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Position of Child Witness under Indian Evidence Act, 1872 – An Analytical Study

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Abstract:

Witness, may be defined as someone who presents evidence, before any court of law. Section 118 of Indian Evidence Act, 1872 explains competency of witness. So according this section a kid of gentle age can be permitted to attest if he had rational capability to comprehend the queries and present logical explanations thereto. As per the law, no precise age has been fixed, in order to exempt them from presenting evidence before the court, on the grounds that they don't possess the required understanding. The evidence presented by a child witness must be assessed more cautiously and with more alertness, this is because a child is vulnerable to be influenced by what others tell them and thus a child witness is an easy target to instructing. This article describes meaning and competency of witness under the Indian evidence Act. Competency of child witness and value of such child witness are analytically discussed in this article with decided case laws. Lastly some effective suggestions are put forward to make this provision more effective.

Key Words: *Child witnesses, Competency of witness, evidence, Voir dire, Corroboration*

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Introduction

Child witnesses are generally vulnerable to schooling, they begin to imagine and believe things, when something is constantly repeated to them by their elders. A child's brain is more like a blank paper, and thus anything can be either be retained or re-written over them by repetitive and frequent communication. But this doesn't mean that they tend to forget things, instead their memories are better, specifically when they are in strain, and they hardly forget strenuous incidents for a longer time unless it is over written by an external force over the course of time. It is not that they always imagine things, but sometimes they may be the effect of imagination created by others. In that case, the officials need to cast that imagination and lastly the court needs to deal with such cases in accordance with the law. Under section 118 of Indian Evidence Act, 1872 a child is competent to testify, if it can understand the question put to it and give rational answers thereto.

Meaning and competency of witness

Documents and witnesses are the chief foundations, on which the theory of evidence rests. Witness is any person who presents the witnesses before the court of law. According to Bentham, witnesses are the ears and eyes of the justice. Witnesses can be any person, who gives valuable information regarding a specific case, before the court of law. It is precisely through the help of documents and witnesses, a certain case is presented before the court of law. Therefore, the law needs to be very thorough regarding certain issues as, who can be termed as competent witness, and how their credibility can be tested.

Section 118 of Indian Evidence Act (IEA), 1872 explains who may testify i.e. competency of witness. A witness is someone, who is termed to be competent when there is nothing in law to prevent him from appearing in court and giving evidence. As per this section, all persons are competent, unless they are unable of providing evidence or comprehending the questions put to them because of tender years, extreme old age, disease or any other cause of the same kind.

Indian Evidence Act, 1872 does not recommend by a specific age as determinative factor to treat a witness to be a competent one. So according to section 118 of the Evidence Act a child of younger age can be permitted to testify if he had intellectual capability to comprehend the queries and present rational answers thereto.

Competency of a witness must be differentiated from privilege and his compellability. The witness is considered as having the competency if nothing is exist in the law which stop them to take affirmation and analyzed if he want to give an evidence. According to the general rule, the witness who is competent, must be able to give evidence in court of law (compellable) but there are cases where the witness is competent, not able to give evidence in court for example ambassadors and sovereigns of foreign states. Even under section 5 of the Banker's Books Evidence Act, 1891 in banks, no officer is ready to provide evidence or appear as a witness even after getting an order from the court in special cause. In divorce and other matrimonial proceedings the parties are competent witnesses but not compellable (e.g. section 51 and 52 of Divorce Act).

Again, there is a difference between compellability to be affirmed and examined from privilege, at the time of making affirmation to answer the certain questions. The competency is cover under the sections 118 to 121 and section 133 while the compellability does not dealt with the Evidence Act, on the other side, privilege covers under section 121 to 132. On the basis of competency of witness, any evidence cannot be admissible in the court of law, it may be inadmissible if it is hearsay evidence or when the confession is made in front of police officer.[1]

Competency of child witness

With respect to children, a child may be a witness in the court if the court thinks that the child is capable to understand the question and give the sensible answer to the court. There is no age limit as per the court within which they are freed to provide the

[1]2 M. MONIR & DEOKI NANDAN, PRINCIPLES AND DIGEST OF THE LAW OF EVIDENCE 2037-2038 (2001)

evidence on the ground that they have not adequate empathetic. Actually it is not possible to lay down any specific rule regarding the degree of brainpower and understanding which will condense a child capability or trustworthy witness. So it is the discretion of the court to judge whether the child is able to understand the question and answer it in sensible manner.

