UNJUST PRESUMPTION UNDER SECTION 112, INDIAN EVIDENCE ACT, 1872

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ABSTRACT

Laws are supposed to be dynamic and not stagnant; they should evolve along with the evolving organism that a society is. Through the course of this paper, the author aims at presenting the absurdness of one such provision of the Indian Evidence Act, viz Section 112. This paper will show how not only the respective section is narrow and restrictive but also in violation of the fundamental rights of the person who is alleged as well as defies the ways of Natural Justice under such case. The provision has been used as a loophole for quite a while now and needs to be amended.

This paper attempts at unveiling the faults in the provision by specifically touching the judgment of Gautam Kundu v. State of West Bengal. Also, several other cases will be referred to understand the diversly noted rationales of judges of various courts.

Keywords: Section 112, IEA, Indian Evidence Act, Fundamental Rights, Natural Justice.

INTRODUCTION

The section 112 of the Indian Evidence Act predates to the year 1872; it was enacted at a time where the modern scientific advancements and DNA test were not even in contemplation of the legislature. In an era which has evolved exponentially in field of science and technology, applying stone-aged provisions *prima facie* feels unfair, on the top of that it is also violative of the Fundamental Rights and the principles of Natural Justice.

In this paper it is argued that presumption as provided u/s 112, IEA and as argued in the case of Gautam Kundu v State of West Bengal, presumption of legitimacy should not be a conclusive proof when there is contrary scientific proof otherwise to that effect[1]. It is absurd to hope that a man should be responsible for care of a child against whom he has no obligation, the fact being that he is neither a consenting nor a biological parent of the child in dispute. It is also unreasonable to mandate that a man must prove lack of access within a time span of 280 days, a reasonable human being does not possess the ability to remember what he has been doing or where he was within a timespan of those 280 days.

Levying the responsibility of someone else's acts onto an innocent man is violative of his right to life u/a 21 of the Indian constitution[2], as it burdens the person with the moral responsibility of the child, not only that, it will also burden him financially and the decisions in his life will have to revolve around maintaining the well-being of that child, hindering his personal life choices, which he would not have to do otherwise.

Till date, judges across the courts have been delivering judgments with a view to go along with the provisions and not with the view to secure the judgments by keeping in mind the principles of Natural Justice and that of Justice, Equity and Good conscience[3].

1. THE CASE OF GAUTAM KUNDU V. STATE OF WEST BENGAL

1.1 DEBARRING BLOOD TESTS AS A MATTER OF STATUTORY POLICY

One does not need to search hard for finding cases where unfairness of the S.112, IEA can be

[1] 1992 SCC OnLine Cal 98 : (1992) 2 Cal LT 130 at page 132.
[2] Article 21, The Constitution of India.
[3] Gautam Kundu v. State of West Bengal, 1992 SCC OnLine Cal 98 : (1992) 2 Cal LT; Chilkuri Venkateshwarlu v. Venkatanarayana, (1954) S.C.R. 424; Nalini Samal v. Brundaban samal, AIR 2014 N.O.C. 444 Ori.

observed in its natural habitat. When in the Gautam Kundu case[4], it was very logically argued from the husband's side that in the case of B.R.B. v. J.B.[5], it was observed by the court that blood tests are modern development and medical science can put the blood of the concerned individuals to determine their blood groups; and by the examination of these samples, it can be shown if the man is not the biological father of the child. They may not be able to tell positively that if the man is the biological father, but they surely can tell if the man is **not** the biological father of the child, because of the fact that the blood groups of the alleged father are so different from that of the child.

This cited observation was argued against by stating that, when section 112 is read with section 4 of the Indian Evidence Act, it debars evidence except of non- access for the purpose of disproving the presumption of legitimacy; the only limited scope under the statutory provisions of Indian Laws for disproving the said presumption is to show that the parties to the marriage had no access to each other when the child may have begotten[6]. Since the English Law that permitted the rebuttal of such presumption of legitimacy by showing on the preponderance of possibilities that the husband could not have been the father by the virtue of no bar as to the matter of fact that it could be shown by adducing any sort of admissible evidence to the court, there was no difficulty for the husband to avail for the blood test report. He could prove that he is not the father despite the fact that he had regular sexual intercourse with the mother of the child within the relevant time span[7].

