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PRESUMPTION AS TO THE LEGITIMACY OF CHILDREN

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INTRODUCTION

In twenty first century still the ‘paternity of child’ and ‘chastity of woman’ holds a lot of significance. The child born in lawful wedlock is considered a legitimate child, while the child born outside the lawful wedlock is recognised as illegitimate often termed as ‘bastard.’ While drafting Indian Evidence Act, 1872¹ (hereinafter referred to as Act) the issue was incorporated under the Section 112 of the Act which deals with the presumption of the child.

However, with advancement in technology in today’s era, it is possible to determine the paternity of the child by conducting the DNA (Deoxyribonucleic Acid) test, though the test was originally introduced to determine the paternity of the child. But in today’s time it is often used to dispute the paternity of the child in matrimonial dispute leaving scars on the child’s fragile heart, the trauma they have to carry for rest of their life.

LAW RELATING TO PRESUMPTION AND ITS CLASSIFICATION

The term presumption is derived from Latin word ‘praesumere’ which means ‘to take things for granted.’ In the Law of Evidence, the word ‘presumption’ is used to designate an inference, affirmative, or negative, of the existence of some fact drawn by the judicial tribunal by a process of probable reasoning from some matter of fact either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal.² In simpler terms presumption means to ascertain the facts on the basis of possibility, experience, human behaviour or course

¹ The Indian Evidence Act, 1872 has been replaced by the Bharatiya Sakshya Adhiniyam, 2023

² Batuk Lal, The Law of Evidence 92 Central Law Agency (23rd ed. 2020)

of nature. For instance, if the road is wet in the early morning it can be presumed that it rained last night, a person X came running shouting that police is here to catch the thief and hearing this Z ran away from the place it can be presumed that Z might be the thief.

Presumptions are of two types

- a) Presumption of fact – These are those inferences which are drawn naturally from observing the course of nature and behaviour of the human. These are ‘rebuttable presumption’ and are weak presumption. For example, Section 114 of the Act.³
- b) Presumption of law – These are those inferences which have already been incorporated in the law. The courts have to presume its existence until its disproved. For example, Section 113B of the Act.⁴ They can be of two types ‘rebuttable presumption of law’ and ‘irrebuttable presumption of law.’

Section 4⁵ of the Act deals with three presumptions

- a) May Presume

The Courts hold the discretion to consider the fact as proved or may seek evidence to verify it. It is a ‘rebuttable presumption of fact.’ For example, section 113A of the Act.⁶ It is defined under the Act as:

“Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.”

- b) Shall presume

The Courts have no discretion rather courts have to presume a fact to be existing until it is disproved. It is ‘rebuttable presumption of law.’ For example, section 114A of Act.⁷ It is defined under the Act as:

“Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.”

³ Corresponding Section 119 of Bharatiya Sakshya Adhiniyam, 2023; Court may presume existence of certain facts

⁴ Corresponding Section 118 of Bharatiya Sakshya Adhiniyam, 2023; Presumption as to dowry death

⁵ Corresponding Section 2 (1)(h) may presume; section 2 (1)(l) shall presume; section 2 (1)(b) conclusive proof

⁶ Corresponding Section 117 of Bharatiya Sakshya Adhiniyam, 2023; Presumption as to abetment of suicide by married woman

⁷ Corresponding Section 120 of Bharatiya Sakshya Adhiniyam, 2023; Presumption as to absence of consent in certain prosecution of rape

c) Conclusive Proof

It means where the existence of one fact confirms the existence of the other fact. For example, section 82 of the Indian Penal Code, 1860,⁸ which states offence committed by child under seven years is not an offence. If it is proved that the child is under seven years then no further evidence will be taken to prove that he committed the offence because one fact confirms the existence of other fact. It is 'irrebuttable presumption of law.' It is defined under the Act as:

"Where 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."

LEGITIMACY RELATING TO CHILDREN

The Section 112⁹ of the Act is incorporated under the Act to uphold the legitimacy of the child. the object behind such presumption is to prevent paternity and legitimacy from being disrupted except to the extent specified in section.¹⁰ The Section is based on the legal maxim '*Pater est quem nuptiae demonstrat*' which means that 'he is the father whom the marriage indicates.'

The Section under the Act reads as -

Section 112. 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.

