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Presumptio Juris versus DNA

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PRESUMPTIO JURIS versus DNA

Presumptions are classified into two categories i.e.*presumption huminis and presumption juris.* Presumption Huminis means Presumption of Fact i.e. May Presume; Presumption Juris on the other hand means Presumption of Law i.e. Shall Presume and Conclusive Proof. Section 4 of Indian Evidence Act, 1872 deals with the Presumptions. Under the classification of conclusive proof, section 112 raised the presumption of law regarding the legitimacy of child.

The conclusive proof of legitimacy of a child born during the continuance of a valid marriage is significantly analysed under section 112 of the Evidence Act. It says that the fact that a person was born during the continuance of a valid marriage or within 280 days after its dissolution but before the woman remarried someone else is itself a conclusive proof that the person to whom the mother of the child was married is the biological father of the child born.[1]

The Law Commission in its 185th Report, proposed certain amendments to Section 112 which are yet to be given force. The Commission proposed that in the case of blood tests, there can be evidence by way of DNA tests to prove that a person is not the father and added three more exceptions under section 112 of the Indian Evidence Act – (a) medical tests to prove impotency (b) blood tests (c) DNA test. Here, introduction and admission of DNA technology can actually be fruitful, to meet the ends of the justice. Blood group antigens, serum proteins, erythrocyte enzymes and salivary proteins are of importance in ascertaining the parentage with certainty. As Roscoe Pound put is: “Law must be stable. But not stand still.”

Presumptio Juris- Section 112 Indian Evidence Act, 1872

Birth during marriage, conclusive proof of legitimacy.—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. Section 112 deals with the presumption of legitimacy of a child. The section is based on maxim pater rest quern nuptioe (he is the father whom the marriage indicates). It provides that a child was born during continuance of valid marriage between the mother and any man or within 280 days after the dissolution of valid marriage and the mother remaining unmarried, it shall be the conclusive proof that the child is a legitimate child of that man unless and until it is shown that the parties to the marriage has no access to each other at the time when the child would have been begotten. The sprit behind Section 112 is that once valid marriage is proved there is strong presumption about the legitimacy of children born during wedlock.

When the above requirements are satisfied the presumption of legitimacy is a conclusive presumption of law. Child born during wedlock is sufficient proof of legitimacy. The presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities. Section 112 is based on presumption of public morality and public policy. “It is a presumption founded upon public policy which requires that every child born during wedlock shall be deemed to be legitimate unless the contrary is proved.” The effect of this section is that a child born as the result of sexual intercourse between husband and wife is conclusively presumed to be their child.

A marriage presumed from living together for a long period is valid marriage for the purpose of legitimacy under this section. Under section 112 it is

[1]http://www.manupatrafast.com/articles

always for the father or person who wants to challenge the legitimacy of the child that there was no opportunity for intercourse between the father and the mother of the child. On the other hand, strong presumption is in favour of the legitimacy to the child born during wedlock.

Valid marriage: presumption

Father and mother of the appellant had been cohabiting for number of years and were treated by others as husband and wife. Six children including the appellant were born out of their relationship. There was no proof that her father and mother had subsisting earlier marriage. It could be said that there was valid marriage between husband and wife. Where evidence of marriage is insufficient, the court is not barred from drawing presumption of marriage for long living together under sections 112 and 114 of the Act. For example- Where parties lived together for more than twelve years, three children were also born, there was presumption of valid marriage between the two, the mere fact that no evidence of saptapadi[2] or sampradan could be produced now was held of no consequence.

