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DIPANWITA ROY V RONOBROTO ROY: A CASE COMMENT

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ABSTRACT

The Indian law of evidence is an old compilation of rules related to evidence that dates back to 1872. While the legislation is intact with a variety of aspects that still find relevance notwithstanding the passage of time, the provisions related to the latest technological advancements can hardly be found. The recent judgement of Dipanwita Roy v Ronobroto Roy ascertains the validity of DNA testing through scientific advanced tools and thus remains the focus throughout the paper.

This paper aims to exemplify and illustrate the strategy of using the accuracy of scientific tests to escape the conclusive proof asserting legitimacy u/s 112 of the Evidence Act of 1972. The case comments provide brief comprehension of the facts and ruling laid down in the instant case to encompass a clear understanding indicating the tenor of the case. The author then sets the background and the context of the case by exploring some similar previous judgements relating to DNA testing as a means to establish infidelity. Further, the author provides an analysis of the impact of the application of such tests on the right of privacy and liberty. In the light of science as another discipline, the paper situates the synthesis between law and science. The accuracy of medical tests using methods of scientific advancements and the application of relevant provisions of the law of evidence are studied and analyzed together. The author then finally returns to the instant case providing legal justification and describing various ways in which the judgement of Dipanwita Roy revives the present law of evidence.

Keywords: *Scientific accuracy, privacy, conclusive proof, infidelity, DNA testing.*

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INTRODUCTION

Indian Law of Evidence is not simply a body of rules incorporated for ascertaining the validity of claims. It is the law that has witnessed its doctrines and application evolving over time. This ostensibly reflects the change in our understanding of law and society and development in various interconnected disciplines like science, technology, philosophy, theology, politics etc. The law of evidence takes into consideration various kinds of presumptions, namely, may presume, shall presume and conclusive proof.[2] While the birth of a child in a continuing marriage is presented as conclusive proof that the baby born to the woman was fathered by the husband, it can only be rebutted only on the ground of non-access to the spouse.[3]

It was a commonly held principle until Dipanwita Roy v. Ronobroto Roy[4] that the conclusiveness under Section 112 of the Indian Evidence Act cannot be rebutted even by substantiating the claim through the scientifically accurate tests when the couple lived together at the time the child was conceived. Formulated back in 1872, the legislators indeed could not contemplate the inclusion of provisions related to several modern scientific advancements like Ribonucleic Acid (RNA) and Deoxyribonucleic Acid (DNA) tests in the law. Thus, the conflict between conclusive proof under the law of evidence and the accuracy of scientifically advanced techniques remained unresolved. Classic judgements[5] were pouring in relating to the legitimacy of the child where the judges placed heavy reliance on the DNA tests, bidding a go- by to the age-old principle of conclusive proof under the law of evidence. However, simultaneously, a contrary view[6] can be observed under the realm of the Indian judiciary that finds such practice against the right of liberty and privacy of either of the spouse. In the recent judgement by the Supreme Court of India,[7] the conflict between the application of rule of law and the accuracy of scientific tests ascertaining the truth was settled. The court in the famous judgment Dipanwita Roy settled that issuance of a direction requiring the parties to undergo DNA testing of the child in an instance of the infidelity of the wife being challenged and for determination of the father of the child is not wrong. Further, the court provided clarity on the unsettling aspect

[2] *See*, the Indian Evidence Act 1872, § 4
[3] Indian Evidence Act 1872, § 112.
[4] Dipanwita Roy v. Ronobroto Roy, AIR 2015 SC 418.
[5] Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Anr, (2010) 8 SCC 633; Goutam Kundu v. State of West Bengal (1993) 3 SCC 418; Dipanwita Roy v. Ronobroto Roy, AIR 2015 SC 418; Nandlal Wasudeo Badwaik v. Lata Nanlal Badwaik (2014) 2 SCC 576.
[6] Rohit Shekhar vs Narayan Dutt Tiwari & Anr, MANU/DE/2351/2010;
[7] Dipanwita Roy v. Ronobroto Roy, AIR 2015 SC 418.

related to the right to liberty and privacy by giving discretion to the wife to comply or disregard such an order. However, it is to be noted that the court can draw an adverse presumption against the wife if she declines to undergo such a test.

