Calcutta High Court
Tushar Roy vs Sukla Roy on 24 June, 1992
Equivalent citations: 1993 CriLJ 1659
Bench: G R Bhattacharjee
ORDER Gitesh Ranjan Bhattacharjee, J.

1. The question that falls for consideration is whether blood group test is permissible in law for determining the paternity of a child born during the wedlock of the husband and the wife. The question has arisen in a proceeding under Section 125, Cr.P.C. for maintenance claimed against the husband by the wife for herself and the minor daughter born during the wedlock. The husband doubts the fidelity of the wife and he wants blood-group test of the child for ascertaining whether he or any body else is the father of the child. The learned Magistrate refused the prayer of the husband for blood group test. Against such refusal the petitioner/husband has come up in this Court.

2. Mr. Sukumar Guha, the learned Advocate for the petitioner argued that blood group test should be allowed for determining the paternity of the child. In a recent decision in Criminal Revision No. 800/92 (Gautam Kundu v. Shaswati Kundu), where a similar question arose, I have held in my judgment dated the 22nd April, 1992 that in view of the provision of Section 112 of the Evidence Act there is no scope of permitting the husband to avail of blood test for dislodging the presumption of legitimacy and paternity arising of Section 112 of the Evidence Act, where the husband had admittedly access to and sexual intercourse too with the wife at the relevant time. The fact that a child was born during the continuance of a valid marriage between a woman and her husband is a conclusive proof that the said child is the legitimate child of that man unless 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. Mr. Guha argued -- and I must say, it is a very novel argument -- that under Section 112 the husband is entitled to show that at the relevant time he had no access to the wife and this he can successfully show by blood test evidence if such test establishes that the husband is not the biological father of the child, for in that case blood test evidence becomes an evidence of the husband's non-access to the wife at the relevant time, namely, the time precisely when the conception took place by dint of sexual act of someone else. There is no doubt that when Section 112 of the Evidence Act was drafted and enacted there was no possibility of determining the paternity of a child by blood test evidence because science was not at that stage as it is now. But then a deeper study would reveal that Section 112 was couched in a carefully worded language and was enacted for a purpose which is much wider than the purpose of filling up the gap of any possible uncertainty about the paternity of a child where a doubt on the point is raised by any suspicious mind. The conclusive presumption under Section 112 is rather based on a sound policy of affording protection to the sanctity and stability of family relationship so that for every trifling suspicion or for oblique purpose the question of legitimacy of a child born or conceived in the wedlock does not become a handy target of scandalisation and indecent investigation. It may be noticed that Section 112 does not draw the comparatively weaker presumption falling within the ambit of the expression 'shall presume' as defined in Section 4 of the Evidence Act. In Section 4, it is stated that whenever it is directed that the Court shall presume a fact it shall regard such fact as proved unless and until it is disproved. Section 112 could very well have been so drafted as to provide that where a person was born during the continuance of a valid marriage between his mother and any man the Court shall

presume that he is the legitimate son of that man. In that case in view of the definition of the expression 'shall presume" as given in Section 4 it would have been open to the contending party to disprove the presumption by adducing evidence in disproof of the presumed fact, as for example, by blood test. Had it been a matter falling within the ambit of 'shall presume' the contending party would have been at liberty to rebut the presumption by evidence, whatever may be the nature of the evidence provided it is admissible. Instead, Section 112 employs the language of a stronger presumption, the language of 'conclusive proof' leaving only a very narrow and defined margin about the manner in which that conclusive presumption of law can be dislodged.

3. Here we may profitably study the text of Section 112 of the Evidence Act which runs thus : --

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.

