

ARTIFICIAL INSEMINATION AND PRESUMPTION OF PATERNITY IN INDIA

Dr. Sandeep Kulshrestha

Associate Professor (Law)
Amity University MP, Gwalior

Abstract

Technical advancement in Medical science gave new hope to infertile couple through Artificial Insemination, but accumulation of technology with the law is still awaited. This advancement creates a large number of socio-legal issues. Legal presumption of paternity is one of them.

Key Words: Presumption of Paternity, Artificial Insemination, Socio-legal Issues

Almighty gave a capacity to every living being to give birth to a similar species thus every living being is desirous to have a child. Family gives an aspiration to anybody to do something for the betterment of the family. Any married couple is incomplete unless they don't have third one in between, i.e. the child. In Indian mythology, a person is incomplete without having a son. He can't go to heaven and will move in various "Yonies", unless his son gave water to his departed soul after his death.

Unfortunately everybody is not that much fateful to have child for various reasons. It may be psychological or physiological disorder or else. Adoption is well adopted and established procedure of having child for such persons. Mythology and history both are full of examples of adoption. Even religious laws provide methodology, Procedures and legitimacy to such child with all rights.

Now the time has been changed and technological development gave new avenues and provided new opportunities to child seekers. Assisted reproductive technology is the technology, enable such peoples having their own child, in spite of almost every disability to have, physiological or other.

The desire of a child in particular male was very natural in the all early societies and this was very boldly declared in *VEDAS*, and also by our ancient writers like *YAJNAVALKYA* and *MANU*, and to beget a son various methods were popular and practiced which our ancient laws permit.

AURASA was said to be a legitimate child begotten by man with his own lawfully wedded wife. Other sons were, *KSHETRAJA* (Son by another man appointed by husband). *GUDHAJA* (Son by another unknown man, brought forth by wife secretly i.e. unknown adultery). *KANINA* (Son secretly born by unmarried damsel in her father's house). *PUTRIKA PUTRA* (Son of an appointed daughter who was given in the marriage to bridegroom). *SAHODHAJA* (Son begotten when a man marries, either knowingly or unknowingly with a pregnant maiden). *POUNARBHAVA* (Son begotten by a man on a twice married woman).

SONS BY ADOPTION were *DATTAK* (Son of same caste given as a gift to a man). *KRITA* (Son sold by its parent to a man). *KRTRIMA* (Orphan son being adopted). *SVAYAMDATTA* (Abandoned son being adopted). *APDVIDHA* (Deserted son being adopted).

In the Mahabharat, Gandhari did not deliver a child rather delivered a semi solid material which was divided by Maharishi Vyas into 100 pieces and planted them in different pans. Thus, the 100 Kauravas were born. Similarly, Maharishi Bhardwaj saw a divine nymph coming out of the water after having a bath and seeing such a beautiful woman, he felt discern and deposited his semen in a pot used for yagna called Darona. This is from where Dronacharya was born and named after the vessel. These could also be referred to as test tube babies.¹

¹ Dr. Justice B.S. Chauhan, *Law, Morality & Surrogacy – with Special Reference to Assisted Reproductive Technology*, NYAYA DEEP, October 2012, 3 at page 7

Worldwide, surrogacy spins a web of emotional, social and legal issues. Mythological surrogate, mothers are well known. Yashoda played mother to Krishna though Devki and Vasudev were biological parents. Gandhari made Dhritrashtra the proud father of 100 children, though he had no biological relation with them.

The Hindu Law and the Mohammedan Law raise similar presumptions as stated in the section 112 of Evidence Act 1872², regarding legitimacy, but while English Law give importance to the time of birth, The Hindu Law and the Mohammedan Law give importance to the time of conception.

Section 16 of Hindu Marriage Act 1955 specifically provides that a child of a null and void marriage under section 11 of the Act or annulled under section 12 shall be legitimate.³ Section provides:-

“Legitimacy of children of void and voidable marriages:-

1. *Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate...*
2. *Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it has been dissolved instead of being annulled, shall be deemed to be their legitimate child Notwithstanding the decree of nullity.*
3. *Nothing contained in subsection 1 or sub-section 2 shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any right in or to the property of any person other than the parents, in any case where, but for passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents”*

It clearly appears from the language of the section that the child will have all rights over the property of his parents but it is clearly mentioned that he will have no right over the property of Hindu Undivided family and he will have no right over the property of others by virtue of being heirs of agnet or cognate categories.