According to the Section any person born during

- a) the continuance of valid marriage between his mother and any man; or
- b) within two hundred and eighty days after its dissolution, the mother remaining unmarried

⁸ Corresponding Section 20 of Bharatiya Nyaya Sanhita, 2023; Act of child under seven years of age

⁹ Corresponding Section 116 of Bharatiya Sakshya Adhiniyam, 2023

¹⁰ Dr. G. V. Mahesh Nath, Disputed Paternity and DNA Testing – A Study in the Indian Context, Social Science Research Network, 2016, (15th July 2026, 10:45 a.m.)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2774315

then it shall be a conclusive proof that the person is the legitimate son of that man and no evidence can be attributed to prove that he is not the father of that child, as it is irrebuttable presumption of law. If any of the of the above circumstances exist it is sufficient to say about legitimacy.

According to the legislative intention the spirit behind Section 112, once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from the wedlock.¹¹ The presumption can only be displaced by strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstance creating doubt.¹²

For understanding the provision, for example, X (a woman) married to Y (a man) on 1st January 2023 and they get divorced on 30th May 2026. The child is born on 15th April 2025 here it shall be presumed that the child is legitimate son of Y.

In another scenario, A (a woman) married to B (a man) on 1st January 2023 and they get divorced on 30th March 2026. The child is born on 18th July, 2026. The woman remained unmarried, here the child is born within two hundred and eighty days it shall be presumed that the child is legitimate son B.

EXCEPTION TO THE PRESUMPTION UNDER SECTION 112

Displacing the legitimacy can be possible according to the only exception provided under the section i.e. non access between the mother and any man. The term ‘access’ means actual sexual intercourse and it means effective access. Access and non-access connote, existence or non-existence of opportunities for marital intercourse.¹³ It does not necessarily mean actual cohabitation.

For example, X (a woman) married to Y (a man) on 1st January 2022 and on 16th December 2024. Y for career growth went to Dubai and returned on 16th July, 2026. The child was born on 27th March 2026. Here the husband didn’t return for two years and child was born, so the presumption under the section can be displaced by showing that when the child was born he

¹¹ Mahendra Agatrao Lomte and Dr. SR Katari, A critical analysis of legal presumption of legitimacy under section 112 of Indian Evidence Act, 1872, 3 International Journal of Law, 50, 2017

¹² Shyam Lal v. Sanjeev Kumar; AIR 2009 SC 3121

¹³ Venketeswarlu v. Vankta Narayana; AIR 1954 SC 156

and his wife had no opportunity to have sexual intercourse. So, the child cannot be the legitimate child of Y.

The section provides limited scope for displacing the legitimacy as the section was enacted when modern scientific tools were not existing. And now when the tools can help to establish legitimacy it is still not incorporated under the section. The section is based on the presumption of morality and may, in certain circumstances, hold the party disputing paternity unjustly accountable. Since the question of legitimacy is an extremely important one in cases of custody, maintenance etc., it is impractical for the section to provide such a limited exception.¹⁴

LEGAL DEVELOPMENTS

This section has undergone many developments with time from weighing the presumption to now accepting DNA tests to establish the legitimacy of child. The courts allow DNA test in exceptional circumstances and weigh the right to privacy and balance of interest for ordering the DNA test.

In **Chilukuri Venkateswarly v Chilukuri Venkatanarayana**,¹⁵ the Apex Court held that if there was access between parties and an opportunity shown to have existed during subsistence of valid marriage, the provision by fiction of law, accepted the same as conclusive proof of the fact that the child born during subsistence of valid marriage was a legitimate child.

In **Goutam Kundu v State of West Bengal and another**,¹⁶ the Court summarised the law as follows:

- a) The Courts in India cannot order blood test as a matter of course.
- b) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
- c) There must be strong prima facie case is that the husband must establish non-access order to dispel the presumption under Section 112 of the Act.
- d) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have effect of branding the child as a bastard and the mother as unchaste.

¹⁴ Dr Namrata Gupta, The Presumption of Legitimacy 9 International Journal of Creative Research Thoughts b 810 (2021)

¹⁵ 1954 SCR 454

¹⁶ (1993) 3 SCC 418

e) No one can be compelled to give sample for blood analysis.

