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# **PRESUMPTION OF LEGITIMACY OF CHILD UNDER SECTION 112 INDIAN EVIDENCE ACT 1872:**

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## **ABSTRACT**

Section 112 of Indian Evidence Act 1872 states about the conclusive proof regarding the legitimacy of a child during the continuance of a valid marriage. The main problem of this presumption is that it is based on sexual intercourse between a married couple and ignores the other ways of pregnancy like surrogacy, sperm banks, in vitro fertilisations etc as the proviso of the section states about non access of the parties which impliedly terms as there must be sexual intercourse between the husband and wife. One other drawback of the section is that it does not recognise the advanced technology developed by the science like DNA for the testing the paternity of a child as DNA can accurately tell about the legitimacy of a child yet this section precludes this authentic source. As this section was drafted in 1872 and at that time science was not so developed and no concept of DNA was present there but as Law is a living creature so this section should be amend as during the course of time science has been developed at such level that the paternity of a child can be determined accurately .

**Key words :** Presumptions, Legitimacy , Paternity , Conclusive Proof etc.

### **Chapterization:**

1. Introduction
2. Presumptions and its kind
3. Scope and objective of section 112
4. Conflict between DNA and Section 112
5. Conclusion

## Introduction

“It is the paternity which is to be determined as maternity is always ascertained”

The legitimacy of a child is considered as one of the prominent issue in our country. As it leads to the chasity of a woman and the child would also be considered as Bastard if his paternity is unascertained. So the framers of the act make this section a conclusive proof by keeping this issue of paternity in mind . As the act came in 1872 at that time the Science was not so much developed like DNA were not discovered so according to that time the framers made two things as the base of legitimacy First is there should be continuation of a valid marriage and the second is husband and wife should have access to each other they also considered the legitimacy of a child in womb that if any child have born within 280 days from the date of cessation of the marriage such child shall be considered as the legimate child of that couple.

## Presumptions and its kinds

Word presumption is not defined anywhere in Indian Evidence Act 1872 but the honble Supreme court in *Suresh vs Maharashtra (1998 SC)* held that presumption is an inference drawn from other proved facts and A presumption can not be taken from other presumptions. According to *Phipson* (a English jurist) Presumptions are the inferences which a mind naturally and logically draws from the facts without the help of any legal directive.

### Why Presumptions ?

As presumption arises the burden of proof shifts to the accused now it is the duty of the accused to revert that presumptions which leads the court to decide the matter speedly.

This concept of presumption is based on a general principle that “*It is the interest of the state that there should be end to litigation*”

### Does court can take presumption on any matter ?

The answer is no as the court are allowed to take presumptions only on those matters which are given under Indian Evidence Act 1872. The Act allows presumption basically on following matters

1. Specific matters like section 113-A,113-B etc

2. General matters like section 114

**Kinds of presume. presumptions**

Presumptions can be categorized in two parts.

**1. Presumption of fact i.e May Presume**

Section 4 of the Act defines all kinds of presumptions.

It defines **may presume** as – “Court may presume a fact it may either regard such fact as proved unless and until it is disproved or may call for the proof of it”.

Such presumptions are the presumptions of the facts they are drawn from the law but drawn from the reasoning faculty of a human being i.e logic of a person. These presumptions are drawn from the logic that why they are permissive presumptions because court have discretion to allow or not to allow them. While making a presumption under ‘may presume’ court should apply reasoning which any intelligent person should apply. Since these presumptions are based on logics and reasoning the natural justice demands that these presumptions must be rebuttable. If it is rebutted it stand cancel and if it is not rebutted it becomes proved.

**2. Presumptions of law:**

Presumptions of law are arbitrary inferences which the law expressly directs the judge to draw from particular facts, these presumptions are based on consideration of public policy there may or may not be any logic.

These are artificial presumptions because law forces the court to take presumptions of the fact whether or not based on logic. It is bound to presume a fact unless it is rebutted.

Presumptions of law can further be divided into two parts

a) Rebuttable presumption of law which are reflected as Shall presume.

Section 4 defines Shall presume as – Court shall presume a fact. It shall regard such fact as proved unless and until it is disproved .

In this type of presumption if party is not able to rebut the presumption then it graduates to prove .

