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EVIDENCE LAW

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I INTRODUCTION

IDEALLY IN litigation, the court inquiring into a dispute should consider all evidences, which are relevant in proving or disproving the disputed facts. However, in practice this ideal situation is almost an impossibility because of the following reasons: (a) Practical problems of time, cost and the need for finality to litigation. (b) Normally in an adversary system of trial, the court is supposed to reach a decision on the basis of evidence adduced by the parties before it. In other words, the court cannot search for relevant evidence other than those adduced by parties.[1] (c) There are rules of evidence, which exclude evidence adduced by the parties for a variety of reasons. For example "evidence may be insufficiently relevant or of only minimal probative force; it may give rise to multiplicity of essentially subsidiary issues, which could distract the court from main issue, it may be insufficiently reliable or too unreliable; its potential for prejudice to the party against whom it is introduced may be out of all proportion to its probative value on behalf of the party introducing it; its disclosure may be injurous to the national interest; and so on."[2] Thus, the court may aspire to the ascertainment of the truth, but at the end of the day it must come to a decision and settle the dispute even if the evidence introduced is inadequate

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1 An exception to this position may be s. 165 of the Indian Evidence Act, 1872, which provides for power of the judge to put questions or order production. The s. reads thus: "165. Judge's power to put questions or order production - The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, The Orient Tavern cross-examine any witness upon any answer given in reply to any such question. Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved. Provided also that this Section shall not authorize an Judge to compel any witness to answer any question or produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted."

2 Adrian Keane, *The Modern Law of Evidence* 1 (7th edn., 2008).

or inconclusive.[3] In this process of deciding a case, courts rely on the settled principles of evidence law and wherever there is vagueness, they make new rules and resolve the dispute. In this background this study surveys the selected cases decided by the Supreme Court and the various high courts in India and attempts to analyze the development in law of evidence during the survey year.

II LEGISLATIVE DEVELOPMENT

One of the most important developments in the area of law of evidence in the year under survey, has been that some important amendments have been incorporated in the Indian Evidence Act, 1872 by the Information Technology (Amendment) Act, 2008.[4] These amendments are as follows:

> The expression 'digital signature' has been replaced with 'electronic signature' in sections 3, 47A, 67A, 85A, 85B, 85C and 90A of the Indian Evidence Act, 1872. Similarly, 'Electronic Signature Certificate' has been substituted with 'Digital Signature Certificate' in the last paragraph of section 3 of the Evidence Act. 'Digital signature' is one of the many types of 'electronic signatures'. In other words an 'electronic signature' is a wider term which includes 'digital signature' along with other forms of electronic signatures like biometrical signature.[5] In effect, this amendment has widened the scope of aforesaid sections.[6]
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> Another important amendment is the new definition given to the term 'electronic form evidence' which read as follows: "…'electronic form evidence' means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines."[7]

3 *Ibid.*

4 Hereinafter referred to as IT (Amendment) Act. The Information Technology (Amendment) Bill 2006 was passed in *Loksabha* on 22.12.2008 and in *Rajya Sabha* on 23.12.2008. It received the assent of the President on 5.2.2009. The government is now in the process of framing the rules, which are required under the amendments.

5 See *Fiftieth Report of the Parliamentary Standing Committee on Information Technology, August, 2007* 12, para 34.

6 On the other hand even the Parliamentary Standing Committee on Information Technology did not list the other types of electronic signatures. However, the committee observed thus: "The Committee also find that ' digital signature', in fact, is one of the types of 'electronic signature' and is considered to be one of the most reliable methods for security, integrity and authentication of electronic records. However, in view of the difficulty to amend the Act very frequently and keeping in mind the ever-evolving technological developments, a need has been felt to substitute 'digital signature' by the all encompassing term 'electronic signature'. The Committee feel that it is a step in right direction to put emphasis on reliable electronic signature as it would enable the Central Government to take steps commensurate with the needs of emerging technologies." See, *id.* at 47, para 5.