Under Muslim Law the Putative father is not recognized for any purpose. It clings to the concept of “filius nullis”. Under Islamic law, conception during lawful wedlock determines legitimacy of the child. There is no process recognized under the Muslim Law which confers legitimacy on an illegitimate child. However Mohammedan have adopted “acknowledgement of paternity” which are preventive measures to save the children from being bastardised. Mohammedan law has made a special provision for conferring legitimacy on or rather recognizing the legitimacy of a child, whether a son or daughter by the doctrine of acknowledgement of *Ikrar*. It is an acknowledgement of paternity by his putative father. The person acknowledged *Zina*, which is adultery in Muslim Law, as he would be if his mother could not possibly have been lawful wife of the acknowledger at any time when he could have been begotten, as where the mother was at that time the wife of other man. Adoption or any equivalent of the same is also not recognized in Muslim Law. It is conclusively presumed that a child born within less than 6 months after the marriage of his mother cannot have been begotten by her husband in lawful wedlock⁴.

As far as maternity is concerned Quran Shareef states 3 stages to ascertain maternity i.e. conception, delivery and feeding. In this concept, child through surrogacy has not a valid child of a mother through surrogacy arrangement.

For the legal purposes, paternity is a question based on genetic factor. Use of the husband’s sperms for inseminating the wife either *in vitro* or *in utero* does not pose any problem to the question of paternity of the offspring. However, the use of donated sperms changes the whole scenario.

The main problem with section 112 of the evidence Act is that it presumes sexual intercourse is absolute essential for the conception of a child. In non access clause of this section it is specifically mentioned that if a man could not possibly have had sexual intercourse it cannot be his child. Section 112 read as follows:-

² Section 112 Indian Evidence Act 1872

³ Section 11 and 12 Hindu Marriage Act 1955

⁴ Caesar Roy, *Presumption as to legitimacy in section 112 of Indian Evidence Act need to be amended*, 54JILI 2012, 382 at page 388.

“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.”⁵”

Indian Courts have been considered it as it provided in the Act. Hon’ble Apex Court held in *Goutam Kundu v. State of W.B.* :-

“24. This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. “Access” and “non-access” mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual “cohabitation”⁶”.

In this Judgement Hon’ble Supreme Court denied the necessity of cohabitation and held that mere access serves the purpose of the section.

Similar view was taken by the Hon’ble Apex Court in *Kamti Devi v. Poshi Ram* and denied the prayer for DNA test to ascertain the paternity and held that it is irrebuttable presumption. Hon’ble Court held :-

“10.The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of 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 irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception.....”⁷”

The concept was further strengthened and Hon’ble Apex Court held in *Banarsi Dass v. Teeku Dutta*, that:-

13. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence 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 irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.⁸

In this manner Court held that presumption under section 112 of the evidence Act is ir-rebuttable and even if DNA test reveals that child does not the child of claimed father, even though, the presumption under section 112 will remain ir-rebuttable. Hence, Court denied to permit DNA test to ascertain the paternity and considered only non access as the tool of denial of paternity as provided under non access clause of section 112. Later on, the view was diluted up to some extent and held that:-

“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

⁵ Section 112 of Evidence Act 1872

⁶ *Goutam Kundu v. State of W.B.*, (1993) 3 SCC 418

⁷ *Kamti Devi v. Poshi Ram*, (2001) 5 SCC 311

⁸ *Banarsi Dass v. Teeku Dutta*, (2005) 4 SCC 449

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 test⁹."