4. The term 'access' as used in Section 112 has been consistently interpreted to include the existence of opportunities for marital intercourse between the husband and the wife at the time when the child could have been begotten according to the ordinary course of nature. A conclusive presumption of legitimacy attracted by Section 112 can be rebutted only by showing that the husband and the wife had no access to each other at any time when the child could have been begotten. What is required to be shown for rebutting the conclusive presumption which is a presumption of law is that the husband and the wife had no access to each other 'at any time' when the child 'could have been begotten'. The words "at any time" and "could have been begotten" are very significant. The requirement of the section for rebutting the conclusive presumption is not to show 'non-access' exactly 'at the time when the child was begotten', but the requirement is still more onerous and pervasive so much so that the contending party will have to show non-access 'at any time' when the child 'could have been begotten' which means non-access not at any particular moment but during the whole span of the time when the conception according to the ordinary course of nature possibly could have taken place. The express terms of the provision of Section 112 require the contending party to show that during the whole of the period when the child could have been begotten according to the ordinary course of nature, the husband and the wife had no access to each other. If instead of undertaking to discharge that pervasive and wider responsibility or onus, the contending party slices out only a fraction of that responsibility and proposes to rebut the conclusive presumption of law only by showing non-access, in a derivative way at the particular moment when the child was actually begotten by proving through blood test that the husband is not the biological father of the child, plainly the same does not constitute a proposal to satisfy the whole of the requirement of the rebuttal responsibility imposed by the section itself. That being so there cannot be any question of permitting the contending party to undertake only a fractional responsibility out of the requirement of the total responsibility prescribed under Section 112 for dislodging the conclusive presumption of law which the section projects. This is more so where, as it

must be in most of the cases, the venture of blood test is only exploratory or investigative in nature due to the fact that the husband also had access to and sexual intercourse with the wife during the possible period of conception even if any other person also had such access a(any possible time to the same woman thereby rendering it a matter of narrow chance or purely fortuitous coincidence that either of the two men can turn out to be the biological father of the child. Blood test in the circumstances is only an investigation for ascertaining, if possible, a biological fact. It is not an evidence till it yields a particular result in a particular manner. If blood test evidence is to be allowed on the reasoning that in case the test establishes that the husband is not the biological father of the child this will show that the husband had no access to the wife at the moment when the child was actually begotten because two men cannot have access to the same woman at the same time where the question of conception by such access is concerned, then this test will have to be allowed even when as a matter of fact the husband actually had access to and sexual intercourse with the wife at the possible time when the conception could have taken place. This is plainly contrary to the terms of Section 112 and will be rather tantamount to putting the cart before the horse. Section 112 is clear enough that once the husband is shown to have had access to the wife at any time when the conception could have taken place, the scope of adducing rebuttal evidence becomes non-available. The contending party cannot he permitted to say that he will rebut the conclusive presumption of law regarding paternity by proving directly by blood test that the husband is not the biological father of the child which will virtually be an abrogation of the existing provision of Section 112. That would have been permissible, had there been no provision of statutory presumption in the matter in which case the matter would have been governed by the ordinary rules of evidence regarding proof and disproof. That would have been also permissible, as I have already pointed out, had Section 112, instead of the existing provision, contained a provision for keeping the matter in the domain of 'shall presume' as defined in Section 4 of the Evidence Act in which case the contending party would have been at liberty to adduce any sort of rebuttal evidence admissible under the law for dislodging the statutory presumption of paternity because Section 4 provides that whenever it is directed by the Act that the Court shall presume a fact it shall regard such fact as proved unless and until it is disproved. The provision of Section 112 being what it is the conclusive presumption of law raised by it will have to be accepted. But if that conclusive presumption is to be assailed it has to be assailed in the limited manner prescribed by the section namely by showing 'non-access' during the whole of the period when the child could have been begotten according to the ordinary course of nature. and not otherwise. It must be noticed that Section 112 requires proof of non-access during the whole of the relevant period so that the presumption that the husband is the father of the child can be demolished. The process is not reversible. Contrary to the conclusive presumption of law, the husband is not allowed to directly prove first that he is not the father of the child born during the wedlock and then to say that since he is not the father therefore he did not have access (to the wife) in the sense of sexual intercourse with the wife at least at the time when the child was actually begotten and therefore the presumption of legitimacy stands rebutted. The question of blood test is not a question of effect of the evidence that may or may not be projected by such test, but it is rather the threshold question of admissibility of evidence in the context of the provision of Section 112 of the Evidence Act.