It was very well argued by the counsel of the husband that that if the result of the blood group test shows that the man is not the father of the child the result is a certainty, but if however, the test shows that the man be the father of the child the uncertainty however will continue to remain. In other words, blood group test may absolve someone from paternity with certitude, if the test answers that way, but where however, the test answers the alternative way, namely that the man may be the father of the child the vice of uncertainty however remains unfitted. It was further submitted that the petitioner husband in this case should not be debarred from having recourse to necessary blood group test so that in case the result of the test is negative it will be scientifically established that he is not the biological father of the child and in that case, there will be no question of his paying maintenance for the child.[8]

[4] 1992 SCC OnLine Cal 98 : (1992) 2 Cal LT 130 at page 135.
[5] (1968) 2 All England Law Reports 1023.
[6] 1992 SCC OnLine Cal 98: (1992) 2 Cal LT 130 at page 136.
[7] Ibid.
[8] 1992 SCC OnLine Cal 98: (1992) 2 Cal LT 130 at page 132.

But after all it is a mere matter of statutory policy that the husband is debarred under the Indian Laws 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 disproving 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. Again, it may be pointed out here that the onus lies heavily under the Indian Law on him who takes the plea of non-access for defeating the statutory presumption of legitimacy and paternity[9].

1.2 RELUCTANT ATTITUDE TOWARDS DNA AS A CONCLUSIVE PROOF

Courts have shown reluctant attitude towards the use of technology in the past. In the case of Gautam kundu v. State of W.B., the Apex court held that nobody can be compelled to give blood samples for the test to be performed for disproving legitimacy.[10] It was further held that courts should not order such test as a matter of a normal course of action, and no adverse opinion can be drawn even from such scientific tests.

In Rohit Shekhar v. Narain Dutt Tiwari[11], it was held that the Apex court erred while delivering the judgment in the Gautam Kundu case, it fails at certain instances, such as in cases where it is the son who wants to confirm who his biological father is; as in this scenario it does not 'bastardizes' the child but gives it rights. The right to know and be cared for is also guaranteed by Article 7 of the Convention on the Rights of the Child, to which India is a signatory. Also, in the case of Nandlal Basudeo Badwaik v. Lata Nandlal Badwaik[12] non-access to the wife by the husband was proved through a DNA test and it was held that the daughter was not the biological daughter of the husband and hence he was not compelled or asked to maintain her, the Supreme Court itself also observed that knowing the truth and neglecting DNA evidences, merely because of the statutes goes against the basic notion of justice[13]. It is also in the spirit of Article 51A of the Constitution that promotes the use of scientific methods and approach[14].

But everything goes in vain when courts backed by the notorious section 112, IEA hold observations such as "The conclusive presumption under the section cannot be thrown out by

[9] 1992 SCC OnLine Cal 98: (1992) 2 Cal LT 130 at page 136.
[10] 1992 SCC OnLine Cal 98 : (1992) 2 Cal LT.
[11] Rohit Shekhar vs Narayan Dutt Tiwari & Anr FAO(OS) No. 547/2011, 27th April, 2012.
[12] AIR 2014 SC 932.
[13] Ibid.
[14] Article 51A(h).

DNA test, non-access should have been proved"[15].

1.2.1 DNA EVIDENCE AND THE RIGHT TO PRIVACY

In Bhabhani pd. Jena v. Convenor Secretary, Orissa State Commission for Women[16], the Supreme court observed that asking for a DNA test will violate the right to privacy and thus, cannot be ordered as a normal course of action. The court said "When there is an apparent conflict between the right to privacy of a person not to submit himself forcibly to a medical examination and duty of the court to reach the truth, the Court must exercise its discretion only after balancing the interests of the parties and on due consideration whether, for a just decision in the matter, a DNA test is eminently needed."[17] Interestingly enough, this right to privacy takes a back seat where a woman claims maintenance from her husband for herself and the child, here the court allowed the DNA test prayer of the woman.[18]

Courts hide behind the right to privacy when it comes to the blood test in a scenario where the test is to be done to prove that husband is not the biological father, the application in this regard is dismissed without a second thought[19], but the husbands right to privacy can be shunned when it comes to blood test for proving that the husband is the biological father.[20]

Not only the courts, but societies as whole have always been against the favour of men, when seen against the interests of a child or women.[21] This two-faced way of approach is discriminatory, it violates the fundamental right to equality before law[22] of the husband. Even if say, by applying this two-faced tactic, the court compels that the husband must bear the responsibility of the child in dispute or in situations where succession of a property is in dispute, it raises some concerning questions, like:

- Won't it be against the very spirit of Justice?
- Is it alright that an innocent person is made to suffer for someone else's deed?
- Is securing one person's life by curbing the other's life a just act?