But recently Hon'ble Apex Court has considered the presumption under section 112 of the Evidence Act as rebuttable presumption if the evidence is sufficient. In *Nandlal Wasudev Badwick Vs. Lata Nandlal Badwick* Hon'ble Apex Court held:-

"20. As regards the authority of this Court in the case of Kamti Devi (Supra), this Court on appreciation of evidence came to the conclusion that the husband had no opportunity whatsoever to have liaison with the wife. There was no DNA test held in the case. In the said background i.e. non-access of the husband with the wife, this Court held that the result of DNA test "is not enough to escape from the conclusiveness of Section 112 of the Act". The judgment has to be understood in the factual scenario of the said case. The said judgment has not held that DNA test is to be ignored. In fact, this Court has taken note of the fact that DNA test is scientifically accurate. We hasten to add that in none of the cases referred to above, this Court was confronted with a situation in which DNA test report, in fact, was available and was in conflict with the presumption of conclusive proof of legitimacy of the child under Section 112 of the Evidence Act. In view of what we have observed above, these judgments in no way advance the case of the respondents¹⁰."

In this case court differentiated its previous Judgment in *Banarsi Dass v. Teeku Dutta*¹¹ regarding the rebuttability of the presumption under section 112 and held that presumption cannot be over-ride conclusive evidence.

Now the question left that in case of donated sperm, the DNA of the child will match with the donor, who never had access to the mother of the child in question.

In a case where a widow uses her dead Husband's preserved sperms to get pregnant after his death, and the complication is that section 112 requires "continuance of a valid marriage" and the child, in this case will unfortunately born after the marriage has ceased, it can easily be proved to be illegitimate¹².

On applying section 112 of Evidence Act to surrogacy, whereby a woman agrees to become pregnant and deliver a child for a contracted party as a gestational carrier to deliver after having been implanted with an embryo. For example Z is the surrogate mother of A, and X is his genetic mother, then according to section 112 Z's Husband shall be legitimate father of A, who is nowhere involved¹³.

So, in light of the above discussion it is crystal clear that any kind of conclusive presumption has no scope to ascertain paternity or legitimacy of a child when conclusive evidence can easily be obtained with the aid of technology developed in recent past, though 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.

Presumption of legitimacy of the child was also considered in various countries in reference to an AI child and a Newyork Court in *Strad Vs. Strad* refused the plea of husband on the ground that after giving consent of Artificial Insemination to his wife, he potentially adopted or semi adopted the child and child was entitled to same rights as those required by a foster parent, who formally adopted the child¹⁴.

⁹ *Bhabani Prasad Jena v. Orissa State Commission for Women, (2010) 8 SCC 633*

¹⁰ *Nandlal Wasudev Badwick Vs. Lata Nandlal Badwick, 2014 (2) SCC 576*

¹¹ *Supra Note 16*

¹² *Caesar Roy, Supra at P. 390*

¹³ *Ibid*

¹⁴ *Sandeep Kulshrestha, Supra note 6 at Page 77*

In *Domboss Vs. Domboss*, the court found that in the absence of consent of the husband for Artificial Insemination, child do conceived is not a child born in wedlock and therefore considered as Illegitimate.

This issue was resolved in Britain by legislative intervention. British Parliament passed legislation called **Human Fertilisation and Embryology Act 1990**. Section 28 of the Act provides:-

“If a child born as a result of Artificial Insemination or embryo transfer to a woman who was at the time of artificial insemination or embryo transfer, married, then her husband will be treated as father of the child.”¹⁵

A number of Countries including Germany, Newzealand, Nigeria, Several states in Australia and USA have resolved this controversy through legislative intervention and have enacted their respective Laws clarifying the legitimacy of child born out of Artificial Insemination or embryo transfer.

In India concept of legitimacy is mainly based on presumption, being the principle of Evidence. Since the language of the Act is quite clear, left very limited scope for judicial intervention, though, the trend shows that court is constructing the issue liberally.

Another problem arose when US gay couple (Fister and Michael) rented a womb in Hyderabad. US Citizen Brad Fister had come to Hyderabad in 2009 when he donated his sperm which was fused with an egg donated by an Indian egg donor. This is a first such case of two fathers.

Since, section 377 of Indian Penal Code provides:-

377. Unnatural offences.-- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”¹⁶

From the bare perusal of this provision it clearly appears that the homosexuality is an offence in India and thus, Gay marriage is not a recognized marriage form in India. In this situation a child born out by any procedure would not be considered as legitimate child of such couple.

¹⁵ *Human Fertilisation and Embryology Act 1990*

¹⁶ *Section 377 of Indian Penal Code 1860*