik*<sup>22</sup> that "the latter must prevail over the former when there is conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct." When Section 112<sup>23</sup> of the Act was passed, the legislature most likely was not able to take scientific advancements into account. Therefore, the section's assumption of irrefutable proof is defensible.

However, In the *Kanchan Bedi v. Gurpreet Singh*<sup>24</sup> case, the court asserted *parens patriae* jurisdiction, distinguished Kundu's case based on the pertinent facts, and ordered a DNA test. Several High Courts have done this while handling paternity matters. The defendant in this case argued that he was not the child's father since he denied ever being married.

### B. Inadmissibility Of DNA Test Emphasized

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik*, (2014) 2 SCC 576

<sup>23</sup> Id.

<sup>24</sup> 2003 IIAD Delhi 252, AIR 2003 Delhi 446, 103 (2003) DLT 165, I (2003) DMC 458, 2003 (67) DRJ, 2003 RLR 229.

When a request for a DNA test is filed, the court shouldn't automatically or routinely order one in a case involving the paternity of a child. The presumption under s. 112<sup>25</sup> of the Evidence Act<sup>26</sup>, the advantages and disadvantages of such an order, and the question of whether the court can arrive at the truth without applying the "eminent need" test are among the many factors that the court must consider.

The conclusiveness in law would not change even if a husband and the wife were cohabiting at the time of conception and the DNA test showed that the child was not born to that husband.

### **C. Whether Consent Is Essential**

Husband may be required to provide blood sample for DNA testing if wife offered in court to have the child's paternity determined by having all parties contribute their DNA.

However, the court ruled in *Teeku Dutta v. State*<sup>27</sup> that none of the party to a legal case may be forced to submit to a DNA test so as to gather evidence against their own will.

In the case of *Dipanwita Roy v. Ronobroto Roy*<sup>28</sup> the court made the following Observations: stating the necessity of ordering DNA Test but its prerequisites that if it is quintessential for the fair adjudication of the dispute. Further stating that the direction to undergo a DNA test must be based on a strong prima facie case and should not be ordered as a matter of routine. The court must weigh the interest of the child and the presumption under Section 112 against the necessity of ascertaining the truth.

Similarly in the case of *Sharda v. Dharmpal*<sup>29</sup>, The court made the following Observations: The Supreme Court ruled that a matrimonial court has the power to direct a medical examination, including a DNA test, if the party refuses to undergo

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<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> AIR 2004 Delhi 205, 2004 (73) DRJ 9.

<sup>28</sup> (2015) 1 SCC 365

<sup>29</sup> (2003) 4 SCC 493

the test and it is essential to ascertain the truth. However, such a direction should not be passed lightly and must be based on sufficient grounds.

These case laws reflect the Indian judiciary's approach to balancing the conclusive presumption of legitimacy under Section 112 of the Indian Evidence Act with the need for scientific evidence to ascertain the truth, while also emphasizing the importance of consent and privacy rights. However, in order to balance the existing contradictions, the courts have contradicted each other giving further need for reforms.

## VI. IMMINENT REFORM NEED

It is more crucial than ever to implement a comprehensive overhaul. The reason for this is that the application of the aforementioned law is essentially random and disorganised due to a disagreement between multiple judicially established principles. Furthermore, the clause itself raises issues of conflict on several fronts, such as treating disputing parties unfairly and prioritising the child's interests over the husband's fundamental rights.

In the case of *Sadashiv Mallikarjun Kheradker v. Nandini Sadashiv Kheradker*<sup>30</sup>, the Bombay High Court sent a copy of its ruling to the Secretary, Ministry of Law, Law Commission of India. In this ruling, the court ordered that section 112<sup>31</sup> of the Evidence Act<sup>32</sup> be amended, along with other significant sections, to clarify the conditions under which blood samples from the spouses and their respective children may be obtained for DNA testing or to resolve disputes over parentage.<sup>33</sup>

## VII. CONCLUSION

In essence, this part was created in 1872 – that is, about 140 years ago. However, over the past thirty years, there has been an erratic rise in scientific temperament, and even the legal community is exhibiting this temperament. The courts are faced with new

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<sup>30</sup> 1996 (1) BomCR 454, (1995) 687 BOMLR 97, 1995 CriLJ 4090, 1995 (2) MhLj 733.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> *Sadashiv Mallikarjun Kheradker v. Nandini Sadashiv Kheradker*, 2008 (6) MhLj 668, para. 17.



issues as science and technology progress over time. The courts can use the new methods to resolve the cases that are in front of them. In order to address the issues of the current day, the Indian Evidence Act has to be amended in several significant ways. However, neither the Evidence Act nor the Criminal Procedure Code contain any explicit language allowing courts to order DNA testing. Without any particular legislation or regulation, courts are powerless to decide how to apply this test.

Undoubtedly, the acceptance of DNA tests is again a critical requirement in terms of modern world. At this point, like other nations, the Indian government ought to take the required actions in order to create legislation pertaining to DNA testing. Regarding this, the Law Commission of India thought to suggest the use of DNA evidence in cases involving paternity disputes in its 185th report on the Indian Evidence Act (Amendment) Bill, 2003. Should the bill pass both chambers of the legislature, it will become a significant piece of statutory law. However, While DNA evidence has become more commonly used in courts, a comprehensive legal framework specifically incorporating the Law Commission's recommendations has not been enacted

Similarly, the husband's fundamental rights must be weighed against the State's compelling interests in recognising the legitimacy of the child. Since law rather than being static it is dynamic, it must go with the requirements and societal developments without sacrificing its fundamental tenets.