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**Paternity – Presumption or Truth? : A commentary on
*Nandlal Wasudeo Badwaik v. Lata Nandlal Badwik &
Anr***

[2014 STPL(Web) 6 SC]

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INTRODUCTION

There is a popular saying, “Paternity is a presumption whereas maternity is a truth.” Even though a presumption, it has got more weight than the truth in our society. That’s why it is fought more in the court rooms than the “truth”.

In law, there is a presumption that a child born to a woman during the subsistence of a valid marriage is fathered by the husband of that woman. Until recently, this presumption has ruled the court rooms in the paternity disputes. By a recent decision, of the Supreme Court in *Nandlal Wasudeo Badwaik v. Lata Nandlal Badwik & Anr*² the Court has acceded that “where there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the whole community to be correct, the latter must prevail over the former”.

NANDLAL WASUDEV CASE:

Brief facts

Nandlal and Lata were married in 1990. It appears that very soon the marriage landed in rough waters. Wife filed an application for maintenance under s.125 of Cr. P. C. The trial court by order dated 10th Dec 1993 dismissed the application. Thereafter the wife resorted to a fresh proceeding under s.125 of Cr. P. C., claiming maintenance for her and her daughter. Her contention was, she started living with her husband from 20th June 1996 and stayed together about two years during which time she became pregnant.

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² Special Leave Petition (CRL) No. 8852 of 2008, Date of judgment 6th Jan 2014.

She was sent for delivery to her parent's home and eventually she gave birth to a girl child. Petitioner husband resisted the claim and alleged the assertion of wife she stayed with him since 20th June 1996 is false. He denied that respondent No.2 is his daughter. According to him after 1991 he had no physical relation with his wife. The trial Court accepted the plea of the wife and granted maintenance at the rate of ` 900/- per month for the wife and ` 500/- per month to the child. The challenge to the said order in revision petition and petition under s.482 of Cr. P. C. has failed.

Against these orders, petitioner preferred a Special Leave Petition.

The Supreme Court, in a Special Leave Petition challenging the paternity of the child had allowed the petitioner's prayer for conducting DNA test. The test was conducted at Regional Forensic laboratory of Nagpur. In their report, they submitted that Nadlal Badwik is excluded to be the biological father of respondent No.2, Neha alias Netra. Respondents, not satisfied with the result, made a request for re-test. The Court allowed the prayer and a retest was conducted at Central Forensic Laboratories, Hyderabad. This test also indicated that the petitioner is not the biological father of respondent No.2.

At this stage counsel for respondents submitted that the appellant having failed to establish that he had no access to his wife at any time when she could have conceived respondent No.2, the direction of DNA test ought not have been given and hence the test result should be ignored.

The Supreme Court rejected this contention. It observed that the coordinating bench have considered the circumstances of the case and it was right in ordering the DNA test. Further, the respondents had not objected the prayer for DNA test and it was only after the reports of the test were adverse to them, they have challenged it on the ground that such a test ought not have been directed.

Issues

The results of DNA test is considered as accurate. At the same time, there is a presumption under s.112 of Evidence Act that "the fact that any person born during the continuance of a valid marriage between his mother and any man or within 280 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 marriage had no access to each other at any time when he could have been begotten."

In the present case, on the basis of DNA test the appellant is not biological father of the girl child. At the same time he was not able to rebut the presumption of legitimacy by proving non-access to his wife when the child could have been begotten.

Decision

The Court held that *“when the truth or fact is known, in our opinion, there is no need or room for presumption.... In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former”*. The Court set aside the impugned judgment so far as it directs payment of maintenance to the second respondent.

CRITICAL EVALUATION OF THE CASE

Now let us see what the law on paternity is and what the science on paternity is. Then on light of both the analysis let us evaluate the decision of the Court.

Indian Evidence Act 1872

Section 112 of Indian Evidence Act³ read with Section 4 of Evidence Act⁴ makes it clear that a child is born during the subsistence of a valid marriage is the conclusive proof that the child was fathered by the husband of the woman.

The object of this clause is to protect the interests of the child. The law does not want to brand any child as bastard. In Indian Epics there are many examples of this presumption. Pandavas are actually not biologically fathered by Pandu. But they are presumed to be the children of Pandu, obviously the reason why they are called Pandavas. Even Pandu himself is an example. Though the father of Pandu, and

³ Section 112 of Indian Evidence Act 1872 says that: “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.”

⁴ Section 4 of the Indian Evidence Act 1872, says that “Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.” Shall presume.”- 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.” Conclusive proof.”- 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.”

Dritharashtra is Vyasa, they are considered as the children of Vichithraveerya, and they succeeded to the crown of Vichithraveerya, even though they were conceived only after the death of Vichithraveerya! Perhaps the reason why it was so is, the presumptions were mostly accepted by the Kings, and they had an aim that the throne should continue to be ruled by their dynasty, and should not go outside. So, being the real father or not was not much of significance.