[15] Kamti Devi v. Poshi Ram, AIR 2001 SC 2226.
[16] AIR 2010 SC 2851.
[17] Ibid.
[18] Chinta Madhu Sadhana Rao v. Chinta Naga Lakshmi, AIR 2015 Hyd. 131; Narinder Kumar v. Tej Ram, AIR 2016 H.P. 24.
[19] Supra note 9.
[20] Kanchan Bedi v. Gurpreet Singh, AIR 2003 Del 446; Veeran v. Veeravarmalle, AIR 2009 Mad. 64.
[21] John E. Williams & Deborah L. Best, pancultural gender stereotypes revisited the five-factor model, https://www,researchgate.net/237996135_Pancultural_Gender_Stereotypes_Revisited_The_Five_Factor_Model, (Viewed 6th October, 2021)
[22] Article 14, The Constitution of India

- Is it in line with the spirit of principles of Natural Justice and that of Justice, Equity and Good Conscience?
- Can it be said that Justice has truly been done?

The answer to every question raised above is a straight 'NO', both rationally and morally. So, it will only be in the interest of basic notion of Justice to provide a proof as conclusively and scientifically accurate as possible for proving the legitimacy of the child. To torment the life of an innocent can in no possible way be in the good spirit of Justice. Therefore, to ensure these aspects, scientific evidence needs to be allowed as rebuttal and should not be restricted to some primitive presumption approach.

2. IRRATIONAL APPROACHES BY COURTS

Indian Law unlike English Law does not at all permit evidence to show that the husband of the woman is not the father of the child born to the woman during the wedlock except by showing that he had no access to the wife at any time when the child could have been begotten, there is no scope of permitting the husband to avail of blood test for dislodging the presumption of legitimacy and paternity arising of section 112 of the Evidence Act[23].

Adhering to the above provision, courts have been drawing judgments without keeping in mind the principles of Natural Justice and that of Justice, Equity and Good Conscience, for instance in the case of Chilkuri Venkateshwarallu v. Venkatanarayana, the Supreme Court observed that the law does not want the legitimacy of new born children to be any matter of doubt or uncertainty. *"Someone must be charged with the responsibility and the most expedient choice is the person to whom the mother is married at the time of birth. Thus, the presumption will apply to children conceived before marriage as also to those born after the dissolution of marriage…"* [24], but again is it not absurd to hope that a man should be responsible for care of a child against whom he has no obligation? The fact being that he is neither a consenting nor a biological parent of the child in dispute. As stated earlier, levying the responsibility of someone else's acts onto an innocent man is violative of his right to life u/a 21 of the Indian constitution[25], as it burdens the person with the moral responsibility of the child, not only that, it will also burden him financially and the decisions in his life will have to revolve around maintaining the well-being of that child, hindering his personal life choices, which he would

[23] Supra note 9
[24] Chilkuri Venkateshwarlu v. Venkatanarayana, (1954) S.C.R. 424.
[25] Article 21, The Constitution of India.

not have been compelled to do otherwise. In the same case when the husband couldn't prove non-access on one of the two possible dates when the child could have begotten, neither the wife could prove access on that same date, the court observed that the presumption of legitimacy will prevail[26], the husband was barred by the section 112 of the Evidence Act to dislodge the assumption via any other means. The decision of the court goes against not only the fundamental rights enshrined under article 14 of equality before law by not providing the husband an opportunity to equally present his case as that of the other party, under article 19 by not letting him express his defence and under article 21 by not hearing his case, but also goes against the principle of *audi alteram partem,* by not providing the husband a fair chance to present his defence and hear his side, and by not complying with the above two it automatically goes against the basic notion of Justice.

