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# Section 112 of the Evidence Act: How Effective is it in Modern Times?

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## ABSTRACT

*The section 112 of the Indian evidence acts deals with the conclusive proof of legitimacy of the child born during the existence of a valid marriage or a child being born after 280 days of dissolution of marriage provided that the mother remained unmarried. The section allows only one exception which is of non-access. 2023 turned out to be a year where the courts series of judgment have taken a literal interpretation of the case had held that as long as the couple have access to each other the child born will be legitimate, the supreme court had also gone to the extent to state that even if the wife is in an adulterous relationship the presumption of the legitimacy of the child cannot be uprooted under the section 112 of the evidence act.*

*This brings us to the question of how effective the section 112 of the evidence act in reality is and whether the section is still effective in current times thus the aim of this paper is to understand the section 112 as well as to analyze the reason behind the varying judgements by the courts; while also understanding the impact of the advancement of science on this section and by finally concluding by determining the lacunae present in the section and how to fill the gap present.*

**Keywords:** *Child Legitimacy, DNA testing, Paternity, Natural , Fundamental rights.*

## I. INTRODUCTION

Paternity is an extremely important aspect of one's life, an individual is recognized in the society by their paternal lineage. Paternity in simple terms refers to establishing a connection between the natural father and a child, this establishment of a connection is extremely crucial as it benefits the child in several ways; the most important benefit is that it helps a child find their identity, it helps in making a child feel more secure about their identity. Other benefits of establishing paternity of a child may include; a better understanding about the child's medical history as well as provides a child with the required financial support.

The Indian society places a huge emphasis on the paternity of child, thus the lawmakers of our country while formulating the laws had taken this aspect into consideration and ensured that a child doesn't get to face the brunt of being an illegitimate child in the society. The section 112

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of the Indian evidence act 1872, deals with the legitimacy of a child.

The section 112 of the Indian evidence act provides with a conclusive proof of the legitimacy of a child, as per this section a child would be considered as legitimate in the following scenarios:

- If the child is born during the continuance of a valid marriage between the child's mother and any man
- If the child was born 280 days after the dissolution of the marriage provided that the mother of child remains unmarried.

From this section we can clearly see that the law is leaning more towards establishing paternity of a child rather than the maternity as this section is based upon the principle that it is easy to prove the maternity of a child in comparison to one's paternity<sup>2</sup>, the essence of the legal maxim "*pater est quem nuptiae demonstrant*" which means "he is father whom the nuptial indicates" can also be traced in the current section. Thus, it can be seen that the intent of the legislative is to protect the interests and rights of the child and to ensure that the child doesn't suffer.

The only exception to the legitimacy principle is when there was "no access" between the couple during the time at which the child might have begotten. This provision can thus only be displaced when there is strong prima facie proof of non-access between the parties and not because of the mere balance of probabilities<sup>3</sup>. Here no access doesn't necessarily refer to actual cohabitation<sup>4</sup> instead it simply refers to the nonexistence/ existence of opportunities in order for sexual intercourse being taken place between the parties<sup>5</sup>. The burden of proving non access falls on the husband while disputing paternity.

This section had been the main reason of debate for some time now, the decision of the judiciary in several recent judgments can be seen contradictory to each other in nature. there are judgments by the court in which they by giving a go bye to the conclusive proof of legitimacy of child had placed more reliance on new scientific technologies such as the DNA report. These leads us to primary lacunas present in these sections, namely being:

- Is the section contradicting the fundamental right of the husband and principles of natural justice by compelling legitimacy of child upon him
- Should the use of modern scientific advances be used by the courts

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<sup>2</sup> Nand v. Gopal, AIR 1940 PC 93.

<sup>3</sup> Gautam Kundu v. State of W.B., AIR 1993 SC 2295; S.P.S. Balasubramanyam v. Suruttayan, AIR 1997 SC 756

<sup>4</sup> Supra note 2

<sup>5</sup> Venkteswarlu v. Venkata Narayana, AIR 1954 SC 176.

Hence the aim of this commentary primarily would be to highlight the gaps present in the section and to show the imminent need to amend the section to incorporate the modern changes.