Now the question is, is it going to be so today? The answer is, yes, as the law presently stands. If the father does not want the child of someone else to be called his, the law is harsh on him. Even if the child was born out of adulterous relation, the husband of the adulteress is compelled to bear the fatherhood of that child, unless he is able to prove non-access during the time when the child was begotten. He may be able to get a divorce on account of her adultery; but still he have to maintain the child.

When the law says, existence of a fact is a conclusive evidence of another, it is next to impossible to prove that in spite of existence of the former, the latter is non-existent. However, s.112 itself provides an outlet to the party who wants to escape the rigor of that conclusiveness. If it could be shown that the parties had no access to each other at the time when the child could have been begotten, the presumption could be defeated.

Now, what is meant by access? The Privy Council in *Karapyya Sevarai v. Mayandi*⁵ held that access connotes only existence of opportunity for marital intercourse. This legal principle was accepted by the Supreme Court in *Chilkuri Venkateswaralu v. Chilkuri Venkatanarayana*⁶ as correct law. In other words, access does not mean actual sexual intercourse between the spouses, but a mere existence of opportunity for that.

Now let us examine the degree of proof required to rebut the conclusiveness of law. In *Smt. Dukhtar Jahan v. Mohammed Farooq*⁷ Supreme Court held that the presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities.

⁵ AIR 1934 PC 49.

⁶ 1954 SCR 424.

⁷ 1987(1) SCC 624.

DNA fingerprinting

It is necessary to know a few basics of DNA fingerprinting. All living beings are composed of cells which are the smallest and basic unit of life. An average human body consists of trillions of cells of different sizes. Human cells consist of 46 chromosomes. Deoxyribonucleic Acid (DNA) found in the chromosomes of living beings is the blueprint of an individual. An individual have a unique DNA pattern which is inherited from his biological parents and it is similar to theirs in molecular structure and genetic code. Because if this similarity the DNA can be used to test conclusively determine biological kinship. When two unrelated people possessing the same DNA pattern are compared, the chances of complete similarity are one in 30 billion to 300 billion. Considering that the earth's population is about 5 billion, the result of a genuine DNA test is scientifically accurate.

The scientific development in the area of DNA testing technology and its application has solved many crime related mysteries in the area of rape, mass killing and in solving civil disputes related with the paternity of a child, finding of an individual etc. It has also been used in solving cases of exchange of babies in hospital wards.

DNA test and Indian Evidence Act

Application of DNA test is now well established in developed countries. In India, in several cases the judgment has been given either based on the results of DNA test or along with other corroborative evidence. Although DNA test has been accepted in many courts in India, it has not yet been included in the Indian Evidence Act. It is therefore left to discretion of the judges whether DNA test under Section.45 of Indian Evidence Act 1872⁸ to be accepted or not.

Decided Cases

The first paternity dispute in India which was solved by DNA fingerprinting was the case No. M.C. 17 of 1988 in the court of The Chief Judicial Magistrate of Tellichery⁹

⁸ Section 45 of Indian Evidence Act 1872 says that: "When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts."

⁹ The CJM held that: "the evidence of expert is admissible under s.45 of The Indian Evidence Act. So also, the grounds on which the opinion is arrived at are also relevant under s.51 of The Indian Evidence Act. PW4 is an expert in the matter of molecular biology and the evidence tendered by him is quite convincing and I have no reason why it should not be accepted.."

The Supreme Court in *Goutam Kundu v. State of Wes Bengal*¹⁰ held that:

- a. That courts in India cannot order blood test as a matter of course;
- b. Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained;
- c. 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;
- d. 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;
- e. No one can be compelled to give sample of blood for analysis.

In *Shard v. Dharmpal*¹¹, the core question was whether a party to a divorce proceeding can be compelled to medical examination. The DNA test was opposed by the respondent on the ground that such an order violates his right to privacy. The three Judge bench of the Supreme Court held that: “If for arriving at the satisfaction of the court and to protect the right of a party to the *lis* who may otherwise be found to be incapable of protecting his own interest, the court passes an appropriate order, the question of such action being violative of Art 21 of the Constitution would not arise. The court having regard to Art 21 of Constitution of India must also see to it that the right of a person to defend himself must be adequately protected.” It also held that if despite an order passed by the Court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference would be made out. S. 114 of the Indian Evidence Act enables the Court to draw an adverse inference.

In *Banarsi Dass v. Teeku Dutta and Anr.*¹² held that the law laid by the Supreme Court in *Goutam Kundu*’s case was is correct and refused to interfere in the High Court judgment setting aside the trial court order which had allowed the application for DNA test.

¹⁰ 1993(3) SCC 418.

¹¹ AIR 2003 SC 3450.

¹² Appeal (Civil) 2918 of 2005 from SLP 17427 of 2004.

In *Bhabani Prasad Jena etc v. Convenor. Sec. Orissa Commn. For Women*¹³ Supreme Court held that there is no conflict in decisions of the Court in *Goutam Kundu* and *Sharda Dharmpal* cases. In principle, both the decisions reiterate that the Courts has power to order a person to undergo medical test there is a strong prima facie case.