7 Through explanation to the newly inserted s. 79A of the Information Technology Act, 2000.

> Similarly, under the newly inserted section 79A of the IT Act, the central government may, for the purposes of providing expert opinion on 'electronic form evidence' before any court or other authority notify any department, body or agency of the central government or a state government as an 'Examiner of Electronic Evidence'.
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> A new section 45A which has been inserted after section 45 in the Evidence Act says that whenever the court has to form an opinion relating to any information transmitted or stored in any computer resource or other electronic or digital form, the opinion of the 'Examiner of Electronic Evidence' referred to in section 79A of the Information Technology Act, 2000, is a relevant fact. The explanation to section 45A says that for the purposes of section 45A, an examiner of electronic evidence shall be an expert.

III CREDIBILITY OF A WITNESS

"In order to judge the credibility of witnesses, the court should not confine itself to the way in which the witnesses have deposed or to their demeanor, but it should also look into the surrounding circumstances as well as the probabilities, so that it may be able to form a correct idea of the trustworthiness of the witnesses."[8] The evidence of a witness will have to be assessed by its intrinsic worth.[9] However, assessing this intrinsic worth has always been a tough task for the court because of the of subjectivity.

In *Manilal Hiraman Chaudhari* v. *State of Maharashtra*[10] the question was regarding the trustworthiness of a person as a witness if he had earlier filed a complaint against the accused. The accused contended that this was a relevant fact, which proves the enmity of the witness towards the accused. The Supreme Court stated that this fact alone was not a sufficient and valid ground for discrediting the witness, as he was otherwise trustworthy. Similarly, in *Bhagga & Ors* v. *State of Madhya Pradesh*[11], it was a proved fact that the family of the accused and the eyewitnesses lived in enmity. The Supreme Court observed that "The mere fact that all the said eyewitnesses belong to one family cannot be a reason to disbelieve their evidence, since they were all present on the spot or nearby the spot when the incident occurred"[12]

8 *Ramachandra* v. *Champabai*., AIR 1965 SC 354, as cited in Kesava Rao (ed.), I *Sir John Woodroffe and Syed Amir Ali on Law of Evidence* 381 (18th edn., 2008).

9 *Ibid*.

10 AIR 2008 SC 161.

11 AIR 2008 SC 1785. See also, *Dharam Pal* v. *State of U.P.*, AIR 2008 SC 920.

12 *Id*. at para 15.

Trusting a witness who committed some mistakes in his evidence

Kishan Singh and Anr v. *State of Punjab,*[13] was another instance where the apex court tried to assess the trustworthiness of a witness who committed some mistakes in his evidence. The court held that, it should not be a reason for making disparaging remarks against the witness on his trustworthiness. Instead the court can disbelieve that particular portion where mistake has been committed. In this case of dowry death the court observed thus: "A Court of law may not accept a particular part of the evidence considering the other facts and circumstances on record. But that does not necessarily mean that what was stated by the witness was false. In fact… (the witness) was believed by the trial court as well as by the High court. It may be that the witness had committed some mistake in giving the period during which dowry demand was made by accused…. If that part of the evidence is not consistent with the facts on record, the court may not accept it. But only for that, the Court should not make disparaging remarks as has been done by the Court."[14]

Link between illiteracy and credibility of witness

Is there a link between illiteracy and credibility of a witness? Whether the state of illiteracy is important in appreciating the evidence of a witness despite the lack of preciseness regarding the chain of events. These questions were answered in *Dimple Gupta (Minor)* v. *Rajiv Gupta*,[15] wherein the Supreme Court observed: "…it is impossible to lay down with precision the chain of events more particularly when illiterate villagers with no sense of time are involved."[16]

If the eyewitness failed to rescue the victim from being killed, can his evidence be trusted?

