Subject Name: Evidence Act
Topic Name: Presumption as to Legitimacy

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Introduction

Section 112 of the Indian Evidence Act embodies the fundamental notion that once a specific relationship, such as marriage, is established, its persistence is to be assumed unless proven otherwise.

According to this section, if a person is born:

(a) during the existence of a lawful marriage between their mother and any man, or

(b) within 280 days after the dissolution of such marriage, with the mother remaining unmarried,
it is conclusively presumed that the person is the legitimate offspring of that man, unless it can be shown that the parties had no opportunity for intimate relations during the period when conception could have occurred.

The mere fact of a child being born within wedlock is deemed sufficient evidence of their legitimacy, thereby placing the burden of proof on any party attempting to challenge this presumption.

In line with the legislative intent and spirit behind Section 112, once the validity of a marriage is established, there arises a strong presumption regarding the legitimacy of children born within that marital union. This presumption can only be rebutted by compelling, unambiguous, and conclusive evidence; mere doubts or probabilities are insufficient.

It is a firmly established legal principle that the law does not presume anything odious or dishonourable; rather, it leans against vice and immorality. In a civilised society, it is deemed essential to presume the legitimacy of a child born during a valid marriage where the parents had

access to each other. Delving into the paternity of a child born under such circumstances is considered undesirable.

Section 112 operates on the presumption of public morality and public policy, reflecting the societal imperative to uphold the sanctity of marriage and family.

The presumption outlined in this section represents a conclusive presumption in law, capable of being overturned solely by evidence demonstrating non-access between the spouses at a time when, according to natural circumstances, the husband could have fathered the child. Access and non-access refer to the presence or absence of opportunities for marital relations.

Non-access can be established through direct or circumstantial evidence, though such proof must be unequivocal and convincing, given the strong favour the law affords to the presumption of legitimacy.

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During the continuance of a valid marriage

The presumption of paternity outlined in this section pertains exclusively to the offspring of a married couple. It specifically addresses the legitimacy of children born within the confines of matrimony.

Upon the birth of a child during marriage, the presumption of legitimacy is deemed conclusive, regardless of the interval between the marriage and the birth.

Furthermore, the law presumes the validity of a marriage when a couple cohabitates as husband and wife continuously for an extended period. Sons born to them from such a union are recognized as legal heirs to the husband's property.

It's noteworthy that even children born prematurely, with a gestation period as short as six months, have been known to survive and thrive. In cases where a child is born eight months after the marriage, there exists little doubt regarding the child's paternity.

For someone asserting themselves as an illegitimate child, the burden lies upon them to establish their alleged paternity through the same means as any other disputed question of lineage.

The presumption that children born to a married woman during her husband's lifetime are legitimate offspring is not an absolute proof of legitimacy. This presumption can be effectively rebutted if the woman lived openly with another individual for an extended period, and both parties claimed the children as their own.

It is the responsibility of the individual claiming legitimacy as the offspring of their parents to present compelling evidence supporting their parents' marriage.

Even in cases where documentary evidence is sufficient to infer marriage between a person's mother and their alleged father, the lack of examination of independent witnesses does not necessarily undermine this presumption.

Paternity of Child and Blood Test

Determining the paternity of a child through blood tests is governed by Section 112, which mandates that the party contesting paternity must demonstrate non-access to rebut the presumption.

"Access" and "non-access" refer to the availability or lack thereof of opportunities for intimate contact, not necessarily actual cohabitation. Section 112 establishes a rebuttable presumption that a child born within a lawful marriage is legitimate and that access between the parents occurred. This presumption can only be overcome by substantial evidence, not merely by a balance of probabilities.

Therefore, the guidelines regarding the permissibility of blood tests to establish paternity are as follows:

1. Courts in India cannot routinely order blood tests.

2. Applications seeking blood tests for the purpose of speculative investigation are not entertained.

3. There must be a strong prima facie case, with the husband demonstrating non-access to dispel the presumption under Section 112.

4. The court must carefully consider the implications of ordering a blood test, including the potential stigmatisation of the child and mother.

5. No one can be compelled to undergo a blood test.

The use of DNA testing is a delicate matter, balancing an individual's right to privacy against the court's duty to ascertain the truth. Courts should exercise discretion and order DNA tests only when absolutely necessary, considering factors such as the presumption under Section 112 and whether the truth can be established without resorting to DNA testing.

Even the results of a valid DNA test may not override the conclusive presumption under Section 112, particularly in cases where the husband and wife were together during the conception period. Therefore, courts must carefully weigh the interests of all parties involved and consider whether DNA testing is truly necessary for a just decision.

Consequently, directing a DNA test should not be done mechanically. In a maintenance case, a request for a DNA test made eight years after the child's birth, without adequate explanation for the delay, was denied by the court. Similarly, if a wife is unable to undergo the test due to financial constraints, no adverse presumption should be made against her. Moreover, if access between the parties is acknowledged and the delivery was normal, the presumption under Section 112 remains intact.