In the case of Chirutha Kutty v. Subramanian[27], the High Court holds that "where the semen of the husband who had gone through vasectomy operation was tested and shown absence of sperms, it would not displace the presumption of legitimacy because it may be that the test was not properly done".[28] The reasoning in this case is not only neglecting the evidence which is procured scientifically, but it also seems to be a deliberate attempt at discarding it and imposing the sanction on the husband.

Where at one end it seems that situations are getting better, when we see cases where the court takes a modern approach, for instance, in case of Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik[29] the Apex Court held that the DNA tests Prevails over the presumption of conclusive proof under section 112 of IEA, there on the other end the situation goes downhill when courts deliver irrational judgments such as in case of Banarsi Das v. Teeku Dutta[30], the Apex court held that "conclusive presumption under the section cannot be undone through the process of DNA test. There must be proof of non-access during the relevant period", any prudent person in such situation would raise a logical question, that "would it not prove non-access itself if the DNA results are negative?", just like it was held in the Nandlal Wasudeo Badwaik case.[31]

Courts have gone to the length of making the women stand at a pedestal where they can't be

[26] Ibid.
[27] AIR 1987 Ker 5.
[28] Ibid.
[29] Supra note 12.
[30] (2005) 4 SCC 449.
[31] Supra note 12.

questioned. Such a case is of Laxmi Kant Venkamma Nayak v. Government of India[32], where the court boldly holds that there is also the presumption based upon human experience of which the court can take judicial notice that "*it is very rare that a lady with children would claim that she is the wife of person who is not her husband.*" If such were to be the case, even if the earlier times are considered, then laws regarding adultery wouldn't have been introduced, neither would the need of provisions regarding legitimacy of child would arise in the evidence act. Therefore, on such reasoning the above observation of the court stands irrational.

2.1 SOCIAL CONCERN OF THE COURTS

The courts have shown their concern over homelessness or bastardization of children at many instances[33], and held it as the main concern from which this provision protects, and their concerns are not wrong, considering the vulnerability of the infants in most cases. But this shall not become an excuse to make an individual sacrifice his life and to bear that responsibility even if he is not either the biological or a consenting parent.

If for argument's sake it is said that such narrow and restrictive approach is for the welfare of the child, then it can also be said that the man actually responsible for the birth of the child must bear the burden. Almost no logical scope of possibility lies that the mother of the child would not know the person(s) from whom she could have conceived the child. The concern can be presented this way that since it is the matter of the welfare of the child, a DNA test must be done which is scientifically accurate as is held by Courts at various levels at several instances and by studies at other times[34], and if the husband or the alleged party is not the father of the child in dispute then the Obligation must fall upon the mother of the child and she must be compelled to notify who may be the biological father of the child and it should be upon such person who is proved to be the father of the child conclusively through scientific evidences to bear the responsibility of the child.

In cases where the wife is hesitant for the DNA test of the child, then it clearly shows her malicious intention and such adverse inference shall be drawn by the courts against her[35] and

[32] AIR 2003 Kant. 54.
[33] Laxmi Kant Venkamma Nayak v. Government of India AIR 2003 Kant. 54.; Kanchan Bedi v. Gurpreet Singh, AIR 2003 Del 446; Veeran v. Veeravarmalle, AIR 2009 Mad. 64.; Dharam Deo Yadav v. State of U.P. (2014) 5 SCC 209
[34] Nandlal Basudeo Badwaik v. Lata Nandlal Badwaik AIR 2014 SC 932.; Janga Bahadur Chettri v. State of Sikkim, AIR 2013 Sik. 9.; Diane S. Kaplan, Why Truth is Not a Defence in Paternity Actions, 10(1) TEXAS JOURNAL OF WOMEN AND THE LAW 69, 72 (2000).
[35] Maya Ram v. Kamla Devi, AIR 2008 H.P. 43.; T. Nagaraj v. Sumathi, AIR 2012 N.O.C. 135 Mad.

it indicates a concrete possibility that she knows that the alleged person is not the father of the child in dispute. Instances are not unknown where women target able men to get alimony and maintenance despite knowing that the alleged person is not the father. Outdated provisions such as these, provide unfair leverage or better stated as "loopholes" to be exploited by ill-intended persons.