Access and non- access

The presumption of legitimacy of child depends upon effective access between the mother and the father. The parties to the marriage have had access to each other when the child was conceived. But, “access and non-access cannot have existence and non-existence of opportunity for marital intercourse.” Non-access can be proved by evidence direct or circumstantial though the proof of non-access must be clear and satisfactory as the presumption of legitimacy is highly favoured by law. From the date of marriage to the date when the wife left to go to her parents, there could not be access because of the wife’s physical ailments and a child born after nine months of marriage was held to be illegitimate. But, the illness of the husband is not sufficient to displace the presumption of access unless the illness is totally disabling. If husband can prove that there was no actual cohabitation, “non-access” is established. Thus the burden of proving illegitimacy is on the husband who has to establish that he had no opportunity to access with the wife when the child was begotten. Recently, the Supreme Court of India, in *Kamti Devi vs. Poshi Ram*[3] refused to rely on the result of a DNA test and held that under sec. 112 of the Evidence Act non- access between the man and woman is the only way to raise the presumption against legitimacy. The dilemma of the Court is that accepting DNA as evidence of legitimacy is likely to render many children illegitimate and many women unchaste. This is quite unfair for the husbands, and the court appears to be saying to them that: “It is your child, unless you can prove beyond reasonable doubt that it is not!” This is certainly not the solution to the problem.

DNA

Although 99.9% of human DNA sequences are the same in every person in the world, there is still enough of a difference in order to distinguish one person from another. Using a method called DNA testing, also known as DNA profiling, scientists analyze a long chain of DNA to identify specific “loci.” These loci are very similar when you are comparing the loci of two closely related people, but among people unrelated, the differences are much greater. Thus, in criminal prosecutions, DNA evidence is often offered to link the accused with being at the scene of the crime, but it can also be used by the defendant to prove their actual innocence.[4]

How Reliable Are DNA Tests?

Courts have accepted the overall accuracy and value of DNA testing. For example, courts have allowed prosecutors to search for suspects by interviewing people in the DNA database who have merely similar DNA to that found at the crime scene, indicating family members.

Hon’ble Supreme Court of India observed in *Nandlal WasudeoBadwaik vs Lata Nandlal Badwaik&Anr*[5]that now we have highly developed scientific techniques and a reliable source of evidence i.e. DNA test report.

We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. 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. In our

[2] An essential ceremony for a valid Hindu marriage, see Sec.7 of Hindu Marriage Act.
[3](AIR 2001 SC 2226)
[4] https://www.legalmatch.com/
[5] 6th January 2014, judgment by Hon’ble Justices Chandramauli Kr. Prasad, Jagdish Singh Khehar

opinion, 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 latter must prevail over the former.

Nandlal Wasudeo Badwaik vs Lata Nandlal Badwaik &Anr (2014 SC)

This is the landmark case on section 112 of EvidnceAct. This case changed the earlier mode of interpretation on 112.

"…as stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl-child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us."

We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

CONCLUSION

We have certain points to remember that are, on one hand Section 112 of Indian Evidence Act raises a presumption if child born during continuance of valid marriage between the mother and any man or within 280 days after the dissolution of valid marriage and the mother remaining unmarried, provided that man was unable to prove the non access between him and mother of child. If he is unable to prove the non access then court will raise the presumption of conclusive proof which can't be rebutted. On the other hand court has an authentic and highly reliable expert report i.e. DNA report. Thus here is fight between presumption juris and DNA profile.

"… It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl-child." – Justice Chandramauli Kr. Prasad.[6]

So in the above said landmark case it was held that on the question of paternity or legitimacy of child the accurate scientific report of the accused will prevail over the rule of presumption which can be raised in other circumstances. Thus in this case the DNA won the fight over presumption juris.

References:

[1] http://www.manupatrafast.com/articles
[2] An essential ceremony for a valid Hindu marriage, see Sec.7 of Hindu Marriage Act.
[3] (AIR 2001 SC 2226)
[4] https://www.legalmatch.com/
[5] 6th January 2014, judgment by Hon'ble Justices Chandramauli Kr. Prasad, Jagdish Singh Khehar
[6] Nandlal Wasudeo Badwaik vs Lata Nandlal Badwaik & Anr (2014 SC)

[6]*Nandlal Wasudeo Badwaik vs Lata Nandlal Badwaik & Anr (2014 SC)*