5. The provision of Section 112 and the consistent interpretation it has received for more than a century has a sound logic backed by a sound ethos which in my opinion is still valid in Indian

conditions. The rule of presumed paternity as embodied in Section 112 is rather founded in decency, morality and policy.

6. The two English decisions reported in (1968) 1 All England Law Reports 20 (Re. L.) and (1968) 2 All ER 1023 (B.R.B. v. J.B.) in which blood test of the child was permitted for determining paternity have been discussed by me in my earlier decision in Gautam Kundu v. Shaswati Kundu (supra). The position in English Law which I have mentioned in my said decision is that although the presumption of legitimacy of a child born during wedlock was extremely strong in earlier days yet the same could be rebutted by proof beyond reasonable doubt that the husband was not the father and that now a days that heavy burden has become comparatively lighter and the presumption of legitimacy can now be rebutted by showing, on preponderance of probabilities that the husband could not be-the father. In that context I made the following observation in the said decision :--

'Under the English Law, therefore, in spite of the presumption of legitimacy it was and is however open to the husband to rebut the presumption by showing that 'he could not be the father of the child', the scope of which is much wider than the scope of rebutting that presumption by "non-access" under the Indian Law, There is no doubt that this burden on the husband even at the time of rendering the aforesaid decisions under the English Law could be discharged by adducing evidence that he was not the father of the child. In that background blood group test which is a modern scientific technique was held available as possible evidence having bearing on the question of legitimacy and paternity. The Indian Law is, however, radically different. Here it is not open to anyone to challenge the legitimacy or paternity of a child born during the continuance of marriage by adducing any sort of evidence however scientific may it be to deislodge the conclusive presumption in favour of legitimacy and paternity. Section 112 read with Section 4 of the Indian Evidence Act debars evidence except of non-access for disproving the presumption of legitimacy and paternity engendered by Section 112. The only limited scope permitted under the statutory provisions of Indian Law for dislodging the said presumption is to show that the parties to the marriage had no access to each other at the time when the child could have been begotten. In the two cited English decisions each of the two men including the husband had access to the woman and had sexual intercourse with her at the time when the child was begotten so that either of the two men could be the father of the child. Since the English Law permitted rebuttal of presumption of legitimacy, to use the language of Lord Denning, M.R. "by showing, on the preponderance of probabilities, that the husband could not be the father" and since there was no legal bar as to the manner in which that could be shown provided it could be shown by adducing any sort of admissible evidence, there was no difficulty for the Court to allow the husband to avail himself of the evidence of blood test for showing that he was not the father of the child in spite of the fact that the husband admittedly had access to and sexual intercourse too with the wife at the relevant time. Under Indian Law however in a similar situation the husband is debarred from disputing the legitimacy and paternity of the child in spite of the fact that another man also had regular sexual intercourse with his wife at the time when the child was conceived. The husband is debarred under the Indian Law in such a situation from challenging the paternity and legitimacy of the child because he having had access to his wife at the relevant time has no opportunity to take the plea of non-access which is the only permissible plea for dislodging the presumption of legitimacy under Section 112, although it is quite possible that the other man who also had sexual intercourse with the woman was the

biological father of the child.

7. By blood group tests of the concerned adults and the child it may be possible in certain cases to say that a particular person is not the biological father of the child. Such test by itself cannot say with certainty that a particular person is the biological father. Where however one of the two men must be the father and by blood tests one of them is excluded if the tests answer in that way, in that case it may be held that the other man is the biological father of the child.

8. Besides the aforesaid two English decisions Mr. Guha also attracted my attention to another English decision namely, the decision of Ormrod, J. in Re. L., (1967) 2 All E.R. 1110. In fact the decision reported in (1968) 1 All ER 20 (supra) is the decision of the Court of Appeal in the same matter in the appeal preferred against the said decision of Ormrod, J. In all the three English decisions the pivotal question that fall for consideration was whether the High Court had power to direct blood test of the child born during wedlock for determining paternity. The desirability of taking the help of modern scientific methods for discovering the truth, where possible, also loomed large as a tempting aspect of consideration in that connection. In the decision in Re. L. reported in (1967) 1 All ER 1110 (supra) Ormrod, J. quoted the following words of Lord Sumner from his dissenting speach delivered in Russell v. Russell : --

My lords, my own view is that in the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to truth. To ordain that a court should decide upon the relevant facts and at the same time that it should not hear some of those relevant facts from the person who best knows them and can prove them at first hand seems to me to be a contradiction in terms. It is best that truth should out and that truth should prevail.