In *Paramjit Singh @ Mithu Singh* v. *State of Punjab, Through Secretery (Home)*,[17] the question that was answered by the apex court was whether failure on the part of the eyewitnesses to rescue the victim from being killed could be a sufficient reason for doubting their presence in the spot. The court said, "…it would be well nigh impossible to apply a universal yardstick as to how a person would react to a given situation…. We cannot ignore the fact that the accused were armed with deadly weapons and the same may have deterred (the witnesses) in making any attempt to rescue the victim when he was under attack".[18]

13 AIR 2008 SC 233.

14 *Id*. at para 32. Similarly, in *Ram Swaroop* v. *State of Rajasthan*, AIR 2008 SC 1747, the Supreme Court held that minor variations in the testimony of prosecution case will not affect the prosecution case.

15 AIR 2008 SC 239.

16 *Id*. at para 3.

17 AIR 2008 SC 441.

18 *Id*. at para 15.

Credibility of a witness and failure to spell out accurately the *situs* of injuries

Similarly, in *Paramjit Singh*,[19] the court also held that the credibility of the witness cannot be doubted for the reason that the witness, could not spell out accurately the *situs* of injuries on the dead body. The court observed that when the victim was under attack from a group of persons armed with deadly weapons, the victim must have made attempts to save himself from the attack and in the process may not have remained static without moving one way or the other.[20] The court further added, "One cannot expect that in such a situation the witness would graphically describe the nature of injuries and spell out accurately the *situs* of the injuries on the body of the victim."[21]

Credibility of interested witnesses

Relying on the law as settled in *Dalip Singh and Ors* v. *The State of Punjab*[22] the apex court in *Gali Venkataiah* v. *State of Andhra Pradesh*[23], held that "relationship is not a factor to affect credibility of a witness."[24] There is no substance in the contention that the witness being a close relative and consequently being a partisan witness, should not be relied upon.[25] Quoting from one of the earlier judgments in *Masalti*[26] the apex court observed, "…it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses…. The Mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."[27] Similarly, in *Vinay Kumar Rai & Anr* v. *State of Bihar*[28], the apex court observed that "The over insistence on witnesses having no relation with the victims often results in criminal justice going awry. When any incident happens in a dwelling house the most natural witnesses would be the inmates of that house. It is un-pragmatic to ignore such natural witnesses and insist on outsiders, who would not have even seen any thing."[29]

19 *Ibid.*
20 *Id*. at para 16.
21 *Ibid*. See also *Chandrappa and Ors* v. *State of Karnataka,* AIR 2008 SC 2323.
22 AIR 1953 SC 364. The court also relied on *Masalti and Ors* v. *State of U.P*, AIR 1965 SC 202; *State of Punjab* v. *Jagir Singh*, AIR 1973 SC 2407; *Babulal Bhagwan Khandare* v. *State of Maharshtra*, 2005 (10) SCC 404.
23 AIR 2008 SC 462.
24 *Id*. at para 7.
25 *Id*. at para 10.
26 *Masalti and Ors*, *supra* note 22.
27 *Supra* note 23 at para 11. See also *D. Salu* v. *State of Andhra Pradesh* , AIR 2008 SC 505; *Kapildeo Mandal* v. *State of Bihar* , AIR 2008 SC 533.
28 AIR 2008 SC 3276. See also *Ashok Kumar Chaudhary* v. *State of Bihar*, AIR 2008 SC 2436.
29 *Id*. at para 13.

Credibility of faculty of a sniffer dog

Reiterating the decision in *Abdul Rajak Murtaja Dafedar* v. *State of Mahrashtra*[30] and *Ramesh* v. *State of A.P*[31] the Supreme Court in *Dinesh Borthakur* v. *State of Assam*,[32] held that, "The law in this behalf, therefore, is settled that while the services of a sniffer dog may be taken for the purpose of investigation, its faculties cannot be taken as evidence for the purpose of establishing the guilt of an accused."[33]

Evidence of an injured person

Whether evidence of an injured person carries more credence than an uninjured witness? In *Vijay Shanker Shinde & Ors.* v. *State of Maharashtra*[34], the apex court said that as a matter of fact, the evidence of injured person who is examined as a witness lends more credence, because normally he would not falsely implicate a person thereby protecting the actual assailant.[35]