Kamti Devi v Poshi Ram,¹⁷ the Supreme Court acknowledge the scientific accuracy of genuine DNA test but even that is not enough to escape from the conclusiveness of Section 112; the same was reaffirmed in the case of **Banarasi Das v. Tikku Datta**,¹⁸ emphasizing that the legal presumption would prevail even in the face of contradictory scientific evidence if the condition of cohabitation met.

In **Shyam Lal @ Kuldeep v Sanjeev Kumar & Ors**,¹⁹ the Supreme Court held “on the proof of legitimacy of marriage, there is strong presumption about the legitimacy of child born out of that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption cannot be displaced by mere balance of probabilities or any circumstances creating doubt.”

In **Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Another**,²⁰ the court found the apparent conflict between right to privacy of person not to submit himself forcibly to medical test and duty of court to reach the truth, the court must exercise it after balancing the interest of the parties and due consideration whether for a just decision in the matter DNA test is eminently needed, it should not be directed by the court as a matter of course or in routine manner, whenever such request is made.

The progressive stance was taken by the court in the landmark judgement of **Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and anr**,²¹ the Court acknowledge that the scientific evidence should be given due weightage in determining paternity disputes. The Court further declared that 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, the latter must prevail over the former.

This case the Court has given due weightage to scientific evidence and is a remarkable step towards accepting modern technology to derive towards justice.

In **Dipanwita Roy v. Ronobroto Roy**,²² the Supreme Court held that it is permissible for a Court to direct the holding of DNA test to determine the paternity of child. There can be no

¹⁷ AIR 2001 SC 2226

¹⁸ (2005) 4 SCC 449

¹⁹ AIR 2009 SC 3115

²⁰ (2010) 8 SCC 633

²¹ (2014) 2 SCC 576

²² (2015) 1 SCC 365

dispute that if the direction to hold such a test can be avoided, it should be avoided. The reason is that the legitimacy of the child should not be put to peril.

In the case of **Aparna Ajinkya Firodia v. Ajinkya Aun Firodia**,²³ the Court held that it is not in the best interest of the child to allow DNA test for proving the allegations of adultery and not for determining the paternity of the child. It also distinguished between 'paternity' and 'legitimacy' as two distinct legal concepts. The idea behind this provision was to establish a conclusive presumption in favour of the 'legitimacy' of a child to not subject him or her to the stigma of being 'bastard.' The said presumption, however, is conclusive only as regards the 'legitimacy' of the child and not its paternity.

In **Ivan Rathinam v. Milan Joseph**,²⁴ the Supreme Court held that a child born during a valid marriage shall be presumed legitimate unless proven that the mother and father did not have access to each other and it was also held that legitimacy is 'entombed' within paternity. Adultery does not necessarily mean non-access, and does not displace presumption under Section 112. The courts must consider the existing evidence to assess the presumption of legitimacy. If that evidence is insufficient to come to a finding, then only the court should consider ordering a DNA test. Thus, there are two blockades to ordering a DNA test: (i) insufficiency of evidence; and (ii) a positive finding regarding the balance of interests.

In the recent case of **Chaturbhuj Pradhan v. Amar Pradhan and Anr.**,²⁵ the Supreme Court applied 'balance of interests' and 'eminent need' tests, holding that paternity can be determined through DNA testing then no other conclusive evidence exists and privacy rights must be weighed against a person's right to establish identity.

LOOPHOLES RELATING TO THE SECTION

Framing this section was according to the needs of that time. And today there are major scientific developments which negate the need for parties to have access to each other. This section has certain loopholes as below:

- (a) The child is born just after the one day of the marriage then the child will be considered legitimate son of that man as he was born during valid marriage or is born after one

²³ (2024) 7 SCC 773

²⁴ 2025 SCC OnLine SC 175

²⁵ 2026 SLP(C) No. 4016 of 2026

month of divorce and the mother married another man then the person to whom she was remarried will be consider the father of the child.

- (b) The Section based on the premise of sexual intercourse as indispensable for conception of the child. Further the interpretation of the word non-access in various authorities cited above centres around the possibility of cohabitation only. However today, the availability of sperm bank or cryobank, in-vitro fertilization, surrogacy has done away with the necessity of sexual intercourse i.e the physical presence of a man near a woman for conception of a child. The husband would be able to prove non-access as interpreted by the Courts despite the fact that the child is his biological child.²⁶
- (c) Even after recommendations of the Law Commission of India to incorporate DNA test, Blood test etc under the section were still not incorporated, due to which it provides very limited scope to prove the exception of non-access.

