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

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Abstract:

A witness is a person who gives evidence before any court. Section 118 of Indian Evidence Act, 1872 explains competency of witness. So according this section a child of tender age can be allowed to testify if he had intellectual capacity to understand questions and given rational answers thereto. No absolute age is fixed by law within which they are exempted from giving evidence on the ground that they have not sufficient understanding. The evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to swayed by what others tell them and thus a child witness is an easy prey to tutoring. 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 prone to tutoring and when something is repeated to them by their elders, they begin to imagining them and really feel them to be the truth. Their innocent brains are like blank papers and can retain anything written over them by repeated communication. But that does not mean that they cannot remember anything. The memories of children are also better and what they see specially when under strain, they seldom forget for a long time unless it is over written by some effort. It is not that what they state is always result of imagination but is that same may sometimes be on effect of imagination created by others and for that one needs another to cast that imagination and then lastly the duty of court would be to work out portions improved and deal with them according to 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

Witnesses and documents are the main sources of evidence. A witness is a person who gives evidence before any court. As per Bentham, witnesses are the eyes and ears of justice. Witnesses can be the person who gives valuable input for the case. It is through witnesses and documents that evidence is placed before the court. So, the law has to be very clear with regards to certain issues like who are a competent witness and how can the credibility of the witness be tested.

Section 118 of Indian Evidence Act, 1872 explains who may testify i.e. competency of witness. A witness is said to be competent when there is nothing in law to prevent him from appearing in court and giving evidence. Under this section all persons are competent to testify they are incapable of giving evidence or understanding 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 prescribe by particular age as determinative factor to treat a witness to treat a witness to be a competent one. So according to section 118 of the Evidence Act a child of tender age can be allowed to testify if he had intellectual capacity to understand questions and given rational answers thereto.

Competency of a witness must be distinguished from his compellability and from privilege. A witness is said to be competent when there is nothing in law to prevent him from being sworn and examined if he wishes to give evidence. Though the general rule is that a witness who is competent is also compellable, yet there are cases where a witness is competent but not compellable to give evidence, as for example, sovereigns and ambassadors of foreign states. Even under section 5 of the Banker's Books Evidence Act, 1891 no officer of the bank shall in any proceeding to which the bank is not a party be compellable to produce any banker's book or to appear as a witness, unless by order of the court for a 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, compellability to be sworn and examined must be distinguished from privilege i.e. from compellability, when sworn, to answer certain specific questions. Sections 118 to 121 and section 133 deal with competency, the subject of general compellability is not specially dealt with by the Evidence Act; and section 121 to 132 deals with privilege. The admissibility of evidence is not solely dependent on the competency of the witness. A witness may be competent, yet his evidence may be inadmissible, as for instance, where it relates to hearsay or to confession made to a police officer.[1]

Competency of child witness

With respect to children, a child may be allowed to testify, if the court is satisfied that the child is capable of understanding the question put to him and give rational answers to the court. No absolute age is fixed by law within which they are exempted from giving evidence on the ground that they have not sufficient understanding. Actually it is not possible to lay down any specific rule regarding the degree of intelligence and knowledge which will render a child a competent or credible witness. So it is the discretion of the court to judge whether the child is capable of understanding

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

the question put to him and give rational answers to the court.

Before examining a child as a witness the court should test his intellectual capacity by putting a few simple and ordinary questions to him and should also record a brief proceeding of the inquiry so that the appellate court may feel satisfied as to the capacity of the child to give evidence. If the 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, it should administer oath to the witness and examine him in the ordinary way unless he is under twelve years of age and does not understand the nature of an oath or affirmation. It is desirable that judges or magistrates should always record their opinion that the witness understands the duty of speaking the truth and state why they think that; otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether.[2]

In *NivruttiPandurangKokate v. State of Maharashtra*,[3] the Supreme Court dealing with the child witness has observed that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

In *HimmatSukhadeoWahurwagh v. State of Maharashtra*,[4] the Supreme Court held that the evidence of a child must reveal that he was able to discern between right and wrong and the court may find out from the cross-examination whether the defence lawyer could not differentiate between right and wrong. The court may ascertain his suitability as a witness by putting questions to him and even if no such questions had been put, it may be gathered from his evidence as to whether he fully understood the implications of what he was saying and whether he stood discredited in facing a stiff cross-examination. A child witness must be able to understand the sanctity of giving evidence on oath and the import of the questions that were being put to him.

In *RatansinhDalsukhbhaiNayak v State of Gujarat*[5] the Supreme Court observed that the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaked and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a 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.

Voir dire test

Voir dire means to speak the truth. It is a preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury.[7] According to the Law

[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
[7] Black's Law Dictionary 2041 (8th ed. 2008)

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 sort of preliminary examination by the judge, in which the witness is required to speak the truth with respect to the questions put to him, when, if incompetency appear from his answers, he is rejected and even if they are satisfactory, the judge may receive evidence to contradict them or establish other facts showing the witness to be in 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 described by many as the father of criminal research, has set out in his book, "Criminal Investigation" (1934 Edition, pp. 61-62), the nature and character of evidence given by children. He has said that in one sense the best witnesses are children of seven to ten years of age, as at that time love and hatred, ambition and hypocrisy, considerations of religion rank etc. are yet unknown 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.[11]

In *Panchhi v. State of U.P*[12] the Supreme Court held that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to swayed by what others tell them and thus a child witness is an easy prey to tutoring.

In *State of Assam v. Mafzuddin Ahmed*,[13] it was held by the Supreme Court that it is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incidental before there were any possibility of coaching and tutoring him.