DIPANWITA ROY V. RONOBROTO ROY: AN OVERVIEW

The instant case has been decided by the Supreme Court bench comprising Justice JS Khehar and AK Agarwal. The case was earlier tried by the family court in 2012, where it denied the request of the respondent-husband for conducting a DNA test. The appeal made in High Court at Calcutta was accepted and the request was granted by the HC. However, through the special leave to appeal, the wife of the plaintiff challenged the judgement before the apex court.

In the instant case, Mrs. Dipanwita Roy was married to one Ronobrota Roy (plaintiff). The plaintiff had reached family court for dissolution of the marriage on the grounds of infidelity. He alleged that the respondent had gone astray and had an extramarital relationship with one Mr. Deven Shah.[8] It was further alleged that the child born was not fathered by the respondent but was born out of the relationship with Deven Shah. However, all these allegations were denied by the wife in her statement.

It is to be noted here that the husband requested the court to direct the DNA testing of the child and himself under Section 13 of the Hindu Marriage Act to prove infidelity of the wife.

The Supreme Court in the appeal not only explained the importance of DNA testing,[9] but also was deemed to be the most authentic and scientifically flawless method by which the spouse could verify his claim. Further, striking a balance between the right to liberty and the order of DNA testing, the court provided discretion to the wife to comply with or disregard the order. However, as illustrated in illustration (h) of Section 114 of the Evidence Act, 1872, the refusal of such a performance would offer sufficient reasons for the court to make an adverse inference. Deciding the issue in the present case, Justice Khehar said, "Despite the consequences of a DNA test, it was permissible for a court to allow it, if it was eminently needed, after balancing the interests of the parties. The interest of justice is best served by ascertaining the truth, and

[8] *Supra* note 5
[9] https://www.scconline.com/blog/post/2014/10/17/dna-test-can-be-conducted-to-prove-or-disprove-allegations-of-adultery/

the court should be furnished with the best available science and may not be left to bank upon presumptions unless science has no answer to the facts in issue."[10]

While upholding the judgment by the Calcutta HC, the opinion of the judges was that without the DNA test, it would be next to impossible for the respondent-husband to prove and validate the statements stated while the pleadings were to be made before the court.

PREVIOUS JUDICIAL PRONOUNCEMENTS

Dating back to the 1980s, the Indian courts had a strict opinion against DNA testing, holding it as an intrusion against the privacy between two individuals married to each other. It is clear from the express language u/s 112 of the evidence law that the legislators intended to maintain the sanctity of marriage. The purpose to import such language was to draw a presumption as to the birth of a child under wedlock and retain its status unless proven contrary. The courts have time and again stressed the need to prevent a child from being bastardised.[11]

It can be initially noted that the Indian Evidence Act, being a pre-independence act, does not expressly provide provisions at par with technological growth and scientific advancements for DNA profiling. Hence, it can be understood that some of the Sections of the Act have become archaic due to advancements like DNA profiling, etc.[12] There have been various arguments put forth in support and against DNA testing stating such a method cannot facilitate an escape from the legitimate presumption drawn under Section 112 of the Act.

The constitutionality and validity of Section 112 were upheld by the bench comprising judges of the apex court in the precedent Gautam Kundu v. State of West Bengal.[13] In this case, the apex court reiterated that courts in India cannot order blood tests as a matter of course, and that such requests for roving inquiries cannot be granted; there must be a strong prima facie case, and the court must carefully examine what the consequences of ordering the blood test would be. Further, on the same premise, the conduct of the test was denied to the parties in this case.

[10] J Venkatesan, *DNA Test can be Done to Establish Infidelity: SC*, The Hindu (October 22, 2014).
[11] Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Anr, (2010) 8 SCC 633.
[12] LAW COMMISSION INDIA, REPORT NO 185 (2014).
[13] Gautam Kundu v. State of West Bengal (1993) 3 SCC 418.

In Kamti Devi and Anr. v. Poshi Ram,[14] shocking remarks were made by the court relating to the conclusiveness of the presumption and burden of proof. In this instance, the judges concluded that Section 112 of the Evidence Act was created at a period when current scientific developments such as Dioxy Nucleic Acid (DNA) and Ribonucleic Acid (RNA) testing were not even considered by the legislators. A true DNA test is considered to provide scientifically reliable results. However, even if a husband and wife were living together at the time of conception but a DNA test proved that the kid was not born to the husband, the law's conclusiveness would remain unrebuttable.[15]

In a judgement similar to that of Gautam Kundu, Sharda v Dharmpal,[16] the court provided that the powers to order a person to undergo a medical test lie only with the matrimonial court. Further, it was held that the courts shall resort to such a recourse only in possession of sufficient information and when the applicant has a strong prima facie case.

