Revisiting the Law on Presumption vis-à-vis Rights of Children: A Case Analysis

Dr. Pratyusha Das*

Introduction

The right to protect genetic material from DNA tests is a recent right of children upheld by the Supreme Court wherein children should not be lost in search of paternity. Family courts are directed that DNA tests should be ordered as a matter of last option between opposing parents.[1] Although determination of paternity is done through application of the DNA test by courts[2] and the reliability and admissibility of DNA evidence has been considered by the Supreme Court[3] in India yet the law of presumption exists. DNA Profiling Technique is not only depended upon by courts has also received legislative recognition,[4] Adversely, where no similarities are found between the DNA profile of the ward and the supposed father, it is presumed that the biological relationship do not exist.[5] The doctrine of presumption is based on a well-known Latin maxim 'pater est quem nuptiae demonstrant' which means 'he is the father whom the marriage indicates to be so'.[6] But

* *Dean and Assistant Professor, Xavier Law School, St. Xavier's University, Kolkata*

[1] THE HINDU, https://www.thehindu.com/news/national/children-have-a-right-to-protect-their-genetic-information-from-dna-tests-sc-judgment/article66537446.ece (last visited Apr. 12, 2023).

[2] Subhash Chandra Singh, DNA Profiling and the Forensic use of DNA Evidence in Criminal Proceedings, 53 JILI 196, 197 (2011).

[3] Kamalanatha v. State of Tamil Nadu, AIR 2005 SC 2132.

[4] Code of Criminal Procedure, 1973, § 53, No.2, Acts of Parliament, 1974.

[5] Madhvika Patidar, Molecular insights of saliva in solving paternity dispute, 7(1) J FORENSIC DENT SCI, 76, 76 (2015).

[6] S. Abdul Khader Kunju, To redefine the maxim "Pater est quem nuptiae demonstrant" LiveLaw.in (Feb 24, 2015, 4:00 PM), https://www.livelaw.in/redefine-maxim-pater-est-quem-nuptiae-demonstrant/?infinitescroll=1.

there has been a controversy between the law of presumption and the admissibility of scientific evidence.[7] The level of disagreement reached to such an extent that many a times it has been planned to omit section 112 from the Indian Evidence Act by amending it. However, it has been presumed that scientifically 'paternity' may be proved by DNA test whereas legally it may be proved through dominance of presumption. Predominance of presumption ruled out the scientific proofs in the past. Presumption was predominant as no knowledge of DNA test or its method was known. Presently, both the rule of presumption and the scientific DNA examination goes hand in hand. But the circumstances are different when either of the two is accepted by the courts. One more assertion can be made DNA test cannot be conducted in derogation to the privacy rights or the fundamental rights or if it leads to bastardization of the offspring rather it must pass through the doctrine of eminent need[8].

The innocent child has no control over his legitimate status as it depended on the marriage of the parents being valid or void which again is contingent on the acts of parents. In such circumstances, the position of the ward would be prejudiced where the person has to suffer permanent setback by being treated as illegitimate and branded with the dogma of being a bastard without any fault of his. Therefore, it could be presumed that the law in India was and is against illegitimacy of children. The presumption of legitimacy also ordained to extend its applications to complications of succession or inheritance. It has been a constant endeavour of the courts to uphold the rights of offsprings of rape victims and also in settling maintenance where every now and then it

[7] PRATYUSHA DAS, FORENSIC EVIDENCE ADMISSIBILITY IN CRIMINAL JUSTICE SYSTEM 54 (Eastern Law House 2019).
[8] Awstika Das, DNA Tests Can Violate Privacy Right, Can't Be Directed As Matter Of Course; Section 112 Evidence Act Protects Children : Supreme Court, LiveLaw.in (Oct 24, 2022, 12:25 PM), https://www.livelaw.in/top-stories/supreme-court-dna-fingerprint-test-children-paternity-right-to-privacy-212400.

becomes incumbent upon judiciary to decide whether to subject the individuals to DNA test or decide basing on presumption. But the complications of the present society confronted with multidimensional problems which are faced by courts frequently made them rely on scientific DNA evidence to implement the administration of justice although they deviated from the reliability mode in instances of need where rights of progenies became utmost important. Applying scientific DNA evidence might not be suitable in all cases. Therefore, the applicability of DNA evidence as relevant or irrelevant changed from case to case. Sometimes scientific evidence might also fetch imperfect results while determining paternity by DNA; an error might result if the probabilities of matches of the blood samples are not known. Moreover, providing samples for DNA evidence not only depends on the decision of courts of law but also on the test subject who provides the sample as it may violate the right of privacy and dignity of the individual concerned, which the law is to forbid. In such cases the law of presumption shall prevail to come to conclusion[9].