Ormrod, J. then made the following observation : --

Lord Sumner, of course, recognized that this principle must yield if there is an existing rule of law which actively excludes the type of evidence under consideration or if the court has no power to order such evidence to be made available, as in W. v. W. (No. 4) I have focussed attention to the above observations for the purpose of highlighting that while truth has its own demand for revealing itself, nevertheless this demand has to yield to any rule of law which precludes evidence or which restricts the types of evidence or if the Court's power to admit evidence has been ousted or restricted by law. In Indian law the truth about the biological paternity of a child born or conceived in wedlock, if contended to be different from the presumption of law, can be established only in the particular manner permitted under Section 112 of the Evidence Act and not otherwise, no matter whether the proceeding in which the question is raised is a matrimonial proceeding, maintenance proceeding, guardianship proceeding or any other proceeding or suit. There are also many other provisions of law which restrict evidence. Professional communications are protected from disclosure under Section 126 of the Evidence Act in certain circumstances. Evidence derived from unpublished official records relating to the affairs of state and confidential official communications are generally protected from disclosure under Sections 123 and 124 of the Evidence Act. Communications between spouses in certain circumstances are also protected from disclosure under Section 122.

Where the court is convinced that the bar of any of those provisions is applicable in a particular case, in that even the inadmissible evidence cannot be admitted simply on the plea that truth will be established thereby. So much for the technical aspect of admissibility of evidence. In every system of law the procedural mechanism is also designed with the object of serving the cause of justice and truth and not for an idle purpose. How far it succeeds is of course a different question.

9. Also in considering the substantive aspect, the necessity of circumspection can not be dispensed with. There is no doubt that truth is always good and the same must triumph when untruth threatens truth. But then there may be occasions when truth competes truth. There then comes the question of choice. The truth that is more beneficial, the truth that serves a wholesome cause in a better and more effective way will have to be preferred. In some of the doubtful cases it may be good to know the truth about biological paternity, but the truth of the necessity of ensuring the welfare of a child rather than bastardising it, the truth of the desirability of protecting the family relationship from scandalisation motivated by oblique purpose are also truths which may in a large number of cases overshadow the other truth. By aggregation of the pros and cons of both the competing truths at a given time in a given society it may be necessary to make the purpose of one generally subordinate to the purpose of the other. That is how the presumption of legitimacy took shape and gained weight of considerable inviolability both under the English law and the Indian Law. I have also pointed out the difference between the English Law and the Indian Law. Under the English Law rebuttal of the presumption of legitimacy is more a question of quality of onus whereas in Indian Law it is rather a question of admissibility of evidence for discharge of the onus.

10. The question that rather troubled the Courts in England was whether the Court could direct the persons concerned including the child to submit to blood test for determining paternity. It was however held that a judge of the High Court has power to order blood test whenever it is in the best interests of the child. But then this power was found to vest only in a judge of the High Court and not in a county court judge. Thus in England blood test for determining the paternity of a child is permitted only when such a course is considered to serve the best interests of the child. In this connection the following observation of Diplock, L.J. in B.R.B. v. J.B., (1968) 2 All E.R. 1022 (Supra) at page 1027 deserves attention : --

His consideration must be what is in the best interests of the child, and I can conceive of cases where it may be in the child's interest to rely on the presumption of legitimacy rather than to put it to the risk. Such cases must. I thing, he rare, because on the whole I agree with Lord Denning, M.R., that in most eases it is in the best interests of everyone, including the child, that truth should out.

