INTRODUCTION

Section 112 of the Indian Evidence Act, 1872 (hereinafter ‘the Act’) prescribes conclusive proof of legitimacy to a child born during wedlock and disallows any evidence to rebut the same, except that which proves non-access. In this paper, it is argued that non-access, as an exception has become an ineffective way of arriving at the truth of one’s legitimacy and thus arises the need for a suitable amendment to the Section. The paper has been divided into two parts. The first deals with the Section in its present form and will attempt to show how the exception of non-access has become is futile for the father in recent times. In light of this, the second section discusses the possibility an amendment to allow the use of DNA evidence to rebut the presumption.

SECTION 112: AN ANALYSIS

Under Section 112, a conclusive presumption (as defined under Section 4\(^2\)) of legitimacy is raised once a child is born during the continuance of a valid marriage or within two hundred and eighty days after its dissolution.\(^3\) A conjoint reading of the two Sections shows that birth during the continuance of a valid marriage is proved, this will act as conclusive proof of another fact, i.e. the child’s legitimacy, subject to the exception of non-access.\(^4\)

The Section is based on the maxim *pater est quem nuptiae demonstrant* meaning ‘he is the father whom the marriage indicates’, its traditional explanation is traced back to a time when

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\(^1\) 3rd Year, B.A., LL.B. (Hons.) student at the National Law School of India University, Bangalore

\(^2\) §4, Indian Evidence Act, 1872 defines conclusive proof as follows- “When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.”

\(^3\) §112, Indian Evidence Act, 1872, is as follows- “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.”

\(^4\) Even as a fundamental principle of Common Law, the presumption was strong and could only be rebutted if impotency was proved or if at the time of conception, the husband was beyond the four seas of England. *See Evidence: Presumption of Legitimacy*, 18(2) MICHIGAN LAW REVIEW 146, 147 (1919).
marriage acted as proof in determining who could be an heir.\(^5\) Under Common Law, a *filius nullius* was both denied a name (unless he could acquire one by reputation) and barred from inheriting property. The harshness of Common Law, the social stigma attached to illegitimacy and the loss of legal rights lead to the strengthening of such a presumption by legislation.\(^6\) Indian courts have taken the basis for such a presumption to be the notion that when a child’s parents have or had a subsisting marital status and access to one another, it is undesirable to look into the paternity of the child.\(^7\) The Supreme Court in *Banarsi Dass*\(^8\) held that the law specifically presumes both that the marriage is valid and that child is legitimate and generally presumes “against vice and immorality”.

The terms access and non-access currently mean either the existence or the non-existence of an *opportunity* for sexual intercourse between spouses at any time when the husband could have fathered the child as per the ordinary course of nature.\(^9\) In Stephens’ Digest, he emphasised that the physical condition of the husband can also be considered to prove of non-access.\(^10\) This is because the term access is taken to mean effective access, and excludes cases of impotency, lack of virility or physical incapability of any kind.\(^11\) Then as per Section 112, any such case of physical incompetency will be equivalent to non-access at any time when a child could have been conceived. The Section requires a high standard of proof and the presumption can only be displaced only once strong preponderance of evidence shows non-access.\(^12\) So evidence showing non-access must be strong, distinct, satisfactory and conclusive.\(^13\) And like any other physical fact, non-access can be proved either by direct or circumstantial evidence.\(^14\)

Often, because of the standard of proof of non-access being so high, the husband is put in an adverse position. There have been instances where the presumption stood because the effectiveness (when no reliable evidence could be given to prove the same) of vasectomy was

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\(^5\) Joseph Cullen Ayer, *Marriage and Legitimacy*, 16(1) HARVARD LAW REVIEW 22, 23 (1902).


\(^12\) Bharatha Matha v. R. Vijaya Renganathan, AIR 2010 SC 2685.


doubted.\textsuperscript{15} Even in cases where despite evidence of adultery,\textsuperscript{16} proof of a wife living with her paramour\textsuperscript{17} or simply when the husband and wife were found to be living in the same city,\textsuperscript{18} the conclusive presumption remained on the ground that the spouses still had the opportunity for sexual intercourse.