EFFECT OF NEW CRIMINAL LAWS

On 1st July 2024 the new criminal laws²⁷ came into force ending the colonial era laws by modernizing the legal framework. These laws have introduced new offences, enhanced punishments, timeline for procedural aspects and with minor changes under evidence law. But there was no change in Section 112 of the Act by the Legislature it still follows judicial precedents.

The Sixteen Law Commission of India, in its 185th report²⁸ with subject ‘Review of the Indian Evidence Act, 1872’ recommended to acknowledge the scientific methods such as DNA testing

²⁶ Vikas Khatri, Section 112 IEA, and the DNA test: Dissecting the Law, LiveLaw.in, (18th July 2026, 3:00 p.m.) <https://www.livelaw.in/columns/section-112-iea-and-the-dna-test-dissecting-the-law-161415>

²⁷ Indian Penal Code, 1860 was replaced by Bharatiya Nyaya Sanhita, 2023; Code of Criminal Procedure, 1973 was replaced by Bharatiya Nagarik Suraksha Sanhita, 2023; Indian Evidence Act, 1872 was replaced by Bharatiya Sakshya Adhinyam, 2023

²⁸ Available at Law Commission of India, https://lawcommissionofindia.nic.in/report_sixteenth/ (18th July 2026, 11:00 a.m.)

Birth during marriage conclusive proof of legitimacy except in certain cases

“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

to introduce certain other exceptions to the conclusive presumption, including impotency, blood tests and DNA test. Including these methods would give broader scope to the section and also protecting child legitimacy.

However, for reasons unknown, the same was not incorporated under Section 116 of Bharatiya Sakshya Adhiniyam, 2023 increasing the dilemma and the concern of the fathers who are compelled to take the burden of the fatherhood of the child, which even though scientifically or by alleged truth, is not theirs.

As one Parliamentary critique noted: “*Why is this Bill which is meant to decolonize the existing law, has made no changes to the provision, apart from simply renumbering it as Section 116?*”²⁹

CONCLUSION

The initial years of the person tends to show how the person will become in future; childhood is the base of the persons future. Dragging the child to the matrimonial dispute and particularly questioning the paternity of the child and visit to courts can cause adverse effects like psychological problems, trauma and societal stigma which the child has to bore throughout his life. Hence, the courts with time have always emphasised the principle that ‘best interest of the child’ is the utmost necessity and every case involving the child must follow this principle.

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- (ii) blood tests conducted with the consent of that man and his wife and in the case of the child, by permission of the Court, that that 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 that 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, and they resulted in an identical verdict that that man is not the father of the child.

Provided further that where that man refuses to undergo the tests under sub clauses (i) or (ii) or (iii), he shall, without prejudice to the provisions of clause (a), be deemed to have waived his defence to any claim of paternity 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 child and the words “DNA” mean ‘Deoxyribo-Nucleic Acid’.

Explanation II: For the purposes 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 marriages which are declared nullity or avoided by dissolution, shall nevertheless be legitimate.”

²⁹ Tanvi Mahajan, Legitimacy by Law or by Science: The Dilemma u/s 112 of Indian Evidence Act, 1872, NC Legal Advocates and Solicitor (17th July, 2026 at 11:30 p.m.), <https://nclegal.co/blog-details/legitimacy-by-law-or-by-science-the-dilemma-us-112-of-indian-evidence-act-1872>

Personal information relating to the person falls under the ambit of 'right to privacy' as enshrined under Article 21 of the Constitution of India, 1950 and this right extends to the children also. Questioning the legitimacy of the child in the court of law is the violation of their fundamental right. The child cannot be used as an object to prove the adulterous relation of the mother. DNA test should not be used as a means to prove adulterous relations, as it can be proved by other existing evidences. For proving the legitimacy of the child DNA test is allowed by the Court when there are no prima facie evidence and in exceptional circumstances to show non access of the husband to the mother of the child. The Apex Court have reiterated again and again in its landmark judgements that DNA test should not be allowed casually and in every case to rebut the presumption relating to child laid down under the section.