Minor discrepancies in the testimony of the eyewitnesses

In *Shivappa* v. *State of Karnataka*,[36] the court held that minor discrepancies or some improvements would not justify the rejection of the testimony of the eyewitnesses if they were otherwise reliable. The court said that some discrepancies are bound to occur because of the sociological background of the witnesses and the time gap between the date of occurrence and the date on which they gave their deposition in court.[37]

IV CIRCUMSTANTIAL EVIDENCE

"The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from the *factum probans*, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are

30 1969 (2) SCC 234. In this case the court said thus: "There are three objections, which are usually advanced against reception of the evidence of dog tracking. First since it is manifest that the dog cannot go into the box and give his evidence on oath and consequently submit him-self to cross-examination, the dogs human companion must go into the box and report the dogs evidence and this is clearly hearsay. Secondly, there is a feeling that in criminal cases the life and liberty of a human being should not be dependent on canine inference. And, thirdly, it is suggested that even if such evidence is strictly admissible under the rules of evidence it should be excluded because it is likely to have a dramatic impact on the jury out of proportion to its true evidential value."

31 (2001) 6 SCC 2051.

32 AIR 2008 SC 2205.

33 *Id*. at para 39.

34 AIR 2008 SC 1198.

35 *Id*. at para 9.

36 AIR 2008 SC 1860.

37 *Id*. at para 19. Similarly in *Ram Swaroop* v. *State of Rajasthan*, AIR 2008 SC 1747., the Supreme Court held that minor variations in the testimony of prosecution case will not affect the prosecution case.

so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. When a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person."[38] Following the same approach, the Supreme Court in *K.T. Palani Swamy* v. *State of Tamil Nadu*,[39] held that all the links in chain must be found to be completed, to form the basis of conviction. The court reiterated the position as held in *Sharad Birdhichad Sarda* v. *State of Maharashtra*[40] regarding the 'five golden principles' that constitute the '*panchsheel'* of the proof of a case based on circumstantial evidence. These five principles are as follows:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.
(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused; that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
(3) The circumstances should be of a conclusive nature and tendency.
(4) They should exclude every possible hypothesis except the one to be proved; and
(5) There must be chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

V EVIDENTIARY VALUE OF MEDICAL REPORTS AND PUBLIC DOCUMENTS

It is a well-settled position of evidence law that where ever there is a conflict between medical evidence and evidence adduced by eyewitness, primacy goes to the deposition of eyewitness. The question that came up in *State of Maharshtra and Anr* v. *Mohd Sajid Husain Mohd S Husain*[41] was that when there was contradiction between the medical report and public document, which one would have primacy? In this case, charged under the Immoral Traffic (Prevention) Act, 1956, the age of the prosecutrix had been recorded as 18 years in the first information report as well in her first supplementary examination. Thereafter in the medical examination her age was approximately determined to be between 14 to 16 years. At the same

38 *Liyakat* v. *State of Uttaranchal*, AIR 2008 SC 1537 at para 13 and 14.
39 AIR 2008 SC 1095.
40 AIR 1984 SC 1662.
41 AIR 2008 SC 155.

time according to the public documents such as her date of birth certificate issued by the municipal council and school leaving certificates, the age was 16 years. The court stated, "A mistake in regard to her age as recorded in the First Information Report or the first medical document or even in her supplementary affidavit should yield to the public documents which have been produced by the prosecution.[42]" And further, "Immoral trafficking is now widespread. Victims, who are lured, coerced or threatened for the purpose of bringing them to the trade should be given all the protection."[43]