In this background the law at California on definite presumption of legality may be discussed[10]. The foundation of section 621 of California's Evidence Code has made the husband liable to back the child born during the subsistence of the marriage and conceived during the cohabitation of the husband and the wife, although the husband might not be the real hereditary father of the child[11]. Although, like Indian Law suggestions were made to

[9] Dr. Pratyusha Das, The Role of DNA Evidence in Determining Paternity in India: A Study of cases from the Legal and Scientific Perspective, 08 PATNA UNIVERSITY JOURNAL OF LAW 73, 73-74 (2017)

[10] Section 621 of California's Evidence Code reads: 'Notwithstanding any other provision of the law, the issue of a wife cohabiting with her husband, who is not impotent is conclusively presumed to be legitimate'

[11] William P. Hoffman, Jr., California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy, 20 STAN L. REV. 754, 754-755 (1968).

abolish the section,[12] California is struggling with the ancient enacted law which is the basis of public policy and is still operational in spite of the modern scientific and social advancements.[13]

Aparna Ajinkya Firodia v. Ajinkya Arun Firodia

In a recent judgement, the Apex Court reiterated that DNA test must not be conducted usually in marital disputes where allegations of infidelity is involved as such DNA test might affect the rights of the descendants adversely including his right to privacy. If any of the parent dispute the fact of paternity, the courts are not obligated to order a DNA test to come to the conclusion of the controversy. In such cases the courts should direct the rivalries to lead evidence to prove the fact of paternity or disprove it.

In the present case, the woman's husband filed a petition for ascertaining the paternity of the second offspring born to her as he alleged that the mother was in an adulterous relationship. The woman objected to such a claim contended by the opponent which was accepted by the highest court. [14]

Reasoning of the Court

Presumptions are assumptions which could contribute to clearness of legal thinking. It also helps in apprehending the rules of evidence. [15] Presumptions

[12] HEINONLINE, https://heinonline.org/HOL/LandingPage?handle=hein.journals/davlr12&div=27&id=&page= (last visited Apr. 13, 2023).
[13] Stephen M. Robertson, California 's Conclusive Presumption of Legitimacy: Jackson v. Jackson and Evidence Code Section 621, 19 HASTINGS LAW JOURNAL 963, 964 (1968).
[14] Kanu Sarda, Supreme Court says cannot order DNA test of child to prove infidelity charge, INDIA TODAY (Feb 21, 2023, 06:44 PM) https://www.indiatoday.in/law/story/supreme-court-says-cannot-order-dna-test-child-prove-infidelity-charge-2337734-2023-02-21.
[15] Raymundo Gama, The Nature and the Place of Presumptions in Law and Legal Argumentation, SPRINGER PROFESSIONAL (Nov. 24, 2016) https://www.springerprofessional.de/the-nature-and-the-place-of-presumptions-in-law-and-legal-argume/11701714.

belong rather to the much larger topic of legal reasoning in its application to particular subjects. About 300 years ago a learned Italian opened his treatise using: “Materia quam aggressuri sutmus valde zutilis est et quotidiana in pratica; sed confusa, inextricabilis fere" which means “the material we are going to attack is very useful and every day in practice but confused, almost inextricable.”[16]

In India the law assumes that parents either beget a child or undertake the lawful responsibilities of parenting by formally adopting a child. Thus, a robust conjecture of paternity and the husband is assumed as the daddy of the child born to his wife. Such presumption can be overruled only by showing non-access of the husband and the wife, otherwise the law contemplates the established fact of the husband’s paternity if the wife and the husband lived together when the child could have been begotten. Thus, the role of presumption is simple, it protects social parentage over biological parentage. On the flip side, a man’s genetic relation with a child may be proved by scientific techniques. This avenue has made the Courts confront husbands in a routine manner who disowns paternity by opting for DNA tests. In this case the court tried to link the fact of paternity with matrimony and saved it from collapsing as it does in every circumstance when the parties are regularly trying to rebut the logic of presumption with the shield of scientific evidence.[17]