CONCLUSION

The current provision under section 112 of the Indian Evidence Act, 1872 are outdated and are against the spirit of the Indian Constitution when they violate the Fundamental Rights under articles 14,19 and 21; they are against the principles of Natural Justice and that of Justice, Equity and Good Conscience when they refuse the husband from presenting his case or refuse from hearing his case in entirety of it just because of its restrictive nature.

Trials demand and prefer strong and conclusive proof, and if DNA tests and Blood tests are both modern and Scientific methods, being strong and conclusive proof of legitimacy then it will only be called ignorance by not using them for such purposes. Afterall the matter concerns not only the well-being of a child, here it also takes at stakes the life of a man as well.

It is therefore the view of the author that since there are such adversities in the provisions, making it unfit and unjust in contemporary times, they should be amended and the scope of the respective provision should be widened to ensure the welfare of the parties involved and deliver fair judgments which do not go against the basic notion of Justice.

BIBLIOGRAPHY

BARE ACTS/TEXT

1.Constitution of India, 1950

2.CPC, 1908

3.CrPC, 1973

4.India Evidence Act, 1872

JOURNALS

1. Diane S. Kaplan, Why Truth is Not a Defence in Paternity Actions, 10(1) TEXAS JOURNAL OF WOMEN AND THE LAW 69, 72 (2000).

2. John E. Williams & Deborah L. Best, pancultural gender stereotypes revisited the five-factor

model,https://www,researchgate.net/237996135_Pancultural_Gender_Stereotypes_Revisited_The_Five_Factor_Model, (Viewed 6th October, 2021)

INTERNET DOCUMENTS

1. Article 21 of the Constitution of India: Understanding Right to Life and Personal Liberty from Case Laws - Academike (lawctopus.com) (viewed on 6 October, 2021)

2. DNA Tests and Section 112 of the Evidence Act: The Need for A Uniform Standard (wixsite.com) (viewed on 2 November, 2021)

3. Legitimacy of child under Section 112 of Evidence Act, Landmark Cases (ipleaders.in) (viewed on 15 November, 2021)

CASES

INTERNATIONAL CASES

1. B.R.B. v. J.B. (1968) 2 All England Law Reports 1023.

2. (1968) 1 All England Law Reports 20 (Re: L)

INDIAN CASES

1. Banarsi Das v. Teeku Dutta, (2005) 4 SCC 449.

2. Bhabhani pd. Jena v. Convenor Secretary, Orissa State Commission for Women, AIR 2010 SC 2851.

3. Chilkuri Venkateshwarlu v. Venkatanarayana, (1954) S.C.R. 424.

4. Chinta Madhu Sadhana Rao v. Chinta Naga Lakshmi, AIR 2015 Hyd. 131

5. Chirutha Kutty v. Subramanian, AIR 1987 Ker 5.

6. Dharam Deo Yadav v. State of U.P. (2014) 5 SCC 209

7. Gautam Kundu v. State of West Bengal, 1992 SCC OnLine Cal 98 : (1992) 2 Cal LT

8. Janga Bahadur Chettri v. State of Sikkim, AIR 2013 Sik. 9

9. Kamti Devi v. Poshi Ram, AIR 2001 SC 2226.

10. Kanchan Bedi v. Gurpreet Singh, AIR 2003 Del 446

11. Laxmi Kant Venkamma Nayak v. Government of India, AIR 2003 Kant. 54.

12. Maya Ram v. Kamla Devi, AIR 2008 H.P. 43.

13. Nalini Samal v. Brundaban samal, AIR 2014 N.O.C. 444 Ori.

14. Nandlal Basudeo Badwaik v. Lata Nandlal Badwaik AIR 2014 SC 932.

15. Narinder Kumar v. Tej Ram, AIR 2016 H.P. 24.

16. Rohit Shekhar vs Narayan Dutt Tiwari & Anr FAO(OS) No. 547/2011.

17. T. Nagaraj v. Sumathi, AIR 2012 N.O.C. 135 Mad.

18. Veeran v. Veeravarmalle, AIR 2009 Mad. 64.

ONLINE DATABASES

1. Lexis Nexis

2. SCC Online

3. Google Scholar

4. JSTOR