

Legitimacy of Children And DNA Tests: A Study

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Abstract: Dispute relating to legitimacy of children arises in various types of quasi-marriages including live-in-relationship, when a child is born to parties. In such cases, it is easy to find that the male party denies any type of physical contact with the women and also the legitimacy of the child. Sec 112 of the Indian Evidence Act provides for the conclusive proof of legitimacy, if the child is born during the subsistence of a valid marriage. The male party is given the opportunity to deny the legitimacy of the child by adducing evidence of non-access. Non-access has been explained in depth, with the help of decided cases. Several useful tests are made for conducting DNA Tests and in case of refusal by the husband, legitimacy can be held to be established. Suitable amendments to existing Sec 112 of the Indian Evidence Act for providing Sec 120A, so that Disputes relating to legitimacy can be resolved.

Key Words

- i) Legitimacy
- ii) DNA Test
- iii) Conclusive Presumption
- iv) Proof of 'Non-access'
- v) Insertion of Sec 112A

Date of Submission: 25-02-2017

Date of acceptance: 12-03-2018

I. INTRODUCTION

1. It is a matter of common occurrence in society to find that people falling in love and have physical contact with each other under the promise to marry. For a variety of reasons the promise is broken and in the event of pregnancy caused to women, there are cases of denial of legitimacy of the children born on account of sexual relationship. Deception takes place by the man to marry the women and even of secret marriage taking place in seclusion and subsequent denial by the man that the child is not his. Instances have come to notice of persons occupying high positions like Governor etc., after contracting the marriage, denying the marriage as well as the legitimacy of children born out of such physical relationship. When DNA Test is ordered by the court, the person refuses to undergo the test and the court had to order that the test be conducted with the help of police.

IV Text of the Article

2. Law leans in favour of validity of marriage and in favour of legitimacy of children and not dastardly.¹ The term legitimacy as a concept, postulate two things namely:-²

- i) that the natural parents were married to each other and
- ii) that they were lawfully married to each other

Section 112 of the Indian Evidence Act³ provides for a conclusive presumption that a child born during the continuation of a valid marriage between his parents is their legitimate child.⁴ Sec 112 of the Indian Evidence Act, proceeds upon adopting the period of birth as distinguished from "conception" as the turning point of legitimacy.⁵

¹ Parvathi Ammal Vs. S.M. Ammal AIR 2002 Madras 462.

² Prakash Vs. Karpagam 2016 Cr LJ P 4519 Para 20 at P.4522.

³ See for details Sec 112 of the Indian Evidence Act.

⁴ Kahan Singh Vs. Nathu Singh AIR 1925 Lahore P.414 and also Thandi Ram Vs. Jagan Nath AIR 1937 Lahore P.786.

⁵ C.Ventateshwarlu Vs. C.Venkat Narayan AIR 1954 SC P.176.

3. The presumption of legitimacy provided under Sec 112 of the Indian Evidence Act cannot be displaced by mere probabilities or any circumstance creating doubt.⁶ Stating this as a proposition of law, the Supreme Court held as follows:-⁷

- i) In a civilized society, it is quite imperative to presume the legitimacy of a child born during the wedlock between the parties and continuation of a valid marriage;
- ii) In reality, Sec 112 of the Indian Evidence Act is based on the presumption of public morality and public policy

It can be safe to assume that the legitimacy of a child should not be a matter of public discussion and in the interest of the future of the child and to safeguard the interests of the child the child should not be made to suffer for any of the mistakes of parents to which the child is not a party.

4. The conclusive presumption raised under Sec 112 of the Indian Evidence Act can be rebutted by the husband, if he is able to establish non-access satisfactorily and conclusively.⁸ Non-access within the meaning of Sec 112 of the Indian Evidence Act means no more than the parties to the marriage had no opportunity of intercourse.⁹ Unless the husband is able to prove the absence of access, the presumption of legitimacy of the child shall not be displaced.¹⁰ In a case where the parties had access to each other for a number of days and the child was born after six months, the child was held to be legitimate.¹¹

5. Non-access can be proved like any other fact by direct or circumstantial evidence of unambiguous character, unless such evidence is forth-coming, it will not be possible for any court to believe it to be probable that there was no access.¹² When the court is satisfied that there is no room for collusion, there is no reason for not treating the admission of parties as civil proceedings.¹³

Ordinarily, if the husband is able to establish that he had several sexual intercourse with his wife and even had reasonable opportunity of sexual intercourse with his wife during the relevant period, the court should not allow the husband to take resort to blood group evidence.¹⁴

Section 112 of the Indian Evidence Act would apply when the man is able to prove that he had no access to have sexual intercourse with the woman and only then the man cannot be said to be the father.¹⁵