Usually, when statutory recognition is given to such a presumption, truth is not what is sought but rather, the protection of social values, which are considered to be more significant.\textsuperscript{19} But the author believes the presence of an exception shows us that while the Section aims at protecting social values, the presence of an exception to show the truth, shows that the Section sought to strike a balance between the two. However, because the courts have repeatedly highly favoured ensuring that a child is not branded as illegitimate,\textsuperscript{20} it is argued that there has been an imbalance between protecting social values and arriving at the actual truth of a case. With the former occupying a high pedestal and the courts conveniently taking legitimacy as established the moment the fact that an opportunity was present is shown but this is far from a genuine attempt to arrive at what is sought- the truth.

Moreover, for 19th-century lawmakers, proof of non-access might have been the most reliable way of being just and arriving at the truth. Because non-access could be easily established if the husband was imprisoned or was in foreign land, return from which often being difficult or prolonged. But today, with say the presence of the possibility of obtaining parole or just flying back, the opportunity of having sexual intercourse is almost always prevalent.\textsuperscript{21} Therefore, in light of how non-access has been interpreted, in the present day context, it is nearly impossible to establish (subject to cases of impotence, etc.), and this is when the possibility of rebutting the presumption by means of DNA evidence is to be examined.

\textsuperscript{15} Chandramathi v. Pazhetti Balan, AIR 1982 Ker 68.
\textsuperscript{17} Parmeswaran Nair v. Janaki Amma, AIR 1972 Ker 80.
\textsuperscript{18} Aazad Kumari v. Satya Prakash, AIR 1986 All. 435.
\textsuperscript{19} Diane S. Kaplan, \textit{Why Truth is Not a Defense in Paternity Actions}, 10(1) \textsc{Texas Journal of Women and the Law} 69, 71 (2000).
\textsuperscript{20} Dukhtar Jahan v. Mohammed Farooq, 1987 AIR 1049.
\textsuperscript{21} Vepa P. Sarathi, \textsc{Law of Evidence}, 265 (6th edn., 2006).
DNA TESTS: A NEW REBUTTAL

The way the field of forensic science advanced is something that could not have envisaged in 1872. A DNA test can establish with 99.85% certainty that a man is not the father of a child (or with 99.99999% certainty that he is), a fact which earlier one could only guess.

A plain reading of the Section shows that DNA evidence cannot be used to rebut the presumption of legitimacy, which remains unless non-access can be proved. However, conflicting stances have been taken by the courts (with bench strengths often being the same) where in some cases the possibility of a DNA test is acknowledged and addressed and in some, dismissed with strict reliance solely being placed on the requirements of the Section. The latter being the stance taken by the Supreme Court with ratios stating that despite DNA tests being scientifically accurate, the conclusiveness of Section 112 cannot be escaped and remains irrebuttable if access at the time of conception is present.

However, the Supreme Court changed its stance in Nandlal Wasudeo Badwaik, and the same was affirmed in Dipanvita Roy where it was held that when there is a conflict between scientific truth and the presumption of legitimacy, the former should prevail over the latter because once the truth is ascertained, the same cannot be simply ignored irrespective of whether the outcome adversely affects the child or not. In these two cases, the Court said that the husband’s plea of non-access stands proven by a negative DNA test and thus the conclusive presumption of legitimacy is rebutted.