Section 79 to 85 , 85 A,B,C ,89,113-B,114 A are some examples under Indian Evidence Act of shall presume.

b) Irrebuttable presumption of law which are reflected as Conclusive proof.

Section 4 states conclusive proof as – When one fact is declared as conclusive proof of another, court

shall on proof of one fact regard other as proved and shall not allow evidence for disproving it.

Only three sections i.e 112,113 and 41 of the act are those sections which deals about the conclusive presumption.

In this type of presumption of law no rebuttance is allowed and hence on proof of one fact the other fact is automatically deemed to be proved. This means that no fact is allowed to demolish or disprove such facts.

## Section 112:

Section 112 of the Act states - **Birth during marriage, conclusive proof of legitimacy:** The Fact that any person born

A) During the continuance of a valid marriage between the mother and any man or

B) Within 280 days after its dissolution mother remaining unmarried

Shall be conclusive proof that the child would be the legitimate child of that man.

Proviso- Unless it is shown that the parties to marriage had not any access to each other at the time when child was begotten.

- Now the question arises does valid marriage involves livin relationship?

Honble Supreme Court In **Ranganath P Mali v EG Kurkarmi (1996 Sc)** held that

A) If the livin relationship is for a long period.

B) If people think them husband and wife

C) Have legal validities to marry.

D) Are not married.

Then Section 112 would lie to livin relationship as well.

Next question arises is what does word “access” in proviso means ?

So this access word has been taken in broad sense by apex court In **Bhagwan Baksh singh vs Mahesh Baksh Singh** - Access includes not only sexual intercourse but also opportunity to have sexual intercourse.

And this is now a settled law as well that access does also includes opportunity to access If husband is impotent then it would amount to NO ACCESS But if he is potent and even after adultery of wife and husband have access then presumption of 112 would lie to husband.

## DNA and 112

Deoxyribonucleic Acid (DNA) in 30 to 300 billion population only two person can have the same DNA and population of the world is less then 8 billion so no two person can have same DNA . Still it does not prevails the presumption of section 112 . When section 112 was envisage there were not the concept of DNA at that time DNA is much later addition and it is based on a scientific evidence. So The Supereme Court in *Gautam Kundu v State of West Bengal (1993 sc)* On one hand Held that DNA can not be roving inquiry and DNA should only be ordered where there is an eminent need and also held that DNA is merely a balance of probability and it is merely an opinion evidence (corroborative) So it can not prevail conclusive proof.

However with the course of time DNA can be considered as a flawless way of determining paternity and both High Court whether Delhi High Court in **Kanchan Bedi case** or Madras High court plead that why can not we use DNA as a substantive piece of evidence.

However The Supereme Court take a great care while deciding this issue because one great danger in declaring DNA a conclusive evidence is that it may amount to judicial legislation, it is not job of Supereme court to make laws it is the job of legislation it is the job of legislation courts can only interpret. Probably Supereme court take the step in a landmark case named as **Vasudev Nandlal Badwaik v Lata Nandlal Badwaik (2014 SC)** apex court held that where a scientific advancement is prove by the community then it can prevail over the conclusive proof of section 112. Here this judgement lead to change or contrary to the provisions of the constitution which would lead to judicial legislation so finally in 2019 Supereme Court in **Pattu Rajan v State of Tamil Nadu (2019 Sc)** Refurbished section 112 and held in sense we cannot override 112 as a thumb rule and thus DNA can not regale conclusive proof. However a window is still open that it varies from case to case which appears to be balanced view that DNA can neither totaly be denied nor can prevail over section 112.

## Conclusion

This section under Indian Evidence Act was fine when it was framed as at that time the requirement of society is to secure the legitimacy of a child and protect a woman from being unchaste and also a child from becoming Bastard. But as after 150 years of framing of this section as science has developed the legislation should amend this section as this section is a conclusive proof which leads to the invalidity of the most accurate thing i.e DNA for determination of paternity . As the law is a living creature so it should be keep changing according to the needs of the society because law is for society not the society for the law . According to various cases discuss in this article it can be concluded that prevailing DNA over 112 would not lead to the infringement of Fundamental right under constitution so our legislation should take some step to make this law more useful and in accordance with the demand of current time .