Regarding the presumption as to the legitimacy of the child, it was again held in Sham Lal @ Kuldeep v Sanjeev Kumar and Ors.,[17] that presumption shall be rebuttable only when there is a clear, strong, conclusive and satisfying proof. It was further held that proving the adulterous conduct of the wife which amounts to very strong evidence, would not render the escape of presumption drawn under Section 112.

In Bhabani Prasad Jena, the Supreme Court again emphasised that the courts must be very cautious in the usage of scientific advances and instruments which could result in devastating effects on the child and might bastardise an innocent child even when his mother and her husband cohabitated together. Further, in this case, it was held by the court that resorting to such a method of DNA testing shall not be done in the cases relating to the paternity of the child. The courts under such circumstances have to consider the application of presumptions under Section 112 and shall order such a test only in circumstances where there is no other method to ascertain the truth. Further, referring to the above two judgements, it was reiterated that such an issue related to paternity when arises before a matrimonial court, may demand the tests however, a civil court would not have any jurisdiction to pass such an order.

[14] Kamti Devi and Anr. v. Poshi Ram AIR 2001 SC 2226.
[15] Id.
[16] *Supra* note 12.
[17] Sham Lal @ Kuldeep v Sanjeev Kumar and Ors (2009) 12 SCC 453.

Making a conscious departure from the rules of evidence laid down under various above landmark judgments, the Supreme court in the past decade has demonstrated a positive approach towards embracing scientific advancements and developments in the field of technology. The Supreme Court judges enumerated the correctness of DNA testing in the recent landmark case of Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and Anr, 2014[18] and held that when there is a possibility of producing evidence contrary to the conclusive proof, the presumption will be rebuttable.

The latest and landmark judgement of Dipanwita Roy settled all the anomalies related to the conclusive proof, presumption, and accuracy of scientific tests as evidence and the paternity of the child. The court held that depending on the favourable facts and circumstances, it would be appropriate to hold a DNA examination for substantiating the allegations made by the plaintiff. The courts concluded that DNA testing is the most authentic and scientifically flawless method for proving the husband's claim of infidelity. This should also be considered as the most legitimate, rightful, and correct methods for the wife to refute the Respondent husband's accusations and prove that she had not been unfaithful, adulterous, or disloyal. If the Appellant-wife is correct, she must be proven.

Thus, the settled position legitimizes the examination through DNA testing and provides it as a valid ground for the dissolution of marriage. As a result, DNA-based proof would be sufficient to overcome a presumption u/s 112 of the Evidence Act.

MEDICAL EXAMINATION AND RIGHT TO PRIVACY

While it has been already seen in the light of various judicial pronouncements, DNA tests may hamper the privacy and liberty of an individual.[19]

However, the judges have recognised the need to protect the right to privacy and liberty of an individual in the case of Dipanwita Roy. The judges prominently provided the wife with an option to either undergo the DNA test or deny to comply with such an order. As stated by

[18] Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and Anr (2014) 2 SCC 576.

[19] Bhabani Prasad Jena v Convenor Secretary, Orissa State Commission for Women and Anr, (2010) 8 SCC 633- the court held that the alternative viewpoint is that the court should exercise caution when using technological developments and techniques that result in a breach of an individual's right to privacy and may not only be adverse to the parties' rights but also have a disastrous effect on the baby.

Justice Khehar in the judgement, this is an ostensible effort made to preserve the right of privacy of the individual to a possible extent. In the opinion of Justice Khehar, if she refuses to obey the High Court's order, the accusation will be decided by the relevant Court, who would draw a presumption of the sort envisioned in Section 114 of the Indian Evidence Act, particularly in terms of example (h).[20]

Further, he concluded that this strategy was chosen to protect individual privacy to the greatest extent feasible, while also advancing the cause of justice. By following the aforesaid path, the problem of infidelity would be resolved on its own, without affecting the presumption established under Section 112 of the Indian Evidence Act.