The point to be noted in this case is that section 112 of the Evidence Act was discussed in detail. The judiciary has taken excerpts from Sarkar’s Law of Evidence[18] which stated as “in the interest of health, order and peace in

[16] James B. Thayer, Presumptions And The Law Of Evidence, III HARVARD LAW REVIEW 141, 141-142 (1889).
[17] Aparna Ajinkya Firodia v. Ajinkya Arun Firodia 2023 SCC OnLine SC 161.
[18] Sarkar’s Law of Evidence, LexisNexis, 20th edn

society, certain axiomatic presumptions are drawn. One such presumption is the conclusive presumption of paternity under Section 112.[19] The purpose of this legislation is to attach unimpeachable legitimacy to children who take birth out of an existing wedlock."

Access is presumed between parents when an offspring takes birth in a lawful wedlock. Therefore, Section 112 of Indian Evidence Act presumes 'conclusive proof' when a descendant takes birth during the lawful wedlock and in such a situation the presumption is that it is a legitimate child. The second portion of the section is dealing with non-access of the father and mother of the offspring and its proof. Thus, by strong evidence to the contrary the presupposition of legitimacy that the child was born can be rebutted. The underlying principle of the section is to avoid underserved enquiry as to the determination of the father of the child whose parents has 'access between them at the relevant point of time'. The law is on the side of valid marriage and a strong presumption is made on the children born out of such wedlock as legitimate. The presumption in favour of legitimacy could be rebutted by strong, pure and conclusive evidence to the contrary. The section is based on public policy and public morality.[20] Therefore, in adjudications between warring parents DNA test should be the last resort.[21]

Raju Das v. State of West Bengal

Whenever an accused refuses or disallows a paternity test on him an adverse presumption is drawn to counter the accused. In the present case, the suspect

[19] Indian Evidence Act, 1872, § 112, No. 1, Acts of Parliament, 1872 (India).
[20] Sham Lal v. Sanjeev Kumar, (2009) 12 SCC 454.
[21] Krishnadas Rajagopal, Children have a right to protect their genetic information from DNA tests: SC judgment, THE HINDU (Feb. 21, 2023, 09:53 PM), file:///F:/DNA%20Article/Children%20have%20a%20right%20to%20protect%20their%20genetic%20information%20from%20DNA%20tests_%20SC%20judgment%20-%20The%20Hindu.html.

was in a relationship with the victim girl and in the pretext of marriage he had sexual union with the victim which resulted in her pregnancy. The accused then refused to marry her. During the investigation the investigating officer examined the girl and the other witnesses and took initiatives to medically examine the victim and accused. However, the accused did not provide his blood samples to conduct the DNA test so that the paternity of the child could be determined. Finally, the court considering the evidences and situations of the case and respective social position of both the sides directed the accused to undergo substantive sentence already undergone and to pay a fine of Rs. 3,50,000/-, in default, to suffer rigorous imprisonment for two and half years (2.5 years) and the entire amount of fine if realized is directed to be disbursed to the victim girl towards compensation. The court opined that monetary compensation will be of some assistance to the victim girl in the struggle for her life with her minor son. [22]

Ashok Kumar v. Raj Gupta

The case in hand is a declaration suit instituted by the appellant to seek declaration of ownership of certain property left by his parents. The appellant claimed himself to be the son of his parents and brought on record the three daughters of the couple parents on record as defendants. In their written statement, the daughters claim that the plaintiff's/appellant's parents are not same as theirs and thus not entitled to get the parent's property. The defendant daughters contended that the assets belong to them as their deceased mother had executed a Will in their favour. After closure of the plaintiff's evidence in the court below and after the matter was stated for evidence on the other side, the defendant daughters presented an application and sought direction

[22] Raju Das v. State of West Bengal (2012) 4 CHN 308.

from the trial court to conduct a DNA test of the plaintiff's son to establish a genetic link between their parents and the plaintiff.

