

Doctrine of Conclusiveness & Concept of Burden Of Proof- Its Scope and Application in India

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INTRODUCTION:

Indian legal system is based upon the adversarial system of courts where the judges act as neutral umpire and decide the issue by applying the law to the facts. Proviso 1 to section 165 Indian evidence act 1872 provides that, the judgement must be based upon facts declared by this act to be relevant and duly proved¹. Therefore, the facts upon which a judgement has to be based, must be relevant and duly proved. Relevancy is governed under section 6 to 55 of the act. Phrase “duly proved” means that a fact must be proved to the satisfaction of the court which involves three aspects, first who shall prove a fact, second what shall be the standard of proof and the last how to prove a fact. The standard of proof depends upon the nature of proceedings i.e. whether it is a civil or criminal proceeding. The most crucial question before us is who shall prove a fact or in legal terminology who shall have the burden of proof. In any case civil or criminal case there must be a rule as to who must prove what. A rule of evidence that imposes on a participant in a court case the initial obligation to prove a certain thing or the contrary will be assumed by the court. Generally, whoever approach to court must prove his allegation in order to establish liability. Under law of evidence a party who must prove something in order to establish or escape liability is said to have burden of proof. Burden of proof is based on *ie incumbit probation qui dicit, non qui negat* means burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it.¹

The term “burden of proof” is of two kinds: The burden of production (or the burden of “going forward with the evidence”) and the burden of persuasion.

A “burden of persuasion” or “risk of non persuasion” is an obligation that remains on a single party for the duration of the court proceeding. Once the burden has been entirely discharged to the satisfaction of the trier of the fact, the party carrying the burden will succeed in its claim. For example, the presumption of innocence in a criminal case places a legal burden upon the

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¹ Vepa P.sarathi, “*Law of Evidence*”, Eastern Book Company, 7th ed., 2017.

prosecution to prove all elements of the offense beyond a reasonable doubt and to disprove all the defences.

The burden of persuasion should not be confused with the evidential burden or burden of production, or duty of producing evidence which is an obligation that may shift between parties over the course of the trial. The evidential burden is the burden to adduce sufficient evidence before the court of law to prove or disprove certain facts alleged by opponent.²

The burden of proof is always on the person who comes before the court and claim certain rights on the basis of existence of alleged facts. It is often associated with the Latin maxism, *semper necessitas probandi incumbit ei qui agit*, means the necessity of proof always lies with the person who lay charges. In a particular case where presumption arises that shift the burden of proof from one party to the opposing party in a court trial.³ The word 'Presumptions' is used to designate an inference affirmative or negative of the existence of some facts, drawn by court 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 court.

In this research paper emphasises on the presumption of legitimacy of child and critically analyse the only way as provided under section 112 to rebut such presumption.

BIRTH DURING MARRIAGE, CONCLUSIVE PROOF OF LEGITIMACY (SECTION 112)

Under section 112 of Indian evidence act, a child born during continuance of valid marriage between mother and a man or within 280 days of dissolution of marriage, if mother remains unmarried it shall be presumed that the child is legitimate offspring of that man. Presumptions arises under this section is conclusive in nature which can be displaced only by proof of particular fact mentioned in section i.e. non access of parties of marriage with each other at a time when according to ordinary course of nature the husband could have been the father of the child. It is the principle of law that "*Odiosa et inhonesta non sunt in lege prae sumenda*" which means nothing odious or dishonourable will be presumed by law. The law leans in favour of validity of marriage and presumption in favour of legitimacy of children. A child born during

² Richard Glover and Peter Murphy, "*Murphy on Evidence*" OUP Oxford Publication, 13 ed., 2013.

³ M. C. and S. C. Sarkar's "*Law of Evidence in India and Burma*", Lexis Nexis India 17th ed., 2010

lawful wedlock is sufficient to establish its legitimacy, presumption arises in favour of child that shifts the burden of proof to opponent who seeks to establish the contrary.

Section 112 of India Evidence Act- 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.⁴

Legislative intention behind section 112, once the validity of marriage is proved then there is a strong presumption about the legitimacy of children born from that wedlock unless it is proved by strong and clear evidences that the husband and wife did not have any access at any time when the child could have been begotten. The presumption can only be rebutted by a very strong and clear proof of non-access. In a civilised society it is undesirable to enquire into the paternity of the child whose parents have access to each other. Section 112 is based on the well-known maxim *pater est quem nuptiae indicunt* means he is the father whom the marriage indicates.

Presumption under this section arises if following conditions are satisfied:

1. That the child should have been born during the continuance of a valid marriage or if the marriage was dissolved within 280 days after its dissolution, the mother remains unmarried.
2. The parties to the marriage should have had access at any time when the child could have been begotten.⁵

The principle upon which this presumption is based is that law doesn't want the legitimacy of new born child under any shadow of doubt or uncertainty. The word "access and nonaccess" connotes only the existence or non-existence of opportunity for marital intercourse, it doesn't mean actual cohabitation⁶.

⁴ Ratanlal and Dhirajlal, "Law of Evidence" Lexis Nexis India, 20th Ed. 2017.