The latest Supreme Court judgement, Ashok Kumar v Raj Gupta and Ors, 2021[21] has reiterated and stressed the preservation of the right to privacy. The concerned case though was related to a property suit where the plaintiff claiming himself to be a legitimate heir was asked and forced to under a DNA test to prove his relationship. The two-judge bench stated that "Forcing a party undergo DNA to test against will impinge on personal Liberty & Right to Privacy". Further, the judges stated in the judgement that compelling a person who refuses to take a test would plainly violate their right to privacy and personal liberty as enshrined under the Constitution.

DNA TESTING & ESTABLISHING INFIDELITY: INTERDISCIPLINARY ANALYSIS

This relatively new application of placing reliance on scientific advancements has a great appeal in the interest of justice being served through ascertainment of truth rather than banking upon conclusive presumptions where infidelity is claimed to be a ground for divorce. The conflict between existing rules of laws and the accuracy of scientific advancements as evidence was prominent for a time now. The legal position in the light of Section 112 was strict and clear. The rules of evidence provided prominent conclusive proof regarding the legitimacy of a child minimizing any need arising for DNA tests. The only exception that was provided was non-access to the spouse which if proved would lead to the establishment that the child is not a legitimate one. The cases now and then involved such facts which demanded clarity on the

[20] *See*, § 114 as also illustration (h).
[21] Ashok Kumar v Raj Gupta and Ors, LL 2021 SC 525.

rule that shall be applied. It remained unclear for a time what should actually prevail- the conclusive proof under Section 112 or the scientific evidence of DNA testing contradicting the same.

In the famous judgement of Kamti Devi, the apex court explicitly provided that no doubt the results of a genuine DNA test are accurate but the same is not enough to avoid Section 112 of the Act's conclusiveness; for example, if the couple was living together at the time the child was conceived but DNA test indicated that the it wasn't born to the husband, the law's conclusiveness would remain unrebuttable.[22]

Further, in the case of Gautam Kundu, the blood test in the disguise of DNA was explicitly denied by the court. The judges stated that such a presumption under the law of evidence could only be "displaced by a strong preponderance of evidence".[23]

However, the landmark judgement of Nandlal Wasudeo Badwaik provided the required clarity. In this case, a serological test was undergone and the report was taken into consideration. The judges opinionated that the highest interest of justice is served by discovering the truth, and the court should be provided with the best available science rather than being forced to rely on presumptions until science has no solution to the circumstances at hand. When a dispute arises between a legally required irrefutable proof and a proof based on scientific advances regarded by the global community as right, the latter, in our judgement, must win.

Later, leaning towards subsisting the claim by medical evidence, the superiority of the accuracy of scientific tests was supported in the Dipanwita Roy case. The judges further reiterated that such a shred of evidence is the correct, rightful and most authentic method which can also provide enough grounds to the wife to prove that she was not unfaithful, disloyal or adulterous.

However, the wife can still deny observing such an order by the court and not undergo a DNA test. It is to be noted that such a departure from observation cannot prevent the court from drawing an adverse inference against the wife as stated under Section 114 of the Indian

[22] Kamti Devi and Anr. v. Poshi Ram AIR 2001 SC 2226.
[23] Gunjan Gupta, *Conclusive Proof of Legitimacy of Child: Silently Wiping Age-Old Law- Legal Analysis and Justification*, Summer Issue, ILI Law Review (2019).

Evidence Act.

CONCLUSION

Every law reform aimed at the law of evidence has generated a positive effort to overcome the side effects of archaic provisions and recognize new scientific advancements providing accurate results. Acting as a substantial piece of evidence, the reliance placed on DNA testing as a legitimate method to check the accuracy of the claim serves a better purpose than to bank upon plain and hollow conclusive proof. Carving out the principles led down in various judicial pronouncements, the present settled situation seems to be in good taste! As a matter of policy, providing for DNA tests along with protecting the right to privacy and liberty of the individual cannot be overviewed as an exemplary tool to serve justice. In conclusion, the Dipanwita Roy case not only offers us insight into the legitimacy and logical application of DNA testing in cases pertaining to infidelity in divorce cases, but it also provides valid premises to understand the difference between the two classes of cases, i.e., the one related to the legitimacy of child and another involving claim for divorce and dissolution of marriages on the ground of infidelity. The landmark judgement has not failed to leave a trace for upcoming judgements in the same line of causes.

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