In both the English cases discussed above the circumstances were such that either the husband or the party cited/co-respondent was the biological father of the child and in both the cases either of the two men would have accepted the child if it could be ascertained that he was the biological father of the child. In such circumstances it may be in the best interests of the child to ascertain the biological father by blood test. It also seems that such is the situation in most of the cases in England where paternity is disputed. But what is the situation in India ? Here in India very rarely an adulterer admits his involvement, far less claims paternity of a child not born in his own wedlock. Even in the instant case although the husband/petitioner wants an exploratory blood test for

ascertaining whether he is the biological father of the child born in his wedlock he has not come forward with any specific case that some other particular person must be or is possibly the lather of the child. And no second man is coming forward with any admission or confession of adultery, not to speak of claiming the paternity of the child. In the circumstances what interest of the child can be served by bastardising it through blood test ? Assuming for the sake of argument that in this case it is possible to bastardise the child by blood test, in that case the child will be exposed to the risk of starvation or of begging for survival as it will be deprived of support by the husband of the wedlock in which it was born, there being at the same time no substitute or putative father to offer support. Therefore even if we were to follow the English principle that blood test may be ordered for determining paternity only in cases where such determination will serve the best interests of the child, it is crystal clear that a situation like this will not only not serve any interest of the child, even if it serves the purpose of an adult who may be interested in bastardising it for avoiding maintenance, but may rather jeopardise the very survival of the child for no fault of it. Therefore even by the application of the English principle this is not a fit case for directing blood test. And this I have no hesitation to say must be the situation in almost all the cases of disputed paternity in India in respect of a child born in wedlock. In the very same case of B.R.B. v. J.B. (supra) Sachs, L.J. made the following observation at page 1028 which also highlights the ticklish aspect of the question of benefit of the child :

What he did do was very properly to draw the attention of the court to the great range of different cases that could arise if the jurisdiction is unlimited. So great and so diverse is that range, that it includes many cases in which it would be extremely difficult to ascertain what is for the benefit of the infant or to determine whether the test is in truth being asked for the benefit of that infant or for the benefit of others.

Then further down the learned Judge again observed thus :

prominent to my mind is the fact that it is essential to remember that the parens patriae jurisdiction is one for the benefit and protection -- I emphasise the words "and protection" -- of the infant; and that it, it must be emphasised, can be something very different from the self-centred interests that adults may have in sorting out their own affairs. The latter interests may obviously be very different from those of the infant, who may in the course of the proceedings be deprived of the name which he thought he bore, not to mention the fortune which he might have inherited. Moreover, one must not wholly overlook the potential existence of cases where the adults wish so to manoeuvre that the infant comes out of his prima facie position. To bastardise a child may be in the interests of the adults or some other child, but not of the infant bastardised. The same may apply to the break-up of a parental home.

Again, at page 1029 of the same decision the Same learned Judge made the following Observation : --

Wherever the consideration lies, however, there is no doubt that the matters to be dealt with are such as to give scope, as was plainly shown arguendo in the present case, for deeply different individual judicial views as to what is and what is not in the interests of the child in relation to

potential bastardisation on the given facts of any one case. For instance, is it or is it not held all. over the country and in all sections of the community that it is of no or of minimal importance to a child to call it out of its name ?

11. The decision of the Court of Appeal in Re. L. (1968) 1 All ER 20 (supra) that blood test can be directed if it serves the best interests of the child however was applicable to cases where exercise of the custodial jurisdiction of High Court was concerned. Lord Denning, M.R. was however of the opinion that blood test could be ordered also in a paternity issue or in any proceedings where it is in the best interests of the child to have its paternity settled one way or the other. The learned Judge was also of the view that even in a petition for divorce on ground of adultery blood test on the child could be ordered. On the other hand in the same decision Willmer, L.J. expressed his reservation about the opinion of Lord Denning. M.R. regarding blood test in proceedings other than in custodial jurisdiction, in the following language at page 34 : -

Since preparing this judgment I have had the advantage of reading the judgment which has now been delivered by Lord Denning, M.R. Having regard to what has been said by him, I think it right to add two further observations. First, I confine my judgment with regard to the Court's power to order a test of a child's blood to cases arising, as this case does, within the court's custodial jurisdiction. I am not, as at present advised, prepared to hold that such a power exists in a paternity issue, and still less on a petition for divorce on the ground of adultery. So to hold would in my judgment be contrary to the decision of this court in W. v. W. (No. 4) Davies, L.J. who was also a party to the said decision concurred with the above reservation of Willmer, L.J. However in the later decision in B.R.B. v. J.B., (1968) 2 All ER 1023 (supra) it was held that a judge of the High Court can order a blood test on a paternity issue or indeed any other issue. Lord Denning, M.R. concluded thus :

The conclusion of the whole matter is that a judge of the High Court has power to order a blood test whenever it is in the best interests of the child.