## **II. CRITICAL ANALYSIS**

### **(A) Understanding section 112 and lacunae present in it**

In a country like India the chastity of a woman holds much value and are considered as the issues of honor, no woman would like to be called as unchaste. The section 112 of the evidence act was developed during a period where a lot of emphasis was placed upon the chastity of a woman. In order to protect the woman and to safe guard the child from branding him as a bastard, the legislature had come up with this particular legislation<sup>6</sup>

A reading of section 122 with the definition of conclusive proof as provided under section 4 of the evidence act makes it clear that the legitimacy of the child born is a conclusive proof (provided the essentials of the section are met) and under no circumstance shall the court allow any evidence to rebut this claim of legitimacy unless in cases where there is proof of non-access. Though the section only provides with the exception of non-access however if it can be proven that the circumstances of access between the parties was such that the it is highly improbable for sexual intercourse to have taken place between the parties then the presumption of legitimacy can be rebutted<sup>7</sup>.

There are so many loopholes present in the section apart from the violation of fundamental right of the husband and the violation of principle of natural justice one problem with the section is the presumption of child being born within the 280 days after the dissolution of the child being a legitimate one. The medical jurisprudence had made it clear that though the period of the average pregnancy is 280 days however the actual duration of the pregnancy is unknown as the gestation period can be prolonged as well<sup>8</sup> thus there is no rationale behind keeping the limit to only 280 days as there is no settled position of maximum duration of a pregnancy being 280 days, any such limit on the number of day would interfere with the objective of the section of protecting the child's interests as a strict reading of the section can mean a child born on the 281<sup>st</sup> day would be illegitimate which goes against the objective of the section.

### **(B) The need of involving scientific evidence**

As seen above there exists a lot of gaps present in this section currently, starting from the violation of fundamental rights to lack of medical grounds. There is a despair need to bring a

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<sup>6</sup> Kanti Devi v. Poshi Ram, AIR 2001 SCC 2226.

<sup>7</sup> James Fitzjames Stephen, A DIGEST OF THE LAW OF EVIDENCE, 183 (1876).

<sup>8</sup> Jaising P. Modi, MEDICAL JURISPRUDENCE AND TOXICOLOGY FOR INDIA, 234 (1920).

change in the same. Section 112 of the evidence act was enacted during a time when there were very less modern scientific advancements such as deoxyribonucleic acid (DNA), or the sperm bank tests thus they were not a part of the contemplation of the legislature back in the time, currently the medical field has been advanced tremendously by just having a tiny drop of one's blood it is possible to scan the entire body system of an individual and to also detect the defect in them. This latest tool of DNA can help efficiently settling grave issues such as the paternity claim, mutilated remains or establishing identity of one.

When it comes to the Indian judiciary and the DNA reports the modus operandi of the judiciary is not uniform at all. As state earlier the courts have opined contradicting judgments in this regard. Let us understand both the perspective;

*a. Inadmissibility of DNA testing*

- This set involves the decision of the court where they had refused to scientific evidence, one of the reasons behind it is because of the lack of mention of scientific evidence within the current ambit of the section and second being the possible branding of the child illegitimate. The court feels that the stigma of being illegitimate in an Indian society is extremely severe as we don't even have protective legislations for illegitimate children as present in England.<sup>9</sup> The courts feel that if there is proof of a valid marriage between the parties and the "no access" not being present in the scenario then the child will be legitimate the same had been reiterated by the courts via several judicial judgments since 1954<sup>10</sup>. In circumstances where the section 112 is applied however the non-access is not pleaded or being proven then the even the presence of a negative DNA test can't be of much help. The court in the case of *Teeku Dutta v State*<sup>11</sup> had held that no person shall be subjected to DNA testing to collect evidence against their own will. The DNA testing can only be ordered in cases where an exceptional situation arises however before ordering for a DNA testing the husband must prove to the court the factum of the marriage and access<sup>12</sup>. The courts in cases such as the *Kamti Devi v Poshi Ram*<sup>13</sup> or the *Shanmugam v. Samundeeswari*<sup>14</sup> were despite the negative result of the DNA reports the court had held that under the section 112 only non-access between the parties is the way to raise presumption on the legitimacy of the child. Even though the DNA test may

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<sup>9</sup> *Vasu v. Santha*, 1975 Ker LT 533

<sup>10</sup> *Ammathayee v. Kumaresan*, AIR 1967 SC 569, *Perumal v. Ponnuswami*, AIR 1971 SC 2532, *Venkateswarlu v. Venkatanarayana*, AIR 1954 SC 176

<sup>11</sup> *Teeku Dutta v. State*, AIR 2004 Del 205 (207)

<sup>12</sup> *Devu Gopal Lunani v. Siva Gopal Lunani*, AIR 2014 AP 29.

