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A Critical analysis of legal presumption of legitimacy of child under section 112 of Indian Evidence Act, 1872

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Abstract
Section 112 of Indian Evidence Act, 1872 deals with the proof of legitimacy of children if they are born during wedlock or within certain period of the dissolution of marriage. In many ways it is a unique section. On the one hand it establishes the fact of marriage as conclusive proof of the legitimacy of the children and at the same mentions that 'conclusive proof' of legitimacy can be displaced by proving 'no access' between the parties at any time when child could have been begotten. This section itself provides an escape route to the party who wants to escape from the rigor of that conclusiveness. The said escape route is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be dispelled. The fact that Section 112 had been drafted at a time when the discovery of modern scientific techniques like DNA had not been contemplated. This article focuses on the analysis of legal presumption of legitimacy of child under Section 112 of Indian Evidence Act, 1872 in the light of modern scientific techniques.

Keywords: conclusive proof, legitimacy, non-access

Introduction

Section 112 of Indian Evidence Act, 1872- 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.

The section is based on the principle that when a particular relationship such as marriage, is shown to exist, then its continuance must prima facie be presumed [1].

According to this section the fact that any person was born-

1) During the continuance of a valid marriage between his mother and any man, or
2) 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 the parties had no access to each other at any time when he could have been begotten, any fact out of these two facts is sufficient to establish its legitimacy, and shift the burden of proof to the party, seeking to establish the contrary.

According to the legislative intention the spirit behind S. 112, once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from the wedlock. This presumption can only be displaced by strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstances creating doubt. It is well settled principle of law that *odiosa et inhonesta non sunt in lege praesumenda* (nothing odious or dishonorable will be presumed by the law). The law presumes against vice and immorality. In a civilized society it is imperative to presume the legitimacy of a child born during continuation of a valid marriage and whose parents "have access" to each other. S. 112 is based on presumption of public morality and public policy [2].

Conclusive Proof

Section 4 of Indian Evidence Act, 1872- "conclusive proof" – when one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

The expression "conclusive proof" shall have to be read along with Section 112 of the Evidence Act. It may be mentioned here that it is not a case of rebutting the presumption for the reason that conclusive proof is irrebuttable. The other presumption mentioned in Section 4 of the Act, namely, 'may presume' and 'shall presume' are rebuttable presumptions. Conclusive proof is irrebuttable. Therefore, no evidence can be permitted to be let in to disprove the conclusive presumption. It becomes a misconception to say that the person who is disputing the paternity of child can disprove the same or rebut the presumption by adducing any evidence of non-access in between the couple at the relevant time. On the other hand, it appears to be correct view that the operation of the conclusive presumption can be avoided by proving non-access at the relevant time. But, certainly it is not case of rebutting the presumption [3].

Legitimacy of Child

Whether the Court can direct the respondent to submit himself

[1] *Bhima v. Dhulappa*, (1904) 7 Bom LR 95.

[2] *Sham Lal v. Sanjeev Kumar*, (2009) 12 SCC 454.

[3] Alex Samuel and Dr. Swati Parikh, *DNA Tests in Criminal Investigation and Paternity Disputes*, 2nd ed. Allahabad, Dwivedi and Company, 2014. p.610.

to the DNA test. The Apex Court in *Gautam Kundu v. State of West Bengal* [4] held in paragraph 26 thus:

1. That Court's in India cannot order blood test as a matter of course;
2. Wherever applications are made for such prayers in order to have roving inquiry, the prayer of blood test cannot be entertained.
3. There must be strong prima 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 will have the effect of branding a child as bastard and the mother as an unchaste woman.
5. No one can be compelled to give sample of blood for analysis.

In *Kanti Devi v. Poshi Ram* [5]. The Apex Court in Para 10 held thus :

"10. We may remember 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 the 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 Act e.g., 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 irrebuttable. 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 favor of the innocent child being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above".

In Shradha v. Dharmal [6] a three Judges Bench of the Apex Court held in Para 81 thus:

"1. A matrimonial Court has power to order a person to undergo medical test.

2. Passing of such an order by the Court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.

3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the Court, the respondent refuses to submit himself to medical examination, the Court will be entitled to draw adverse inference against him."

Thus from the above judgments it is pertinent that the Court has the power to order a person to undergo medical test and such an order would not be in the violation of Article 21 of Indian Constitution. However the Court should exercise such power with due care, only when it is expedient in the interest of justice and when the facts in a given case require the same. It is apparent from these judgments that DNA test cannot rebut the conclusive presumption of the legitimacy of the person born or conceived during wedlock. The parties can avoid the rigor of such conclusive presumption only by proving non-access which is a negative proof. It is always open to the Court to draw an adverse inference when the spouse refuses to undergo the test despite the order given by the Court.