12. Therefore in English law blood test may be permitted in cases of disputed paternity only when it is in the best interests of the child to do so. In England the matter has since been covered by legislation and Section 20 of the Family Law Reforms Act, 1969 provides that in civil proceedings in which paternity of any person falls for determination, the court may give a direction for the use of blood tests. Section 23 of the said Act authorises the Court to draw such inference as appears proper in the circumstances when the person concerned does not comply with the direction of the court for blood test. Even before these statutory provisions came into force in England, Lord Denning, M.R. expressed his views in the matter in Re. L. (supra) as well as in B.R.B. v. J.B. (supra) in the following language :

If an adult unreasonably refuses to have a blood test, or to allow a child to have one, I think that it is open to the court in any civil proceedings (no matter whether it be a paternity issue or an affiliation summons, or a custody proceeding) to take his refusal as evidence against him, and may draw an inference therefrom adverse to him. This is simply common sense.

Displock, L.J. however, as it seems, had some reservation in the matter and this is how the learned judge expressed the same in B.R.B. v. J.B. (supra) at page 1027 : --

-- I reserve my views about the evidential inferences to be drawn by the refusal of anyone to take a blood test. As Lord Denning, M.R., said in Re. L. (ii), that is a matter of common sense, and I would prefer to leave it to common sense.

It is apprehended that drawing of adverse inference from the refusal to submit to blood test is fraught with the risk of ushering in grave injustice in a good number of cases quite unwittingly, particularly in Indian situations as prevailing yet. Such inference will be generally unsuitable for application to cases falling within the ambit of Section 112. Suppose in a paternity issue in a maintenance case or in a divorce case on ground of adultery or in a nullity proceeding on ground of premarital pregnancy, the husband and allegedly another man 'A' had sexual intercourse with the wife at the time when the child could have been begotten so that if the allegation were true either of the two men could be the father of the child. As I have already indicated, in the prevailing Indian situations it is very much unlikely that the man 'A' will admit or acknowledge his physical relationship, if any, with a woman who is or was not his wife. He will be far less eager to acknowledge paternity of a child born of his extra-marital relationship, if any. Very much likely that he will not submit to blood test. To draw an adverse inference against 'A' by reason of his refusal to submit to blood test and to hold him the father of the child by reason of such adverse inference is quite likely to be a fallacy contrary to the physical facts of the husband being the biological father of the child which may also be equally true inasmuch as the husband had access to the wife at the relevant time. To dislodge a statutory presumption by an inference drawn from a mere rule of procedure in a situation like this may not be a correct conclusion of truth regarding a biological fact, and at any rate such an artificial conclusion cannot claim the authenticity of a physical truth. In such a situation the very purpose of blood test venture, by reason of the technicalities of its procedural operation may lead itself to a self-defeating farcical end. Why then dislodge a statutory presumption by another presumption or inference which is quite susceptible to error on point of fact ?

13. I am not aware of any law by which an adult person in India can be forced physically to submit to blood test where such person does not consent to such test. It is also not unlikely in India that even an innocent person may feel embarrassed to submit to blood test. The Science of serology is not yet that perfect as can definitely say that certain person is the biological father of a child. It can only exclude some person from paternity, and that too not in hundred per cent cases. Even an innocent person, if perchance he is not so excluded by reason of the imperfection of the science, will fall within the category of possible father. That itself may expose him to a speculative suspension baked by the imperfect science. In Indian social conditions that itself may prove to be a social stigma for which even an innocent person may feel shy or embarrassed to submit to serological test. To attribute paternity on the basis of inference from refusal in such circumstances will be simply grotesque. Imperfection of science on this subject was also considered by a Division Bench of this Court in refusing blood test in a decision reported in 73 CWN 19 (Leelabati v. Kashinath).