VI OFFICER UNDER NDPS ACT vis-a-vis POLICE OFFICER UNDER SECTION 25 EVIDENCE ACT

In *Kanhaiyalal* v. *Union of India*[44], the Supreme Court said that an officer vested with the powers of an officer-in-charge of a police station under section 53 of the Narcotic Drugs and Psychotropic Substances Act (NDPS) Act is not a 'Police Officer' within the meaning of section 25 of the Indian Evidence Act. So a statement made under section 67 of NDPS Act is not the same as a statement made under section 161 of Code of Criminal Procedure unless made under threat or coercion. The court said that it is because of this vital difference a statement made under section 67 of NDPS Act can be used as a confession against the person making it and excludes it from the operation of section 24 to 27 of the Evidence Act.[45]

VII DYING DECLARATION

Trust worthiness of a dying declaration

The grounds of admission of dying declaration are "firstly, necessity for the victim being generally the only principal eye witness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to false hood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice."[46] Similarly the court also pointed out that "The principle on which dying declaration is admitted in evidence is indicated in the legal maxim "*nemo morituru proesumtur mentri"* which means that "a man will not meet his maker with

42 *Id*. at para 25.
43 *Id*. at para 20.
44 AIR 2008 SC 1044.
45 *Id*. at paras 38 and 39.
46 *Dashrath alias Champa* v. *State of Madhya Pradesh*, AIR 2008 SC 316 at para 9.

a lie in his mouth."[47] That means, "the situation in which a person is on deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason that the requirements of oath and cross-examinations are dispensed with.[48] Besides, should the dying declarations be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence."[49]

Again in the same case the court also reminded that, "Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no scope of cross-examination. Such a scope is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of deceased was not as a result of either tutoring or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence."[50]

Certificate of fitness by a medical officer

In *State of Rajasthan* v. *Parthu*[51], the accused allegedly had burned his wife to death. Two dying declarations were recorded by two police officers but in the presence of the same doctor. There was no conflict between the dying declarations. Both these dying declarations were attested by the doctor in whose presence they were made as to the correctness of the thump impression and the statement of the deceased. The trial court on the basis of these dying declarations held the respondent guilty of commission of murder. The high court, however, on appeal held that since there was no evidence in the form of a certificate as to the fitness of the state of mind of the deceased while she was making dying declarations, it could not be relied. The high court also opined that keeping in view the fact that the incident took place on 27.05.1995 and the death took place only on 19.06.1995 the dying declarations should have been recorded by a magistrate. Further, the high court commented that there could not have any attestation of such statement. On these grounds the high court recorded a judgement of acquittal.

47 *Id*. at para 10.
48 *Id.* at para 9.
49 *Id.* at para 11.
50 *Id*. at para 12.
51 AIR 2008 SC 10.

However, reversing the decision of the high court, the Supreme Court said thus: "Technically the high court may be right but what was meant by (the doctor) by issuing such a certificate in the dying declaration was that the statement of the deceased was made by her before the investigating officer in his presence and the same has correctly been recorded by the latter." The court said that the doctor is a medical jurist and had himself inquired about the incident in question from the deceased and was also satisfied about the fitness of the deceased to give such declarations.

Similarly, in *State of Rajasthan* v. *Parthu*,[52] even though the trial court convicted the accused on the basis of dying declarations, the high court acquitted him on the reason that no certificate was issued by the doctor about fitness of the deceased. The Supreme Court setting aside the order of the high court, held that in a circumstance where dying declaration was made in the presence of the doctor who also attested the thumb impression, it would be too technical to insist on a certificate from the doctor about the fitness of the deceased.

The facts of *Nallapati Sivaiah* v. *Sub Divisional Officer, Guntur, A.P.*,[53] is also of same nature. In this case two dying declarations were recorded, one by a police officer and another by a magistrate. At the same time, the forensic expert raised doubt as to the fitness of the victim to make voluntary and truthful statements because the deceased had received 63 injuries. Moreover, the doctor who was present when the declarations were made was also not examined. Under these circumstances the Supreme Court said that the benefit of doubt should go to the accused. The court also said that when there is suspicion as to the correctness of dying declaration, courts cannot record conviction on the basis of dying declaration alone. Courts will have to look for some corroborative evidence as well.