The author opines that this may have been an instance where the judiciary sought to assuage the prevailing imbalance of interests by allowing DNA evidence to be adduced. And if one considers the infallible, clear and convincing nature of a DNA test which functions as circumstantial evidence, it does fit right in as proof of non-access but only if the term non-access means actual cohabitation. As long as it means the lack of opportunity for sexual

22 Kaplan, supra note 18, at 72.
24 Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik, (2014) 2 SCC 576; Dipanwita Roy v. Ronobroto Roy, AIR 2015 SC 418, the former being a paternity dispute in a maintenance proceeding and the latter, a matrimonial dispute.
intercourse, the Supreme Court’s interpretation that a negative DNA test proves non-access is fallacious. This is because the function of a DNA test is to either affirm or negate paternity and cannot prove the presence or lack of opportunity to have sexual intercourse. So either the term non-access is to be reinterpreted to mean sexual intercourse and not just an opportunity to have intercourse and thus allowing the use of DNA evidence to prove that the same never occurred at any time the child could have been begotten or, as is argued, the Section is to be amended and made more flexible.

A case before High Court of Delhi where it was the child sought to ascertain his parenthood also highlights how society has changed and the need for a revision of the Section. In this case, it was held that despite Section 112 being attracted, the conclusiveness of law should not cause detriment to the child’s interests if best served via a DNA test. Such a stand taken by the Court that supported the arrival of the truth via a DNA test in order to help protect the interests of the child is the polar opposite of the rationale behind the Section - presuming legitimacy to protect a child’s interests.

Contrasting judicial decisions and judicial activism are far from what is needed right now - a law that is compatible with changing times. Developing scientific temper and striking a balance between the Section 112 as it is and technological and scientific advancement is essential for a better justice delivery system. Finally, it is submitted that if the option of adducing DNA is to be available, Section 112 may be amended in one of the two ways:

[1] Incorporating the proposals given by the Law Commission in its 185th Report is one possibility. The Report provided new ways like DNA tests and blood tests to rebut the presumption of legitimacy provided that the child and the alleged father have consented to it and thus overcoming privacy concerns. Furthermore, as long as the court has the power of drawing an adverse inference in the case of refusal, the possibility of the same becoming a constant routine may be reduced. [2] Since, Section mandates the strongest of all

26 That the term access means sexual intercourse and nothing short of it was the stand taken in the Banbury Peerage case, (1811) 1 Sim & St 153.
27 Rohit Shekhar v. Narayan Dutt Tiwari, (2011) 121 DRJ 563 (Del) with the Supreme Court upholding the same in an appeal.
28 Article 51A(h), THE CONSTITUTION OF INDIA, 1950.
31 §114, Indian Evidence Act, 1872.
presumptions, any evidence other than that which proves non-access cannot be adduced and as seen earlier, DNA evidence cannot be used to contradict the presumption. So another possibility is to make a minimal change to the Section by substituting the term ‘conclusive proof’ for ‘shall presume’.32 The benefit of this is twofold, first, it will ensure that the Courts mandatorily raise the presumption of legitimacy and second, since the presumption will be rebuttable, DNA evidence (or scientific evidence of any kind) may be adduced to trump it.33

With regard to the possibility of option [1], such an amendment will ensure certainty in law with regard to what kind of evidence may be made use of to disprove the presumption. But this amendment will still retain the conclusive presumption and add the requirement of stringent scientific proof. For the legislators of the Act, non-access seemed to be a fair way to escape the presumption but now the same is pointless in present day context. It can be said that there is always the possibility of a similar situation arising in the future with regard to such specific exceptions and may place the father again in a disadvantageous position. This is when option [2] becomes a practical and uncomplicated way from the point of view of the legislator, as it will ensure that the presumption of legitimacy is always raised and at the same time does away with the need for laying down fixed exceptions to rebut the same.

CONCLUSION

The Section was adopted with the rationale of protecting the best interests of a child with strict requirements to be met if one was to escape its grasp. However, with the standard of proof required, currently being higher than that what is ‘more likely than not’, proving a lack of an opportunity is often difficult and sometimes impossible for the supposed father. It has been shown that since efforts to prove non-access often end in vain and as a result, what the courts arrive at may not be the truth. In light of this, it is concluded that this is why the option of admitting DNA evidence should be made available to those contesting paternity by an amendment to the Section.

32 §4, Indian Evidence Act, 1872, defines the term ‘shall presume’ as- "whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."