In *Mangoo v. State of M.P.*[14] the Supreme Court while dealing with the evidence of a child observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces 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 unsafe to rely 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 examined carefully to see that he was not been tutored.[15] Admissibility of evidence is not solely dependent on competency of witnesses. A witness may be competent within section 118, yet his evidence may be inadmissible if he states his opinions or beliefs instead of facts within his knowledge or gives hearsay evidence.[16]

Evidence of child witness without oath

Under section 4 of the Oaths Act, 1969 all witnesses are to take oaths or affirmation. The proviso says that sections 4 and 5 of the said Act shall not apply to a child witness under twelve years of age. The proviso to section 4 of the Oaths Act, 1969 must be read along with section 118 of the Indian Evidence Act and section 7 of Oaths Act. An omission to administer an

[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)

[11] S. SARKAR, LAW OF EVIDENCE 2127 (16th Edition, 2007)

[12] A.I.R 1998 S.C 2726 : (1998).7 S.C.C 177 : 1998 S.C.C. (Cri) 1561

[13] A.I.R 1983 S.C 274 : (1983) 2 S.C.C 14

[14] A.I.R 1959 S.C 959 : 1995 Cri.L.J 1461(S.C)

[15] SARKAR, *Supra* note 11

[16] *Id*, at 2123

oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with, in section 118 of the Evidence Act. Every witness is competent unless the court considers he is prevented from understanding the questions put to him, or from giving rational answers, by reason of tender years, extreme old age, disease whether of body or mind or any other cause of the same kind. Therefore, unless the Oaths Act adds additional grounds of incompetency, it is evident that section 118 of the Evidence Act must prevail.[17] The Oaths Act does not deal with competency. In *Bhagwania v. State of Rajasthan*,[18] it was held that an omission to administer oath under the Oaths Act, 1969 does not affect the admissibility of evidence unless the judge considers the witness to be otherwise incompetent. Further, in *Ghewar Ram v. State of Rajasthan*,[19] it was held that once the child witness is found competent, his inability to take or understand oath or omission in administering it, neither invalidates the proceedings nor renders his evidence inadmissible.

In *Rameshwar v. State of Rajasthan*,[20] the Supreme Court held that an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with is section 118 of the Evidence Act. Every witness is competent unless the court considers he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. It is further held that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. The Supreme Court in *DattuRamraoSakhare v. State of Maharashtra*,[21] further held that even in the absence of oath the evidence of a child witness can be considered under section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness is that the witness must be a reliable any other competent witness and there is no likelihood of being tutored.

Need for corroboration

Children are most dangerous witnesses, for due to tender age they often mistake, dreams for reality. They are capable of cramming things easily and reproducing them. They repeat as to their own knowledge that they have heard from others and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. Hence it is unsafe to rely on uncorroborated testimony of a child. In *Mohamed Sunal v. King*,[22] it was held that in England where provision has been made for the reception of unsworned evidence, from a child it has always been provided that the evidence must be corroborated in some material particulars implicating the accused. But in Indian Acts there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence court can act upon it. It is sound rule in practice not to act on the uncorroborated evidence of a child, whether sworned or unsworned but this is a rule of prudence and not of law. In *GaganKanojia v. State of Punjab*,[23] the Supreme Court held that part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the un tutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of hostile witness.

In *Arbind Singh v. State of Bihar*,[24] the Supreme Court observed that it is well settled that a child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring. Further in *Bhagwan Singh v. State of M.P*,[25] the Supreme Court observed that the law recognizes the child as a competent witness but a child who is unable to form a proper opinion about the nature of the incident because of immaturity of

[17] *Rameshwar v. State of Rajasthan*, A.I.R 1952 S.C 54 : 1952 Cri.L.J 547(S.C)
[18] 2001 Cri.L.J 3719(Raj.)
[19] 2001 Cri.L.J 4460(Raj.)
[20] A.I.R 1952 S.C 54 : 1952 Cri.L.J 547(S.C)
[21] (1997) 5 S.C.C 341; See also *State of Karnataka v. ShantappaMadivalappaGalapuji and others*, A.I.R 2009 S.C 2144
[22] A.I.R 1946 P.C 3
[23] (2006) 13 S.C.C 516 : (2008) 1 S.C.C (Cri.) 109
[24] A.I.R 1994 S.C 1068 : 1995 Supp (4) S.C.C 416
[25] A.I.R 2003 S.C 1088 : 2003 (3) S.C.C 21

understanding, is not considered by the court to be a witness whose sole testimony can be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony. But in *Suryanarayan v. State of Karnataka*,[26] the Supreme Court held that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

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 required to be evaluated carefully as he is an easy prey to tutoring. So it will be unsafe to rely the testimony of the child witness without corroboration, though it is not the rule but a measure of caution and prudence. Some 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 capable of understanding the question put to 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 should be permitted to testify via closed circuit television or through video conferencing. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. The advancement of science and technology is such that now it is possible to set up video conferencing equipments in the court itself. In that case evidence would be recorded by the magistrate or under his dictation in the open court as observed by the Supreme Court in *Sakshi v. Union of India*.[27] The suggestions made by the Law Commission of India in its 198th Report regarding witness protection may be considered.[28]

(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 should take appropriate action to ensure a speedy trial in order to minimize the length of time a child must endure the stress of his or her involvement in the proceeding. Also the court should take the appropriate steps to avoid repeated appearance of a child witness before the court.

(v) 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 alleged victims and witnesses of abuse..

[26] (2001) 9 S.C.C 129
[27] A.I.R 2004 S.C 3566
[28] *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