280 Days

The provision "within two hundred and eighty days after its dissolution, the mother remaining unmarried" does not impose a maximum period of gestation. Consequently, it does not preclude the establishment of a child's legitimacy born more than 280 days after the dissolution of marriage. The section simply means that no presumption of legitimacy arises, and the determination of legitimacy hinges solely on the evidence presented for and against it.

Furthermore, a person born within 280 days after the death of their father is presumed to be their legitimate son.

In cases where an individual claims legitimacy under this section as the son of a deceased person, they must demonstrate that they were born within 280 days after the death of their father.

Meaning of Access

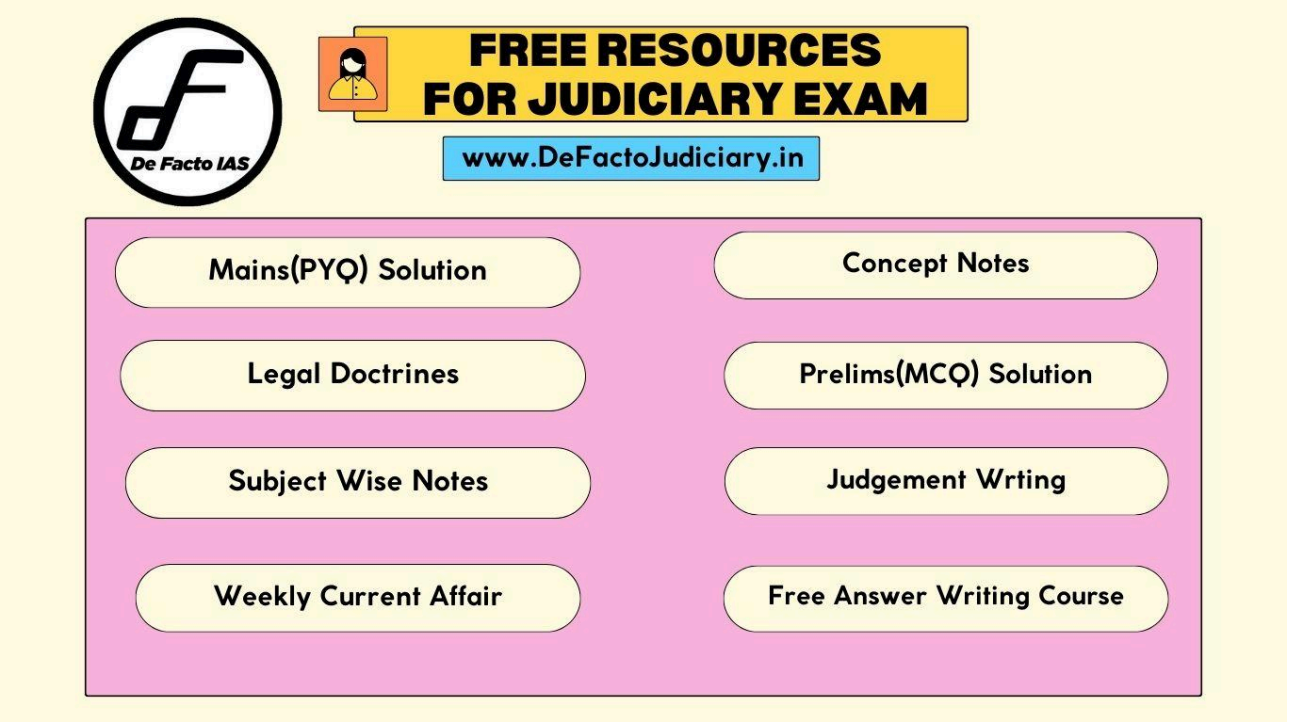
In the case of **Kamti Devi v. Poshi Ram**, the Supreme Court examined the interpretation of the term "access." Justice Thomas noted that there was prior debate over whether "access" referred to actual sexual intercourse between spouses. However, the controversy was settled by the Privy Council in Karapaya Servai v. Mayandi, where it was established that "access" merely signifies the opportunity for marital intercourse. This legal principle was affirmed by the Supreme Court in **Chilukuri Venkateswarlu v. Chilukuri Venkata Narayana,** indicating that the law had been correctly interpreted.

Section 112 of the Evidence Act establishes a presumption of legitimacy for a child, which can only be rebutted by substantial evidence, not just a mere likelihood. The law prioritises protecting innocent children from being stigmatised. In cases where non-access between spouses during the relevant period is not even alleged, the Supreme Court held that this matter was not properly examined by the High Court. The settled legal position indicates that proof of non-access between spouses is the only way to challenge this presumption.

It's crucial to note that this section's principle does not extend to cases involving a paramour. The presumption can be overturned if the child's mother is not a wife but a mistress. In such instances,

the mistress can demonstrate that the real father of the child born during her concubinage is different from her paramour.

Moreover, a married woman cannot claim maintenance for her child from someone other than her husband if there is no divorce or evidence of lack of access to the husband.



Standard of Proof

The Supreme Court has emphasised the standard of proof in such cases, asserting that it should lie between the thresholds of ensuring the impossibility of the child being conceived through the plaintiff's husband. In **Gautam Kundu v. State of West Bengal,** the Court, after considering the precedent set by an earlier three-judge bench decision in **Dukhtar Jahan v. Mohammed Farooq**, ruled that this presumption can only be overcome by a strong preponderance of evidence, not merely by a balance of probabilities.