<sup>13</sup> *Kamti Devi vs. Poshi Ram*, (AIR 2001 SC 2226)

<sup>14</sup> *Shanmugam v. Samundeeswari*, (2007) 1 MLJ (CrI) 386 (Mad)

be scientifically true however it can't be used to escape the conclusiveness of the section.

*b. Importance of DNA testing*

- Though several courts rely upon the strict reading of the section, recently the courts have taken different approach to this. While dealing with cases relating to paternity, the supreme court had held recently that whenever there is a contravention between the scientific evidence and the section 112, scientific evidence should prevail<sup>15</sup>. DNA reports have a certainty of about 99.8 percent hence the presumption of legitimacy in cases where the DNA report claims that the man is not the father of the child must be altered though the section does not provide with any other exception apart from non-access.

- The supreme court can be seen endorsing the reliability of DNA in ascertaining paternity, the court in the *Dipanwita Roy* case had held that the DNA is the most legitimate and scientific means of ascertaining paternity<sup>16</sup> even if section 112 raises a presumption as there is no requirement of presumption when the truth is known. Similarly, the Madras high court in one of its recent judgments had held that with the advancement of science, the advancement must be used on order to determine the paternity of a child instead of relying upon the presumption of an age-old section as during the enactment of the act the technological advancement were not available<sup>17</sup>. The court in furtherance to this held in the judgement of *Goutam Kundu v. State of West Bengal and Anr*<sup>18</sup> that direction to conduct DNA test is not in violation of the personal liberty as prescribed under article 21.

### III. LAW OF DETERMINING PATERNITY IN OTHER COUNTRIES

#### (A) England

By the 1930s the immunological test became available in countries a result of which was that establishing paternity became more feasible. Following this an attempt in 1938 was made to make blood test mandatory for determining paternity had failed. It was in the year 1957 through the Affiliation Proceedings act it was established that the evidence being submitted must be corroborated with facts such as the blood test. The family reforms act 1969 conferred upon the courts the power to direct for blood test in civil paternity proceedings, since this passing it has become a general practice to use blood test to determine the paternity of a child. After the Family reforms act 1987 the laws in England took a more progressive approach as instead of paternity

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<sup>15</sup> *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik*, (2014) 2 SCC 576

<sup>16</sup> *Dipanwita Roy v. Ronobroto Roy*, AIR 2015 SC 418

<sup>17</sup> *Bommi and another v. Munirathinam*, (2004) 3 MLJ 537

<sup>18</sup> *Goutam Kundu v. State of West Bengal and Anr*, 1993 (3) SCC 418.

the term “parentage” came into light considering the shared responsibility of paternity.

Re Lord Denning M.R in cases such as *B.R.B v J.B*<sup>19</sup> had given the judgement while emphasising the importance of usage of scientific stated that it is the duty and object of a court to determine the truth and if the scientific methods are able to provide fresh means of ascertaining truth then one must not hesitate to use it.

### **(B) United States of America**

Similar to the situation in England it did take a decent amount of time to establish that blood grouping for parentage exclusion is valid. It was initially the supreme court of New York which had passed an order to direct for blood test citing an Italian case which was later revised upon appeal however soon after this appeal the several states had passed statutory authority to order blood test in cases of disputed paternity.

Paternity testing in the USA had developed more slowly in comparison to the other countries.

However as of today scientific methods such as blood grouping regarding the paternity is recognised and is mandatory in some states also.

## **IV. NEED FOR REFORMS**

As seen throughout the paper it is essential to bring necessary reforms in the section 112 of the evidence act. There is a clear conflict between the principles that has laid by the judiciary, the lack of proper principle makes the implementation of the section extremely chaotic and arbitrary in nature, apart from the lack of clearness in the judiciary principle the section itself has lot of lacuna and also involves conflict at various aspects such as unequal treatment of the parties.