Non- access

Section 112 requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual cohabitation. It is rebuttable presumption of law under Section 112 that a child born during the lawful wedlock is legitimate and that access occurred between parents. This presumption can only be displaced by a strong preponderance of evidence, and not by mere balance of probabilities [7].

Non-access could be established not merely by positive or direct evidence; it can be proved undoubtedly like any other physical fact by evidence either direct or circumstantial, which is relevant to the issue under the provisions of the Indian Evidence Act, though as the presumption of legitimacy is highly favored by law it is necessary that proof of non-access must be clear and satisfactory [8].

As per the need of the hour, recently, the Indian Evidence (Amendment) Bill, 2003 has been proposed by the recommendation of the 185th Law Commission Report. In the Bill, proposal is there to revise Section 112 of the Indian Evidence Act, 1872. It provides as follows:

"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.

(i) After the marriage was declared nullity, the mother remaining unmarried, or

(ii) 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 case of child, by permission of the Court, that the 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 the 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,

[4] AIR 1993 SC 2295 : 1993 Cri LJ 3233,

[5] (2001) 5 SCC 331: 2001 AIR SCW 2100: AIR 2001 SC 2226.

[6] 2003 (3) ALD 1 (SC): (2003) 4 SCC 493: 2003 (6) AIC 138: 2003 (51) ALR 289.

[7] *Gautam Kundu v. State of West Bengal*, : 1993 Cri LJ 3233,

[8] *Babita Devi v. State of Jharkhand*, 2012 (1) DMC 108 at 110: 2011 Cri LJ 3645 (Jhar).

and they resulted in an identical verdict that man is not the father of the child.

Provided further that where man refuses to undergo the tests under sub-clause (i) or (ii) or (iii) he shall, without prejudice to the provisions of clause (a), he deemed to have waived his defense to any claim of parentage 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 the child and the words 'DNA' mean 'Deoxyribonucleic Acid'.

Explanation II: For the purpose 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 marriage which are declared nullity or avoided by dissolution, shall nevertheless be legitimate."

It transpires from above proposal that the Law Commission has recommended two more exceptions that where there is string proof; conclusive proof will be the standard for the same. So, as far as DNA evidence is concerned, the Bill prescribes that a mismatch is a conclusive proof for the person not being the father [9].

Conclusion

Section 112 is based on presumption of public morality and public policy. The rule of presumed legitimacy as embodied in this section is rather founded in decency, morality and policy. This conclusive presumption can be dispelled only by non-access of the parties, and that not-access required to be proved not on balance of probabilities but on the strong preponderance of evidence. No other evidence is admissible to rebut this conclusive presumption. The presumption is in favor of legitimacy and against bastardy. Provisions of this section apply only to lawful marriage. It is obvious that Legislatures had no contemplated the advancement of modern techniques while enacting section 112 of The Indian Evidence Act, 1872. Law is considered to be dynamic one and not static, it should keep changing according to needs and development of the society without compromising its basic principles.

Suggestions

1) The Indian Evidence (Amendment) Bill, 2003 has been proposed by the recommendation of the 185th Law Commission Report. In the Bill, proposal is there to revise Section 112 of the Indian Evidence Act, 1872. Recommendations of the 185th Law Commission with reference to Section 112 of the Indian Evidence Act, 1872, should be accepted and incorporated
2) It may turn out the first Indian legislation to give statutory acceptance to modern techniques like DNA investigations conducted by consent of parties.
3) It will introduce modern advanced techniques to dispel the conclusive presumption and these techniques are supposed to be free from human errors like memory errors, judgmental errors etc. and vices of human nature, which will minimize the hardship on the concerned parties.
4) By incorporating these recommendations the rule of presumed legitimacy as embodied in this section which is founded in decency, morality and policy will remain intact.

[9] 2006 Cri LJ, Journal Section at 102

References

1. Bhima Dhulappa v. 1904. 7 Bom LR 95.
2. Sham Lal v. Sanjeev Kumar. 2009, 12 SCC 454.
3. Alex Samuel and Dr. Swati Parikh, DNA Tests in Criminal Investigation and Paternity Disputes, 2nd ed. Allahabad, Dwivedi and Company, 2014. p.610.
4. AIR 1993 SC 2295 : 1993 Cri LJ 3233,
5. (2001) 5 SCC 331: 2001 AIR SCW 2100: AIR 2001 SC 2226.
6. 2003 (3) ALD 1 (SC): (2003) 4 SCC 493: 2003 (6) AIC 138: 2003 (51) ALR 289.
7. Gautam Kundu v. State of West Bengal, 1993 Cri LJ 3233.
8. Babita Devi v. State of Jharkhand, 2012 (1) DMC 108 at 110: 2011 Cri LJ 3645 (Jhar).
9. 2006 Cri LJ, Journal Section at 102