



EMBRACING THE EMERGING SCIENTIFIC DEVELOPMENTS IN LAW RELATING TO PATERNITY DETERMINATION

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Abstract

The research paper examines the evidentiary law relating to paternity determination under the previous Indian Penal Code, 1860 and the new Bharatiya Nyaya Sanhita, 2023. The research paper examines the changes brought, if any, and examines whether the practical shortcomings are done away with in the light of the judicial pronouncements and orders.

The research paper also discusses in depth the requirement of law to embrace the new scientific developments in paternity determination such as DNA testing and other scientific developments. Society in an everchanging social organism and law must not be stagnant and must inculcate the new social developments.

Key words: DNA Testing, Paternity, Presumption of Legitimacy, Child Born During Valid Marriage.

Methodology and sources

For this research, it is crucial to collect and analyse data from the relevant judicial pronouncements applicable on different set of facts as per each case in such pronouncements. The research work will explore the jurisprudential and constitutional essence of the law relating to paternity. The doctrinal methodology used in this research work will not be restricted to the study of judicial pronouncements rather, it will embrace the commentaries on the relevant area, previous work of researchers on the topic, parliamentary laws, statutes and reports, Legal literature, journals periodicals and newspaper reports will also be made subject matter of appraisal.

The real efficacy of present legal structure pertaining to determination of paternity cannot be deciphered without knowing the opinion of the professionals involved on day-to-day basis applying the words of law into action. These professionals are police officers court staff and most prominently advocates who faces effect of lacunas during trial. Therefore, empirical study is undertaken. Among these professionals, Respondents are selected from various categories of professionals provided above. Questionnaire is the tool to know the responses. Selected respondents are also personally interviewed.

Introduction

From Meluha to India that is Bharat various dharma, vyavahara, smriti, niyama, Nyaya, Vidhi, ordinance, rules and regulations are in force which narrates the societal relations and applies differently to both masculine and feminine gender. The framing and application of these laws/rules can be understood by drawing an analogy to a pendulum which never rests and always proclive towards either one side; majority of the time it inclined towards masculine gender.

In modern India law makers with the tool of codification to curb the inclination to any one side drafted various laws nevertheless society is an unrest organism with perpetual changes which gives rise to lacunas in laws with new challenges.

Presumption of legitimacy

The codified law relating to determination of paternity and legitimacy of child was enshrined under section 112 Indian evidence Act, 1872. The section reads out as:



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.

It is to be noted that s.112 was enacted in the absence of the modern scientific developments relating to DNA testing and natal/pre-natal scientific developments. The jurisprudential essence of s.112 was justice, equity and benefit of the child born and to prevent bastardization of the child. S.112 states the following:

- (a) "Person was born during the continuance of a valid marriage or within two hundred and eighty days."
- (b) "The mother remaining unmarried."
- (c) "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."

The normal gestation period for a human child birth is normally 10 lunar months or 9 calendar months. The reason why 280 days are decided under s.112 and not more or less days such as 281 days or 279 days is that it is a matter of legislative prudence. The words 'mother remaining unmarried' indicates that the child born will be considered legitimate child of the previous husband. The jurisprudential essence in such is that s.112 is made to stop the bastardization of the child even though the mother might have sexual intercourse with another male other than the legitimate father. Another situation is possible that after divorce the mother remarries and now the child is born within 280 days of the dissolution of previous marriage, the interpretation of s.112 makes it clear that the child will be considered legitimate child of the present husband even though the child may not be biological child of the present husband.

By the above discussion under the legislative framework of s.112 evidence Act it is clear that a situation is possible that legitimate father of a child and biological father may be different person moreover, presumption raised under s 112 Indian evidence Act was of conclusive nature and only evidence possible by the alleged father was the evidence of non-access to mother at the time when child might have been begotten which in itself is difficult and vague. Such state of affairs might have been excusable in 1872 without the advent of DNA testing in order to safeguard child rights but, under the constitutional regime where the essential principles of equality justice and individuality is in force no man shall be made to bear responsibility which is not his to bear especially when we have the method of DNA testing which is synonymous to the truth.

The Bharatiya Nyaya Sanhita,2023 (The law herein after referred as "BSA") was enacted and passed in the era of the modern scientific development and law is expected to embrace the new scientific developments. S. 116 BSA reads out as:

Section 116. 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 child 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.

It is explicit from s.116 BSA that it fails to recognize the new scientific developments. The possible explanation for the same can only be that obtaining DNA samples violates the right to privacy however the author argues that in cases of paramount importance such samples shall be taken.