The courts in the case of *Kanchan Bedi*<sup>20</sup>, contrary to the *Gautam Kundu* case had directed for a DNA test as the husband had claimed that he in no manner was involved in the marriage. The court had also sent a copy of its judgment<sup>21</sup> to the ministry of law and the law commission stating the requirement to bring an amendment in the section 112 of the evidence act and to include blood test to decide the parentage as an essential.

### **(A) Equality & Natural justice**

- Equality before the law means that everyone is treated equally; among equal the law should be equally administrated. The likes should be treated alike. Section 112 is a rule which is applicable only to husband; the rule of drawing adverse inference is invoked only if

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<sup>19</sup> [1968] 2 All England Reports 1023

<sup>20</sup> *Kanchan Bedi v. Gurpreet Singh* case, AIR 2003 Delhi 446

<sup>21</sup> *Sadashiv Mallikarjun Kheradker v. Nandini Sadashiv Kheradker*, 1995 Cri LJ 4090

the husband denies it<sup>22</sup>; the demonstration rule of forceful comes into the picture only when the subject is the husband similarly the husband is the only one who is barred from disputing the paternity because of the exercise of consent is also only applicable to the husband. The protection of a child's legitimacy solely cannot be a reason to violate the husband's right to be heard.

- Non access being the only exception to the presumption of legitimacy is not sufficient or sound enough as stated above that mere access does not necessarily mean that the child born is of the wedded couple.

- The lack of proper structure to the current section places an unnecessary burden upon the husband as he would be compelled to be the father of the child and pay for maintenance when it is not required. As already established earlier there have been instances when the husband was forced to pay for maintenance even when the DNA report clearly stated that the child was not his.

### **(B) Evolution**

- The society and circumstances which had been present during the time when the evidence act was established as changed, the change is the only constant in life. When the society has evolved it would only be fair that the laws governing the society also evolves and comes in terms of the modern changes.

- So many significant changes had taken place since the enactment of the section, the most major one being the advancement in the field of science and technology. A plausible reason behind the lack of mention of scientific procedure in the section would very well be due to the lack of the technology back then. Now that we have evolved so much it is necessary to employ the advancement in the section. Similar to other countries across the globe who have changed the laws and included scientific methodology in order to match the current modern society, we must also do something similar.

- The law commission of India had also recommended a similar change in the section 112 where the commission had suggested that scientific evidences must be included in the section

## **V. CONCLUSION**

Cases such as *Kamta devi* showcases the serious lacuna present in the law currently, the section

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<sup>22</sup> Sadashiv Mllikarjun Kheradkar v. Nandini Sadashiv Kheradkar, 1995 Cri LJ 4990(Bom), Dwarika Prasad Satpathy v. Bidyu Prava Dixit, Crl. Appeal No. 1082-83 of 1999(SC)



112 was enacted with the objective of safeguarding and protecting the interests of the child however the section has lot of lacunae.

The section currently having only one exception of non-access violates the husbands right to fair trial cause if he is not able to prove non access then he has no other way to prove his parenthood, the section just assumes the paternity of the husband without providing sufficient opportunities to him. The current wording of the section is also extremely vague as access to each other doesn't automatically mean that a sexual intercourse would have taken place, it is not conclusive.

The section was formulated way back in the year 1872 which is almost 140 years ago. Over the last three decades only we have experienced an unpredictable growth of science. With the advancement in the field of science new challenges have also been faced by the courts, we have seen the courts at times using the new found technology to reach judgments. The Indian evidence act particularly needs change, it is essential to amend the important sections of the act in order to ensure that the sections are able to provide relief for the modern day challenges.

The admissibility of scientific evidences such as the DNA, blood test is a pressing need of the hour, it is important for the government to take the much awaited necessary steps in order to include DNA test as done already by several countries across the globe. The DNA evidence must be included in the statute book in order to conclusively and accurately prove the parentage of a child. The government by taking the suggestions of the law commission mentioned in its 185<sup>th</sup> report on the amendment of the evidence act where it had recommended that inclusion of DNA evidences in cases of paternity dispute is essential. If the same bill gets passed by both the houses then the statutory which will be a result of it will pay an important role.

Law must always be dynamic in nature and not static hence it is necessary to change according to the needs and developments of the society while ensuring that the basic principles are not compromised.

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