In the court of law, the court should ask few simple and ordinary questions to test his intellectual capability before examining a child as a witness and the recoding should be done of whole inquiry by which appellate court can be satisfied with the capability of child to giving the evidence. If the law court is not satisfied as to the child's capacity to depose it should decline to examine him, but if it is satisfied as to this matter, the oath should be taken by the witness after that he should be examined in ordinary way. It does not matter the child is under 12 age and not able to understand the meaning of oath or affirmation. The opinion of judges or magistrate must be recorded in which it was stated that the witness understands the value of truth. While in some cases, the evidence are rejected made the child.[2]

In *NivruttiPandurangKokate v. State of Maharashtra*,[3] the decision was taken by the Supreme Court regarding the child witness by testing the child for their sufficient intelligence through the trial judge who noticed his behaviors, his apparent control or lack of intelligence, and on the basis of test, judge able to disclose his ability and understanding as well as intelligence for the oath. The high court may neglect the decision of the trial court if they perceived that the recording conclusion is erroneous. This protection is essential because child witnesses are agreeable to training and often live in a make-believe world. However, it is considered as the child witnesses are dangerous witnesses as they are flexible and accountable to be prejudiced easily, shaped and molded, but it is also true if the child witness is cured and secured before presenting the court, the impressive truth can be attained which would be acceptable in the court of law.

In *HimmatSukhadeoWahurwagh v. State of Maharashtra*,[4] showed that the child was able to differentiate between right and wrong which was find out in the cross examination by the Supreme Court while the defense lawyer was confused to make the decision what is wrong or right? By asking the question, the court try to find his correctness as a witness and if no questions are asked to child witness, the evidence related information is able to understand the capability of child what is wrong or right? This session is run in cross examination. A child witness must be able to recognize the holiness of oath for giving evidence and the question which is asked to him.

In *RatansinhDalsukhbhaiNayak v State of Gujarat*[5] the decision was taken by the Supreme Court regarding the child witness by testing the child for their sufficient intelligence through the trial judge who noticed his behaviors, his apparent control or lack of intelligence, and on the basis of test, judge able to disclose his ability and understanding as well as intelligence for the oath. The high court may neglect the decision of the trial court if they perceived that the recording conclusion is erroneous. But the precaution is taken by the court to safe the child witness as the child can be easily mold and live in materialist world. So, it is also considered that the child witnesses is dangerous. On the other side if the precaution is to secure the child witness, the truth can be found easily and no obstacle in the acceptance of the evidence given by the child witness.

In case of *Baby Kandayanathil v. State of Kerala*,[6] the learned trial judge has put preliminary questions to each of the witnesses and satisfying himself that they were answering questions intelligently without any fear whatsoever, proceeded to record the evidence.

[2] *Id*.
[3] A.I.R 2008 S.W.C 1460 : (2008) 12 S.C.C 565 : (2009).1 S.C.C (Cri) 454
[4] A.I.R 2009 S.C 2292 : (2009) 6 S.C.C 712 : (2009) 3 S.C.C(Cri) 1
[5] A.I.R 2004 S.C 23 : (2004) 1 S.C.C 64; *See also* GollaYeluguGivindu v. State of A.P, A.I.R 2008 S.C 1842
[6] A.I.R 1993 S.C 2275 : 1993 Cri.L.J 2605(SC) : 1993 Supp.(3) S.C.C 667

Voir dire test

Voir dire refers to tell the truth. It is an initial inspection of a potential juror is done through a judge or lawyer for making the decision about the qualification and compatibility of jury to work as jury.[7] According to the Law Lexicon it is a special form of oath administered to a witness whose competency to give evidence in the particular matter before the court is in question, or who is to be examined as to some other collateral matter.[8]Voir dire means to tell the truth. A nature of initial analysis by the justice, in which truth is spoken by the witness regarding the questions which are asked by them. If the witness seem incompetent by their answers, he is rejected as a witness and if the judge satisfied with the answers, they accept the evidence and shows the fact that the witness is competent.[9] According to Encyclopaedic Law Dictionary, voir dire means an examination of a witness upon the voir dire in a series of questions by the court and usually in the nature of an examination as to his competency to give evidence on some other collateral matter. And this takes place generally prior to his examination-in-chief.[10]

Credibility and admissibility of child witness

Dr. Henry Gross, who has been designated by numerous individuals as the 'father of criminal research', stated in his book, "Criminal Investigation" (1934 Edition, pp. 61-62), the character and nature of evidence specified by children. He also stated that in one manner the best witnesses are children of 7 to 10 years of age, as during that time the one undergo with immense hatred as well as love, considerations of religion rank, ambition and insincerity and many more are yet unfamiliar to them. He has, however, pointed out the great drawbacks which have made more distrustful of the capacity of children. They are apt to say much more from imagination than they actually know.

In Panchhi v. State of U.P the Supreme Court believed that the evidence of a witness of child would constantly standpoint once and for all mark out. It is not considered as law that if a child is found to be witness, his evidence shall be excluded, although it is present consistent. The law is that evidence of a child witness must be estimated more cautiously and with better suspicion as a child is vulnerable to influenced by what others detailing and thus a child witness is found to be an easy task for prey to tutoring.