It is not palatable to enquire into the paternity of the child, whose parents have 'access' to each other.¹⁶

6. The Supreme Court explained the importance of DNA test in cases of determination of legitimacy of children¹⁷ as follows:-

- i) Section 112 of the Indian Evidence Act was enacted at a time when the modern scientific advancement and DNA test was not even in contemplation of the legislature;
- ii) The result of DNA Test is said to be scientifically accurate;
- iii) Although Sec 112 raises a presumption of conclusive proof on satisfaction of the condition enumerated therein, but the same is rebuttable;
- iv) The presumption may afford legitimate means of arriving at an affirmative legal conclusion;
- v) While the truth of the fact is known, there is no need or room for any presumption;
- vi) When there is evidence to the contrary, the presumption is rebuttable and must yield to proof;
- vii) Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue;
- viii) When there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement, accepted by the World community to be correct, the later must prevail over the former and

⁶ Sham Lal Vs. Sanjeev Kumar (2009) 12 SCC P.454.

⁷ Ibid.

⁸ Bhagwan Vs. Mahesh AIR 1935 PC P.199.

⁹ Karpaya Vs. Mayandi AIR 1934 PC 949.

¹⁰ Perumal Nadar Vs. Ponnasamy AIR 1971 SC P.2352.

¹¹ Samila Devi Vs. Shanker Dass 1978 Cr LJ (NOC) P.176.

¹² T.P.Moni Vs. Amma Kannu AIR 1942 Madras P.129.

¹³ Mahendra Vs. Susheela AIR 1965 SC P.364. Also refer to Section 58, Order 8 Rule of the Civil Procedure Code for treating as 'civil proceedings'.

¹⁴ Ibid.

¹⁵ Prakash Vs. Karpagam quoted in the case cited Foot Note 2. (Para 26).

¹⁶ See Foot Note 6.

¹⁷ Nandlal Wasudeo Badwaik Vs. Late Nandlal Badwaik AIR 2014 SC P.572 at Page 536 Para 17.

ix) The scientific proof provided by DNA Test is an acceptable one and the presumption of the legitimacy of the child could be rebutted.

As observed by the Supreme Court in Maniappan's case,¹⁸ there would be no impediment in ordering the DNA Test.

7. While the child born during the wedlock of parties is presumed to be legitimate,¹⁹ the burden lies on the husband to prove otherwise.²⁰ This can be rebutted by strong evidence which could be obtained from the outcome of DNA Test.²¹

8. Courts have the inherent power to order DNA Test in order to reconcile the competing interest of respective parties. DNA Test would enable the court to find out the real truth in the dispute relating to legitimacy.²²

9. Refusal of the party to undergo DNA Test ordered by the court, there would be a strong case for drawing an inference. Section 114 of the Indian Evidence Act permits the court to draw an adverse inference, if the party does not produce the relevant evidence in his power and possession.²³

II. Conclusions & Recommendations

An amendment to Sec 112 of the Indian Evidence Act is urgently needed to the following effect:-

Sec 112 A

- i) The court shall have the power to order DNA Test in cases of disputed legitimacy of children.
- ii) If the male party to the marriage refuses to undergo the DNA Test. It shall be conclusive proof of legitimacy and he shall be deemed to be the father of the child.
- iii) The conclusive presumption under Section 112 shall apply to children born out of secret or marriages performed by deception or breach of promise to marry the woman with whom sexual intercourse has taken place and conception of the child out of such intercourse or the live in relationship between man and women.
- iv) The court may apply the provision of Sec 112A to other cases which it may deem fit and proper in the facts and circumstances of a case in the interests of justice and future interest of children out of such relationship between a male and female party, akin to all types of quasi-marriages.²⁴

IOSR Journal Of Humanities And Social Science (IOSR-JHSS) is UGC approved Journal with Sl. No. 5070, Journal no. 49323.

Prof (Dr) Mukund Sarda Legitimacy of Children And DNA Tests: A Study." IOSR Journal Of Humanities And Social Science (IOSR-JHSS). vol. 23 no. 3, 2018, pp. 35-37.

¹⁸ Maniappan Vs. Ponni AIR 2011 SC P.52.

¹⁹ See Section 112 of the Evidence Act.

²⁰ See Parvathi Ammal's case. See Note 1.

²¹ M.Kartika Vs. R.Manohar (2009) 3 CTC P.672.

²² See Note 1.

²³ Sharda Vs. Dharnipal AIR 2003 SC P.480. Also see Sec 114 of the Indian Evidence Act.

²⁴ Quasi-marriages have the same meaning of quasi-contracts i.e., appear to be marriages and not really a marriage.