⁵ Singh, "Principle of law of Evidence", Central Law Publications, 20th ed. 2016

⁶ *Kamti Devi vs. Poshi Ram* AIR 2001 SC 2226

The legislative intent behind this provision seeks to establish that any child born during lawful wedlock must be legitimate. The law doesn't presume immortality unless conclusive proof can be produced for the same. Section 112 based on presumption of morality and public policy.

PRESUMPTION OF LEGITIMACY AND NOT PATERNITY

It is possible to hold that section 112 deals with presumption of legitimacy and not paternity. In all cases legitimacy need not include concept of paternity that refers to biological parentage. In the interest of welfare of child it is perfectly permissible to burden a non-biological father with obligation arising from legitimacy of a child born during his valid matrimony with the mother of the child. It is not necessary to include within the presumption of legitimacy, the presumption of paternity invariably in all cases.⁷

LOOPHOLES IN SECTION 112

Section 112 talks about legitimacy of child, not paternity of child. This section establishes that if a child is born during lawful wedlock between his mother and a man, child belongs to that man, means that person is legitimate father of child and it is conclusive proof unless non-access between parties can be shown at relevant time. The only exception to rebut presumption of legitimacy is non-access between the parties. So, if in a case parties have access to each other, and dispute arises regarding paternity. For example, in case of adultery, due to standard of conclusive proof, party disputing paternity will find himself without any remedy, even though he does not have any biological relation with that child, law unjustly compelled him to support the child.

WHETHER DNA TESTING CAN REBUT PRESUMPTION OF LEGITIMACY UNDER SECTION 112:

The Indian Evidence Act was enacted at a time when the modern scientific advancement with DNA as well as RNA test was not even in contemplation of the legislature. The result of genuine

⁷ *Rajesh Francis vs. Preethi Roslin*, 2012 AIR CC 2262

DNA test is said to be scientifically accurate but even that it is not enough to escape from the conclusiveness of the section 112 of the act. E.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain un rebuttable. However, it may look hard from the point of view of the husband who is not the biological father of the child but still he would be compelled to bear he fatherhood of the child. But even such a case the law leans in favour of innocent child from being bastardized. Hence the only way to rebut the conclusiveness under section 112 is to prove non-access between the parties by a strong, clear and conclusive evidence.

PRESENT LEGAL SCENARIO

The Supreme Court of India laid down various judgements while discussing the issue regarding the admissibility of modern scientific inventions such as Blood test, DNA test, RNA test to rebut the conclusiveness of legitimacy.

In *Goutam Kundu vs. State of West Bengal*,⁸ wherein this court held:

1. That the courts in India cannot order blood test as matter of course;
2. Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
3. There must be a strong prima-facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act.
4. The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
5. No one can be compelled to give sample of blood for analysis.

In *Sham Lal vs. Sanjeev Kumar and others*,⁹ wherein it was held that:

Once the validity of marriage is proved then there is strong presumption about the legitimacy of children born from that wedlock. The presumption can only be rebutted by a strong, clear, satisfying and conclusive evidence. The presumption can't be displayed by mere balance of probabilities or any circumstance creating doubt. Even the evidence of

⁸ AIR 1993 SC 2295

⁹ AIR 2009 SCC 454

adultery by wife which though amounts to very strong evidence, it, itself, is not quite enough to repel this presumption and will not justify finding of illegitimacy if husband has had access.

In *Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another*,¹⁰ SC observed that even if it is clear on the basis of DNA test that the appellant is not the biological father of the girl child, however at the same time presumption of legitimacy has been established and no finding with regard to plea of husband that he had no access to his wife at the time when the child could be begotten has been recorded. Therefore, it is conclusively prove under section 112 that the appellant is the father of girl child. The result of DNA test is scientifically accurate but even that is not enough to escape from the conclusiveness of section 112 of Indian Evidence Act. The dilemma of the Court is that accepting DNA as evidence of legitimacy is likely to render many children illegitimate and many women unchaste. This is quite unfair for the husbands, and the court appears to be saying to them that: “It is your child, unless you can prove beyond reasonable doubt that it is not!” This is certainly not the solution to the problem.

CONCLUSION

The reasoning behind the conclusiveness of legitimacy is no doubt to confer legitimate title on the children born during lawful wedlock and to protect women’s chastity. In the present scenario, the husband has the only option of rebutting on the issue of ‘non access’ to his wife otherwise the legitimacy of the child is deemed certain. This can be proved either by showing that he was away in some other city or at a distance from which he could have had no possible opportunity of having sexual intercourse with the mother or by proving that he was impotent at all times at which the child could have been conceived. If the husband fails to prove any of these, he shall be deemed to be the father of the child born even if he can prove that someone else is the biological father of the child born, even with infallible scientific evidence.

It’s high time to reconsider section 112 of Indian Evidence Act .the law commission of India in its 185th report made suggestions for the amendment of section 112 of the act in the Indian evidence (amendment)bill2003.it proposes to enlarge the scope of exceptions to section 112 to include medical and scientific inventions such as RNA test, DNA test ,blood test etc. which

¹⁰ AIR 2014 SCC 576

can conclusively prove paternity and also lay down certain procedures to ensure that these tests are conducted in safe and secure manner. Unfortunately, this bill has not yet been passed. It is the need of the hour to make suitable amendments as early as possible. As Roscoe Pound put is:

“Law must be stable. But not stand still.”