The plaintiff opposed this application in the context that the defendant's application to conduct the DNA test is a misuse of the procedure of law where the plaintiff from inception has led evidence to prove his legitimacy as child to the duo parents. The prayer for allowing the DNA test of the plaintiff by the defendant's daughters has been dismissed on the basis of the plaintiff's refusal to give his samples for the DNA test and in such circumstances, he cannot be compelled by courts to give such evidence. Being aggrieved by the order the defendants filed a revision petition to the High Court. The High Court ordered in favour of the defendants. Against the said order the plaintiff appealed to the Supreme Court.

Decision of the Supreme Court

The appeal was allowed by the Supreme Court holding that DNA tests must be applied only in worthy cases and not directed in a routine manner. Courts can exercise discretion only after harmonizing the interest of litigants and determining the need for arriving at a fair result and after satisfying the test of 'eminent need'. If other evidence is available to verify the relationship or dispute it, no blood test should be allowed. The reason for not allowing blood tests is because it intrudes upon privacy rights of individuals and has major societal impacts. The law of India favours legitimacy and disfavours bastardity.[23]

The presumption of legitimacy of a child cannot be lightly resisted, rather the fact to be displaced requires robust evidence rather than just equilibrium of

[23] Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Another (2010) 8 SCC. 633

likelihoods.[24] Many children might be exposed to the peril of being illegitimate when the test is based on preponderance of possibility which is a light test compared to its effect. The declaration by the court of law that the husband is not the father of the youngster has a twofold effect. It would lead to a ruinous effect on the child if the original father is not traced, as well as, it will lead to humiliation of the mother in front of the society. The bastardized child will face social abhorrence and can be a prey to errant life. Hence, as a matter of public policy and abundant caution, law should not allow such a thing to happen to an innocent child based on likelihood. Its outcome is thus shifted as a burden on the plaintiff husband on whom a greater standard of proof lies. So, the level of certainty must be such that ensures there were no chances that the child was conceived through the man whose paternity is doubted.

Normally the burden of proof is on the party who contends the affirmative. But in case it is challenged the burden shifts to the opposite party. In this case, it is prudent on the court to resolve the matter by balancing the interest of the parties keeping in mind the social and cultural implications involved and to find out the truth. Even for an adult it would lead to stigmatizing the person as a bastard, leading him to severe embarrassment as he is not be shown as the biological son of the claimed parents, unfortunately intruding in his life to privacy.

In the present case the plaintiff has already adduced his evidence and is not willing to produce any further evidence. Now, the turn to produce evidence should lie on the defendants. In this stage the plaintiff is not expected to furnish further evidence, hence the Supreme Court held it has been correctly rejected by the trial court the application of the Declaratory suit. In the present

[24] Goutam Kundu v. State of West Bengal (1993) 3 SCC 418.

case the plaintiff furnished affidavits, his school leaving certificate and his domicile certificate to substantiate his claim. Surprisingly, one of the respondents/ defendants in her affidavit declared the plaintiff was raised as the son of her parents. Therefore, the court need not order for a DNA examination in the given circumstance.

The other issue to be resolved was regarding whether a contrary assumption can be drawn from the refusal of the plaintiff to subject himself for the DNA test. This ground has no application in the case in question as the plaintiff presented his documentary evidence and did not show inclination to submit further evidence. He consciously did not allow the test to be conducted on him and is firm on his decision. Moreover, the court shall decide on the nature and quality of the materials placed by him on record and not by drawing adverse inference. The court should weigh all the evidence with the attending circumstances and give the verdict. The litigating party cannot insist on producing evidence rather it should place its own evidence for proving the matter and the other party should not be insisted by the court to demonstrate his case as per the will of the contested party.

The evidence brought by the appellant on record sufficiently supports his case. Whether his suit will succeed or fail with the evidence on record depends on the evidence adduced by the other party. If the plaintiff/appellant is unwilling to undergo DNA examination, subjecting him forcefully for the test will infringe his privacy rights and deter his personal liberty. Therefore, the impugned judgement of the High Court to subject him to DNA test was set aside and the trial court's order was restored. The suit was ordered to proceed accordingly[25].

[25] Ashok Kumar v. Raj Gupta (2022) 1 SCC 20.