In a specific case where a husband sought dissolution of marriage on the grounds that his wife left him after eight days of marriage, alleging her involvement in an extramarital affair and bearing another man's child, the court found that he failed to prove that the marriage was not consummated and that his wife only stayed with him for eight days. The presumption of marriage could have been dispelled by evidence of non-access, which the husband could not provide. Therefore, the dismissal of the dissolution petition was deemed appropriate.

In instances where non-access was neither pleaded nor proven, it was determined that even a negative DNA test report could not refute the presumption. The wife's refusal to undergo a DNA test was not considered sufficient to sway the decision against her.

Furthermore, the court noted that applying the criminal law standard of proof beyond reasonable doubt would pose the risk of rendering many children homeless. Therefore, a different standard of

proof, falling between the extremes, is deemed necessary in such cases to ensure justice without unduly jeopardising the welfare of children.

Landmark Decisions on Section 112 of Indian Evidence Act

Goutam Kundu v. State of West Bengal

In Goutam Kundu v. State of West Bengal, the Supreme Court delineated guidelines regarding the ordering of blood tests in paternity cases. It emphasised that courts in India cannot routinely order blood tests and should only do so when there is a strong prima facie case, particularly when the husband establishes non-access to dispel the presumption under Section 112 of the Evidence Act. The court must carefully consider the consequences of ordering a blood test, including potential stigmatisation, and no one can be compelled to provide a blood sample.

Sharda v. Dharampal

In Sharda v. Dharampal, the Court clarified that Goutam Kundu does not categorically prohibit the ordering of blood tests under all circumstances. It affirmed that matrimonial courts have the authority to order such tests without violating the right to privacy under Article 21 of the Indian Constitution. The court should exercise this power judiciously, considering the strength of the applicant's case and the availability of sufficient material. Refusal to comply with a court-ordered medical examination may result in adverse inferences.

Banarsi Dass v. Tiku Dutta

In Banarsi Dass v. Tiku Dutta, the Supreme Court emphasised that DNA tests should not be ordered routinely but only in deserving cases. The court must carefully balance the right to privacy against the duty to ascertain the truth, considering factors such as the presumption under Section 112 of the Evidence Act and the necessity of the test for a just decision.

Bhabani Prasad Jena vs Convent.Sec

Bhabani Prasad Jena vs Convent.Sec., Orissa State Commission of Women and another reiterated the cautious approach to ordering DNA tests, highlighting the need for careful consideration of the parties' interests and the potential impact on privacy rights. The court emphasised that DNA tests should not be ordered routinely but only when deemed eminently necessary for reaching the truth.

Nandlal Wasudeo Badwaik vs Lata Nandlal Badwaik & Anr

In Nandlal Wasudeo Badwaik vs Lata Nandlal Badwaik & Anr, the Supreme Court addressed the prevalence of DNA test results over the presumption of conclusive proof under Section 112 of the Evidence Act. It highlighted that when there is evidence to the contrary, the presumption is rebuttable and must yield to proof. The court emphasised the importance of ascertaining the truth and prioritising scientific evidence over presumptions, particularly when there is a conflict between the two.

Aparna Ajinkya Firodia vs Ajinkya Arun Firodia

In the recent case of Aparna Ajinkya Firodia vs Ajinkya Arun Firodia, the Supreme Court of India delivered a landmark judgement delineating the principles governing the ordering of DNA tests in matrimonial disputes, particularly concerning children born during the subsistence of a valid marriage. The bench comprising Justices V Ramasubramanian and B V Nagarathna provided a comprehensive analysis, emphasising the protection of children's rights and the preservation of their privacy.

The court articulated that DNA tests of minor children should not be routinely ordered in matrimonial disputes. Such tests should be directed only when there is compelling prima facie evidence to challenge the presumption of legitimacy under Section 112 of the Evidence Act. Moreover, if no plea regarding non-access is raised to rebut the presumption under Section 112, the court may refrain from ordering a DNA test.

The judgement highlighted that the court should not mechanically order a DNA test when the paternity of a child is not directly in issue but is merely collateral to the proceedings. Instead, parties should be directed to present evidence to establish or disprove paternity. DNA tests should be reserved for exceptional cases where they are indispensable to resolve the controversy.

The court highlighted the adverse psychological impact on children if their legitimacy is questioned frivolously. It stressed that children should not be subjected to forensic testing unnecessarily, especially when they are not parties to the divorce proceedings. Protecting children from undue stress and maintaining their dignity were deemed paramount.

Moreover, the judgement addressed the complex issue of children born outside a valid marriage, emphasising the need to safeguard their rights and preserve the presumption of legitimacy under Section 112 of the Evidence Act. The court cautioned against the indiscriminate ordering of DNA tests, considering their potential to cause confusion and harm to children's well-being.

Furthermore, the court cautioned against drawing adverse inferences when a parent refuses to subject a child to a DNA test. It emphasised the necessity of exercising discretion and directing DNA tests only in exceptional cases where they are indispensable to resolving the controversy.