14. It is interesting to note that Lord Denning, M. R. in Re.L. (supra) took note of the new situation which would justify reconsideration of the presumption of legitimacy. His Lordship at page 23 of the

said decision observed thus :

Moreover, there is not nearly the same stigma on illegitimacy as there used to be. It can be, and often is, cured by subsequent marriage of the parties. Even when the parents do not marry, the penalties on the child have been largely removed. The sins of the fathers, are no longer visited on the children. In this new situation I think that we are at liberty to reconsider the presumption of legitimacy. I am prepared to hold that it can be rebutted on the balance of probabilities.

This new situation" is yet to arrive in the Indian scene. The stigma on illegitimacy is yet as dark here as ever. Illegitimacy, as far as I am aware, cannot be cured in India by subsequent marriage of the parents. In India while it may not be difficult to find childless parents who are eager or agreeable to adopt a legitimate child of known parentage, it is indeed extremely difficult to find out a childless couple agreeable, far less eager, to accept a child of illegitimate birth or of unknown parentage as their own child by adoption. The psychology of such reluctance if not abhorrence is embedded in the traditional outlook and attitude of the Indian mind towards illegitimacy which as a matter of fact, notwithstanding a few noticeable exceptions, is still prevalent and prominent in this country, -- good or bad whatever may it be. In this background, I am of the opinion that the time for reconsideration of the presumption of legitimacy is perhaps not ripe yet here in India and I am afraid, any premature enthusiasm for ascertaining the scientific truth about the biological paternity may not, quite in a good number of disputed cases and even generally, prove beneficial to the interests of many children born during wedlock. We have seen how even in England the learned Judges have expressed reservation in the matter in spite of the 'new situation' that has already emerged there. We have also noticed how the field has been covered by legislation in England by enacting provisions like Sections 20 and 23 of the Family Law Reforms Act, 1969. We do not yet have any such legislation in the Indian scene.

15. Having regard to the Indian legal and social scenario I have no hesitation in my mind that the time is not yet ripe for a meaningful judicial activism so as to throw away over-board the judicial interpretation which Section 112 of the Evidence Act has consistently received so long and to take recourse to any over-jealous interpretation by causing extreme violence to the language of the said section so as to virtually abrogate the same. I therefore hold that neither the language of Section 112 of the Evidence Act nor the interpretation it has consistently received throughout, nor even the consideration of welfare of the children in disputed cases of paternity in general, demands or permits blood test as exploratory or investigative experiment for determining paternity. It is however to be mentioned here that my views expressed in this judgment about the desirability or permissibility of introducing blood/test right now are confined, for obvious reasons, to the question of determination of paternity of a child born or conceived during wedlock. The question whether blood test should be resorted to for determining the paternity of a child who was not born or conceived during wedlock, does not fall within the scope of Section 112 of the Evidence Act and different considerations may arise in such cases. Similarly, where maternity is in dispute, say, where replacement of a child soon after its birth in a hospital is suspected and each of the two married ladies Mrs. X Mrs. Y claims, it as her child, blood tests of both the couples may be of help in resolving the dispute about maternity. In such a situation Section 112 of the Evidence Act will not come into play because here the basic question is to which of the two ladies the child was born and

the section, by its own term, does not apply where the maternity of the child is not certain. The two Indian decisions relied upon by Mr. Guha in support of his argument for blood test, of which one is a single bench decision of Rajasthan High Court in Swati Lodha v. State of Rajasthan, 1991 Cri LJ 939, and the other is a single bench decision of the Allahabad High Court in Bharti Raj. Sumesh Sachdeo. , relates to facts which do not attract Section 112 of the Evidence Act and therefore do not help him in the present case.

16. For all the reasons discussed above I hold that no interference with the impugned order rejecting the prayer for blood test is warranted. The revisional application is, therefore, dismissed. Urgent certified copy be supplied by the Department to both parties, if applied for verbal prayer for stay of operation of this judgment is rejected.