Nandlal case v/s other cases

A distinction between the other cases and Nandlal case is that, Nandlal case did not examine the propriety of courts ordering DNA test. The issue before the Court was, when there is a scientific proof reached by DNA test, (not once, but twice) whether to accept it or go by s.112 of the Indian Evidence Act. The Court in an obiter dictum in the *Kanti Devi & Anr v. Poshi Ram*¹⁴: “The results of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of s.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.” In *Kanti Devi* case, the Court held that on the strength of evidence, the Court was satisfied that the plaintiff husband had no opportunity whatsoever to have liaison with the defendant mother. In other words, there was no prima facie case to order a DNA test, where the evidences adduced were enough to reach a conclusion.

One may dissent that Nandlal decision is not lawfully correct. Under the circumstances of the case, the decision of the Court could not be otherwise. It would have been a different story had the respondents objected to the DNA test in the first instance. But when both the DNA tests exclude the petitioner husband as the father of respondent No.2, the Court cannot ignore it and resort to the presumption of s.112 of Evidence Act.

But the decision of the Court cannot be considered as laying a new law. S.112 continues to remain an irrebuttable presumption.

CONCLUSION

In India, a special protection is given to the status of legitimacy. The law is very strict regarding the type of evidence which can be let in to rebut the presumption of

¹³ CA Petition 6222 – 6223 of 2010 from SLP 22095 – 22096 of 2009.

¹⁴ Appeal (civil) 3680 of 2001.

legitimacy. Even proof that the mother committed adultery with a number of persons will not by itself be sufficient for proving illegitimacy of the child, if she had access to her husband when the child could have been begotten.

In England and European countries, DNA test has been approved where legitimacy arises for consideration. In India we cannot adapt this procedure because stigma of illegitimacy is very high and unlike those countries, we do not have any of the protective legislations to protect illegitimate children. Of course, in some cases, this may require a husband to maintain children of who he is not the father. But consider the situation where DNA test is allowed in every case of paternity dispute. A doubting husband can drag a wife and child to the court and subject them to ignominy. Ultimately even if the test proves he is the real father, the damage done to the reputation of the mother and child is irreparable and the trauma they suffer cannot be compensated by any amount of damages.

The law commission in its 185th report has recommended an overhaul of the Indian Evidence Act including s.112¹⁵. These recommendations have not yet been put to the

¹⁵ **It suggests Section 112 to be like this:** “Birth during marriage conclusive proof of legitimacy except in certain cases - The fact that any child was born during the continuance of a valid marriage between its mother and any man, or within two hundred and eighty days,

- (i) after the marriage was declared nullity, the mother remaining unmarried, or
- (ii) after the marriage was avoided by dissolution, the mother remaining unmarried,

shall be conclusive proof that such person is the legitimate child of that man, unless

(a) it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten; or

(b) it is conclusively established, by tests conducted at the expense of that man, namely,

(i) medical tests, that, at the relevant time, that man was impotent or sterile, and is not the father of the child; or

(ii) blood tests conducted with the consent of that man and his wife and in the case of the child, by permission of the Court, that that man is not the father of the child; or

(iii) DNA genetic printing tests conducted with the consent of that man and in the case of the child, by permission of the Court, that that man is not the father of the child; and

Provided that the Court is satisfied that the test under sub-clause (i) or sub-clause (ii) or sub-clause (iii) has been conducted in a scientific manner according to accepted procedures, and in the case of each of these sub-clauses (i) or (ii) or (iii) of clause (b), at least two tests have been conducted, and they resulted in an identical verdict that that man is not the father of the child.

Provided further that where that man refuses to undergo the tests under sub clauses (i) or (ii) or (iii), he shall, without prejudice to the provisions of clause (a), be deemed to have waived his defence to any claim of paternity made against him.

mandate of the legislature. It cannot be that the legislature is unaware of the advancement of science and technology. It may have felt it wise to leave the law as such to protect the interest of society at large. Before making the proposed amendments, the pros and cons of the same must be widely debated. Our values still continue to favor long standing family relations over genetics. It is agreed that scientific research and advancement should be utilized in every facets of life including law and justice. But there is a great difference between utilizing such technologies in fact finding of crimes, and civil disputes of delicate nature such as parentage.

Explanation I: For the purpose of sub clause (iii) of clause (b), the words 'DNA genetic printing tests' shall mean the tests conducted by way of samples 35 relatable to the husband and child and the words "DNA" mean 'Deoxyribo-Nucleic Acid'.

Explanation II: For the purposes of this section, the words 'valid marriage' shall mean a void marriage till it is declared nullity or a voidable marriage till it is avoided by dissolution, where, by any enactment for the time being in force, it is provided that the children of such marriages which are declared nullity or avoided by dissolution, shall nevertheless be legitimate."