In State of Assam v. Mafzuddin Ahmed, it was designed by the Supreme Court that it is dangerous to rely on the only evidence of the child witness as it is not present directly after the incidence of the incidental before there were any option of tutoring and training him.

In Mangoo v. State of M.P. the Supreme Court while allocating with the evidence of a child witnessed that there was always possibility to instructor the child, though, it cannot only be a ground to come to the decision that the child witness must have been taught. The court must regulate as to whether the child has been taught or not. It can be established by observing the evidence and from the matters thereof as to whether there are any suggestions of tutoring.

Competency of a person to be a witness is quite different from reliability of the witness unless a child is found competent to be a witness his statement is not admissible as evidence. Thus a child has to be a competent witness first then only his statement is admissible. Thereafter, the admissibility of the child witness has to be considered for reliability on scrutiny of his evidence. If the child is found to be reliable then only the child may be taken as a reliable witness. Otherwise rule of prudence which has been christened as a rule of law is that generally it is insecure to depend upon statement of a child witness as children are easily tutored or threatened or persuaded to speak in the way as told by others. Hence the statement of the child witness has to be observed carefully to see that he was not been tutored. Permissibility of evidence is not merely competency or dependent of witnesses. A witness

[7] Black's Law Dictionary 2041 (8th ed. 2008)
[8] P. RAMANATHA AIYAR, THE LAW LEXICON 1965 (2nd ed. 2000)
[9]Wharton's Law Lexicon 1049-1050 (1999)
[10] DR. A.R. BISWAS, ENCYCLOPAEDIC LAW DICTIONARY 1512 (2008)

may be capable within section 118, yet his evidence may be prohibited if he declared his beliefs as well as opinions in its place of facts among his information or gives unconfirmed report evidence.

Evidence of child witness without oath

Under section 4 of the Oaths Act, 1969 all witnesses are to proceeds confirmation or oaths. The condition says that sections 4 and 5 of the said Act shall not apply to a child witness under 12 years of age. The proviso to section 4 of the Oaths Act, 1969 must be read alongside with section 118 of the IEA and section 7 of Oaths Act. An exclusion to the one who govern the oath, also to an adult, goes only to the reliability of the witness and not his proficiency. The question of proficiency is give out with, under section 118 of the Evidence Act. All witness is proficient except the court reflects he is prevented from considerate towards the questions deliver to him, or for providing sensible answers, extreme old age, by reason of tender years and disease whether of mind or body or including any other reason of the similar kind. Consequently, unless the Oaths Act adds extra grounds of incompetency, it is obvious that section 118 of the Evidence Act must prevail. The Oaths Act does not involve with capability. In Bhagwania v. State of Rajasthan, it was detained that an exclusion to govern the oath under the Oaths Act, 1969 and does not disturb the permissibility of signs except the judge reflects the witness to be or else incompetent. Later, in the case of Ghewar Ram v. State of Rajasthan, It was believed that once the child witness is originate proficient, his incapability to take or recognize omission as well as oath in administering it, neither cancels the proceedings nor reduces his evidence prohibited.

In *Rameshwar v. State of Rajasthan*,[11] the Supreme Court held that an error to manage an oath, even to an adult, goes only to the trustworthiness of the witness and not his capability. Under the section 118 of Evidence Act, the competency question comes. According to the court, every witness is competent to give the evidence unless he does not understand the question asked to him and from giving sensible answers due to the extreme old age, ender years, disease related to body or mind and other causes of same kind. The recording are made by the judge and lawyers on their opinion through which child able to understand the responsibility of speaking truth. Otherwise the trustworthiness of the witness may be extremely affected, or the evidence may be rejected. The Supreme Court in *DattuRamraoSakhare v. State of Maharashtra*,[12] further stated that without oath, the evidence provided by the child witness is accepted according to the section 118 of Evidence Act which states that the witness able to understand the answers thereof. On the basis of case, the evidence of a child witness and trustworthiness thereof would depend. The only protection which the court should tolerate in mind while measuring the evidence of a child witness is that the witness must be a dependable any other capable witness and there is no probability of being taught.