In a different case the issue was whether a DNA test was incumbent to be conducted for issuing a succession certificate under the Indian Succession Act, 1925. According to the Supreme Court the burden lies on the respective parties to establish their claims on the basis of supportive evidence and here the trial court was wrong to hold that since there is lack of sufficient documents produced by the respondents DNA test is required. [26]

Ramkanya Bai v. Bharat Ram

A solemnization of marriage took place between the couple. But after some time, the respondent husband started harassing the appellant wife and was subjected to cruelty and finally ousted from the matrimonial home. Thereafter, an application for divorce was filed by the respondent husband under section 13 of the Hindu Marriage Act, 1955 which are dismissed by the trial court. Eventually a child was born to the parties. Being unhappy with the decision of the court below, the respondent husband filed an appeal to the High Court of Madhya Pradesh, In the said appeal an application was made for the DNA test of the child born as the husband contended the child was not born out of the marital relationship between them. The appellant wife objected to the application and brought forth that the husband did not deny the fatherhood of the baby. The High Court, believing that the family can be reunited, allowed the conduction of the DNA test against which this special leave petition was instituted by the respondent wife. The Supreme Court granted the leave and did not accept the impugned decision of the High Court putting forth that except the husband who raised a prestige issue about the paternity of the child no other relevant reason was found for the Court's order to conduct the DNA examination.

[26] Shri Banarsi Dass v. Mrs. Teeku Dutta and Another 2005(3) CTC 227 (SC).

While going through the application for granting DNA test the Supreme Court found previously the respondent husband did not take up the allegation regarding illicit association of the spouse with some third party out of which the child was born. Even in the trial court when the Divorce petition was pending no allegation or prayer for the DNA test was made and also the plaint was silent on it. Therefore, it was improper to order the DNA test of the child at the appellate stage by the High Court.

The Supreme Court was also of the view that presumption of legitimacy is a presumption of law. When a baby takes birth from a wedlock there is a presumption of legitimacy. In such cases it is presumed that the parties had access to each other. It has also been observed that the paternity of the child cannot be disputed at the mere will of the husband in the final stage when the High Court itself has observed that the child was begotten from the respondent husband. On the aforesaid ground the impugned decision of the High Court was set aside and the application for conducting the DNA test was rejected. The appeal was allowed with a request to dispose of the pending appeal within six months from the date of supply of the order made by the Supreme Court. [27]

Inayath Ali & Anr. v. State of Telengana & Anr

This appeal has arisen when the complainant wife lodged a First Information Report due to harassment for dowry against her spouse and against his brother under sections 498A, 323 and 354 of Indian Penal Code, 1860. The appeal of the accused husband was permitted by the Division Bench of the Supreme Court and it was considered that the trial court was mechanical in accepting the application while directing the appellant and the children to provide a

[27] Ramkanya Bai v. Bharat Ram (2010) 1 SCC 85.

sample of blood for conducting DNA test. The High Court also allowed the DNA examination to fix the paternity on the allegations of the wife that her cohabitation and development of relationship with the brother-in-law was forced. The Supreme Court disallowed the DNA test based on two grounds. Firstly, in the preceding the children were not parties nor examination of their status were required for the complaint. The Court detected the doubts in their legitimacy status and that they are children of legally wedded parents and direction to conduct their DNA test would expose them to inheritance related problems. Regarding this Sec 112 of the Indian Evidence Act acts as a shield to protect children from allegations of this type. Secondly, the paternity of children was not an issue; rather the question in this case was whether the offences had been committed where the determination of paternity was collateral to the allegations.

The Court observed that the court below and the revisional court entirely disregarded the fact of the children's welfare and treated them like commodities and sent them for forensic analysis.[28]

Dwarika Prasad Satpathy v. Bidyut Prava Satpathy

The Apex Court observed that summary proceedings under section 125 of CrPC does not determine the validity of marriage neither it determines the rights and obligations of the parties. The section is intended at averting hunger and homelessness which leads to commission of offences and the facts under the section is to be found based on the evidence brought on record by the parties.[29] So, the standard of proof in proceedings under section 125 is not strict as the trial of offence of bigamy[30]. The claimant in the proceeding can

[28] Inayath Ali & Anr. v. State of Telengana & Anr 2022 LiveLaw (SC) 869.
[29] K.N. CHANDRASEKHARAN PILLAI, R.V. KELKAR'S LECTURES ON CRIMINAL PROCEDURE 393 (EBC 2019).
[30] Indian Penal Code, 1860, § 494, No. 45, Acts of Parliament, 1860 (India).

show that she and the respondent have lived together as wife and husband which would make the court presume that they are legally wedded spouses. In case the husband denies the marital status, he can rebut the presumption by placing relevant evidence.