DNA testing and the right of privacy

The jurisprudence relating to the DNA testing and the conflict with the right of privacy and freedom of choice including rule against self-incrimination was discussed by the hon'ble supreme court in the case of **Rajendra v. Kamar Nisha & Others 2025 INSC 1304** in para 28 hon'ble court states that

“(28) This Court has consistently held that DNA testing cannot be ordered as a matter of course and must be subject to stringent safeguards to protect the dignity of individuals and the legitimacy of children born during the wedlock. The power to direct such tests must be exercised with utmost circumspection and only when the interests of justice imperatively demand such an intrusive procedure. Courts must remain vigilant against fishing inquiries masquerading as legitimate requests for scientific evidence, ensuring the sanctity of family relationships is not compromised by speculative or exploratory investigations.”

Hon'ble court under para 31 states:

“31) This Court in the case of Bhabani Prasad Jena vs. Convenor Secretary, Orissa State Commission for Women and Another held thus:

“21. In a matter where paternity of a child is in issue before the Court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the Court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the Court to reach the truth, the Court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the Court as a matter of course or in a routine manner, whenever such a request is made. The Court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the Court to reach the truth without use of such test."

It is evident from the above reference that the hon'ble court ruled in according with the principle of balancing of interest between the stake holders and DNA test in a matter relating to paternity of a child should not be directed by court as a matter of routine and the party shall first show reasonable non-access. It would be prudent to mention there is over emphasize on the age old non-access rule and according to the principles of natural justice and essential constitutional principles of the constitution, in order to do justice to one person injustice to another shall not be done no matter how pious the cause is. Though the courts are imparting justice and applying the just principles on case-to-case basis it is high time that parliament may amend s.116 BSA and give clear legislative provision as to the cases when DNA testing shall be ordered. The presence of such legislative provision becomes paramountly important in the case of determination of legitimacy versus paternity as was decided in **Ivan Rathinam versus Milan Joseph 2025 INSC 115** judgement dated 28 January 2025 the Respondent (child) was born in 2001 to a mother who was married to one Raju. The mother claimed the child was fathered by the Appellant. The Respondent and mother filed a Suit seeking a declaration that the Appellant was the Respondent's father. The Munsif Court directed the Appellant to undergo a DNA test, which was later set aside by the High Court. The Respondent filed a Maintenance Petition under Section 125 of the Criminal Procedure Code (CrPC). The Munsif Court dismissed the Original Suit, and the Family Court closed the Maintenance Petition. The Respondent and Mother filed an Appeal against the Munsif Court's decision but the same was dismissed. Thereafter, a Second Appeal was filed before the High Court but it was also dismissed. In 2015, the Respondent filed an application to revive the Maintenance Petition. The



Family Court revived the said Petition and allowed Raju to be impleaded as a party Respondent. The Appellant challenged this Order before the High Court and the Court held that the legitimacy of birth was irrelevant when considering the right of the child to receive maintenance from their biological father. The Court also held that the Civil Courts lacked jurisdiction to determine the legitimacy of the Respondent. Therefore, the Appellant approached the Apex Court.

The hon'ble apex court recognised theoretical distinction between legitimacy and paternity of the child and it is possible that a situation might arise where legitimate and biological father of a child might be different. The hon'ble court stated that

"In our view, it would be possible and easy to contemplate such a situation arising, which leads us to the postulation that in a more technical sense, the terms 'legitimacy' and 'paternity' may indeed undertake different meanings"

The hon'ble Court in the case was of the view that there exists a presumption that the husband is the father of the child borne by his wife during the subsistence of their marriage and since the presumption is in favour of legitimacy, the burden is cast upon the person who asserts 'illegitimacy' to prove it only through non-access. Here it is arguable that there is over emphasize on the non-access rule. The hon'ble court stated that:

"In our considered opinion, the challenge raised before the High Court that 'paternity' and 'legitimacy' are distinct or independent concepts is a misdirected notion and is liable to be rejected. The High Court's view that 'paternity' can be determined independent of the concurrent findings regarding the legitimacy of the child thus, cannot be sustained."

Conclusion

The benefit of a child is in evitable in any civilised society and law as guardian of the child must ensure the same. In matters of legitimacy the law must prevent the bastardization of child and must make necessary steps in this regard however, in the modern present socio economic constitutional framework justice should prevail however in order to do justice to on injustice to another shall not be done, even though history proves injustice. The ultimate aim of legislative policies in the matters of presumption of legitimacy shall be to stop bastardization of child by determining legal father and the name of biological father thus, there exists differentiation between legitimacy and paternity and the same shall not be discarded rather the requirement is to avail the already existing tool of DNA testing. Moreover, if in order to stop bastardization of child one who is not biological father can be given all rights and liabilities of child including maintenance, the same can be used to order to overreach right of privacy up to a certain extent DNA testing. Therefore, it is high time to have a uniform legislative provision establishing parameters of DNA testing in the matters of presumption of legitimacy and to get rid of over reliance on the rule of non-access.

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