Need for corroboration

The children are most hazardous witnesses, because of tender age they frequently mistake, dreams for realism. They are proficient of cramming things simply and repeating them. They replicate as to their individual knowledge that they have perceived from others and are significantly impact by hope of reward, with punishment fear, and by means of wish of notoriety. Hence it is unsafe to rely on uncorroborated testimony of a child. In *Mohamed Sunal v. King*,[13] it was held that in England where establishment has been made for the response of unsworned evidence, from a child it has always been providing that the evidence must be verified in some material essentials involving the suspect. According to Indian Acts there is no such facility and the evidence is found to be permissible whether validated or not. Once there is permissible type of evidence court can turn upon it. It is considered as sound law in training not to act on the unsupported evidence related to child, whether unsworned or sworned but this is a just a rule of prudence and not considered as law. In *GaganKanojia v. State of*

[11] A.I.R 1952 S.C 54 : 1952 Cri.L.J 547(S.C)

[12] (1997) 5 S.C.C 341; See also *State of Karnataka v. ShantappaMadivalappaGalapuji and others*, A.I.R 2009 S.C 2144

[13] A.I.R 1946 P.C 3

Punjab,[14] the Supreme Court held that portion of the statement of a child witness, even if taught, can be depend upon, if the taught portion can be detached from the untaught part, like such remaining untaught part motivates in increasing the confidence. In such a possibility the untaught part can be supposed or at least engaged into concern for the resolve of support as in the case of hostile witness.

In *Arbind Singh v. State of Bihar*,[15] the Supreme Court observed that it is well established that a child witness is disposed to tutoring and hereafter the court should look for validation chiefly when the evidence deceives tutoring traces. Further in *Bhagwan Singh v. State of M.P*,[16] the Supreme Court observed that the law recognizes the child as a competent witness but a child who is incapable to form a appropriate estimation about the nature of the occurrence for the reason that of immaturity of sympathetic and deliberated by the court to be a witness whose only testimony can be depend on with absence of other corroborative evidence. The evidence of child is mandatory to be estimated cautiously since he is an easy prey to tutoring. Consequently, the court looks for acceptable validation from other evidence to his testimony. But in *Suryanarayan v. State of Karnataka*,[17] the Supreme Court held that validation of the testimony of a child witness is not a regulation but an amount of attention and prudence. Few differences in the statement of a child witness cannot be ended on the basis for removal of the testimony. Differences in the statement, if not in material essentials, would lend acceptance to the child witness testimony who, under the usual conditions, would allow to mix-up what the observer saw with what he or she is possible to imagine to have perceived. While increase in value the evidence of the child witness, the courts are essential to rule out the opportunity of the child being taught. In the lack of any allegation concerning teaching or using the child witness for concealed commitments of the action, the courts have no option but to trust upon the confidence stimulating testimony of such witness for the determinations of holding the suspect guilty or not guilty**.**

Suggestions and conclusion

In case of child witness, the question on which his competency depends is whether he can understand and answer the question put him. The evidence of the child is essential to be estimated cautiously as he is a simple prey to education. So it will be risky to depend on the child's testimony witness without corroboration, though it is not the rule but a number of attention and practicality. Few suggestions are put forward to make the provisions relating to child witness more effective –

(i) When any witness who is under examination is a child, the court should comply section 118 of the Evidence Act properly i.e. court should apply its discretion to judge whether the child is proficient of considerate the question towards him and give rational answers.

(ii) The examination in chief and cross examination of the child witness should properly be controlled by the judicial officers. The court should monitor the leading questions which are faced by the child witness.

(iii) Whenever possible the child must acceptable to testify through closed circuit television or by video conferencing. Video conferencing is a development in technology and science which allows one to visualize, listen and talk with somebody far away, with the similar skill and comfort as if he is shown before you i.e. in your availability. The development of technology and science in present time make possible to established video conferencing apparatus in the court itself. Hence with this scenario, evidence would be documented or recorded through the magistrate or below his dictation in the open court as detected by the Supreme Court in *Sakshi v. Union of India*.[18] The suggestions made by the Law Commission of India in its 198th Report regarding witness protection may be considered.[19]

(iv) In criminal justice system in India, speedy trial is regarded as one of the fundamental rights. In order to ensure this right, the court must consider suitable action to confirm a prompt test in manner to decrease the length of time a child must tolerate the stress regarding contribution in the happening. Also the court should take the appropriate steps to evade repetitive arrival of a child witness before the court.

[14] (2006) 13 S.C.C 516 : (2008) 1 S.C.C (Cri.) 109
[15] A.I.R 1994 S.C 1068 : 1995 Supp (4) S.C.C 416
[16] A.I.R 2003 S.C 1088 : 2003 (3) S.C.C 21
[17] (2001) 9 S.C.C 129
[18] A.I.R 2004 S.C 3566

[19] *198th Report on Witness Identity Protection and Witness Protection Programmes*, LAW COMMISSION OF INDIA (June 01, 2017, 08.07 PM) http://lawcommissionofindia.nic.in/reports/rep198.pdf

Prosecutors, Police, Judicial Officers should be well equipped with child psychology and child behavior. They should receive proper training in this regard to deal with the cases where children are supposed sufferers and observers of abuse.