In this decided matter the appellant claimed before the learned court that he married under duress and at the point of a knife and exchanged garlands. But he could not prove the contention by leading necessary evidence. The court viewed that once the fact of the wedding is admitted and its procedure is followed there is no necessity to prove whether Hindu rites were followed or not. An order under section 125 does not finally determine the rights and obligations of the party. It only provides a summary remedy for providing maintenance to wife, children and parents. The section is to be used to confer rights as per the mandate of the legislature to destitute women, children and parents and not to defeat their rights and protect them from social insecurities.

Here, when the appellant contended that he is also not the father of the kid and thereafter when the learned counsel for the appellant stated that he is not ready to undergo a DNA test for determining the father of the child the court ordered that the suspected father is not entitled to the dispute same when it was recorded.[31]

Observations and Conclusion

Section 112 of the Indian Evidence Act was enacted many years back when the contemporary technical developments like the DNA test were not in existence and were even not in contemplation of the legislature. However, the interesting part is that it is still in vogue keeping aside the advancements in science and technology like DNA fingerprinting. Even the accuracy of a

[31] Dwarika Prasad Satpathy v. Bidyut Prava Satpathy (1997) 7 SCC 675.

genuine DNA test is not adequate to discharge the definiteness of the relevant section. It means that if the couple has cohabited during the time when the baby was conceived and the scientific DNA test revealed that the husband is not the father of the child, still the inevitability of law will persist irrebuttable.[32] The principle underlying the conclusiveness of section 112 is that apparently from the viewpoint of the husband, he might be bound to accept the parenthood of a kid who might not be his child at all but in such case the innocent child would be protected from being bastardized taking into consideration that both the parents have lived together during the period of conception. .[33]

Social scientists are now also planning to introduce presumption of legitimacy among same sex couple. This is still a difficult matter as there are practical issues involved. In case of female partners, it is possible to become mothers but for gay male couples the child can be borne only by a female who gestates the pregnancy which will require recognizing three legal parents for the child. There are problems in these circumstances which need to be further analysed before incorporating into the existing legal framework. Before the matter could be placed into practice "public consensus" needs to be developed where people would examine the situations from different viewpoints and would be aware of the process of determination of parentage for children born of assisted reproductive technologies. However, States should take active roles and intervene to support such matters. Ultimately, the presumption of legitimacy in same sex couples will depend on the value accorded to gender neutrality, the functional analysis and the role given to it and the scope left

[32] Kamti Devi (Smt) and Another v. Poshi Ram 2001 (2) CTC 625 (SC).
[33] Babita Devi @ Babali and Others v. The State of Jharkhand (25.04.2011 -JHRHC) MANU/JH/0479/2011.

for officially privileged relationship in contemporary family law.[34] The need of the hour would be to implement marriage equality and then to apply the presumption rule to ensure that all parents are recognized irrespective of their gender diversities and families are preserved.[35]

In foreign jurisdictions even the husband has a right to prevent his wife from rebutting the fact of presumption that he is the natural father of the child born during their wedlock. Although in most of the jurisdiction presumption of legitimacy is rebuttable but statutes in some jurisdiction still impose limitations on the wife's ability to dispute the paternity of the child whereas other courts may impose evidentiary limitations on her testimony.[36] Thus from the entire study it may be derived that presumption of legitimacy is a rule of substantive law and not a rule of evidence.[37]

[34] Susan Frelich Appleton, Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era, 86 B.U.L.Rev. 1, 2-4 (2006).
[35] Angela Ruffini, Who's Your Daddy? The Marital Presumption of Legitimacy in the Modern World and its Application to Same-Sex Couples, 55 FAMILY COURT REVIEW 307, 307 (2017).
[36] BJ Runner, Protecting a Husband's Parental Rights When His Wife Disputes the Presumption of Legitimacy, 28 J. FAM. L. 115, 115 (1989).
[37] William P. Hoffman, Jr., supra note 11, at 754