In the year under survey, the apex court in *Sher Singh and Anr*. v. *State of Punjab*,[54] analysed the conflict between the medical evidence and deposition of the person who recorded the dying declaration regarding the fitness of the declarant/victim. The medical evidence showed that the victim was not in a fit state of mind. At the same time the magistrate who recorded the dying declaration was of the opinion that the victim was capable of making a valid dying declaration. The court said that, "normally the court places reliance on the medical evidence for reaching the conclusion whether the person making a dying declaration was in fit state of mind, but where the person recording the statement states that the deceased was in a fit and conscience state, the medical opinion will not prevail, nor it can be said that since there is no certification of the doctor as to the fitness of mind of the declarant, the dying declaration is not acceptable. What is essential is that the person recording the dying declaration must be satisfied that the

52 AIR 2008 SC 10.
53 AIR 2008 SC 19.
54 AIR 2008 SC 1426.

deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement without there being the doctors opinion to that effect, it can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certificate by the doctor is essentially a rule of caution and, therefore, the voluntary and the truthful nature of a statement can be established otherwise."[55]

Dying declarations made in different languages

The acceptability of dying declarations were made in two different languages were discussed in *Amarsingh Munnasingh Suryavanshi* v. *State of Maharashtra*.[56] In this case there were two dying declarations but made in two different languages. The question that arose was whether this could make the dying declarations invalid. The court held that as the deceased was proficient in both the languages, the dying declarations would not lose its credibility. [57]

Admissibility of dying declaration

In *Dharam Pal & Ors* v. *State of U.P*[58], the report of occurrence was dictated by the deceased himself and the same was read over to him after which he had put his thumb impression on the same. The court said "this report is admissible under section 32 of the Evidence Act as a dying declaration"[59] if there is no doubt into the genuineness of such report. Similarly, in *Shaik Nagoor* v. *State of A.P.*,[60] the court said thus: "Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence".[61]

55 *Id*. at para 14.
56 AIR 2008 SC 479.
57 *Id*. at para 21.
58 AIR 2008 SC 920.
59 *Id*. at para 10.
60 AIR 2008 SC 1500.
61 *Id*. at para 10. The earlier principles formulated by the Supreme Court as indicated in *Paniben* v. *State of Gujarat*, (1992) 2 SCC 474 are as follows. (1) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration, [*Munnu Raja* v. *State of M.P*; (1976) 3 SCC 104]; If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration, [*State of U.P* v. *Ram Sagar Yadav*, and *Ramawati Devi* v. *State of Bihar*; (1985) 1 SCC 552]; the court has to scrutinize the dying declaration carefully and must ensure that the declaration is not a result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration [*K. Ramachandra Reddy* v. *Public Prosecutor*; (1976) 3 SCC 618]; Where dying declaration is suspicious, it should not be acted upon without corroborative evidence [*Rasheed Beg* v. *State of M.P*, (1974) 4 SCC 264]; where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. [*Kake Singh* v. *State of M.P,* 1981 Supp. SCC 25]; a dying declaration which suffers from infirmity cannot form the basis of conviction

At the same time the apex court in *Shaikh Rafiq* v. *State of Maharashtra*,[62] where the dying declaration, which was being relied upon by the prosecution, was not recorded as per the requirements of law. It was recorded by a police officer even though the special executive magistrate was available for recording the dying declarations. The police officer also did not take a fitness certificate from the doctor as to whether the deceased was in a position to give statement or not. It was also fatal to the prosecution case that the police officer did not record the time of the dying declaration being recorded. Considering all these, the court said that dying declaration recorded in such circumstances could not be relied. [63]

Whether a statement made under section 161 Cr PC would be admissible under section 32 of Indian Evidence Act

The facts of the case in *Vinay D Nagar* v. *State of Rajasthan*[64], shows that a statement was made by the deceased to the police under section 161 Cr PC in regard to the accused's involvement in the abduction of a boy. This statement had no connection or reference to the death of the deceased. The prosecution contended that this statement was also admissible under section 32 of Evidence Act. The court said, "the statement recorded by the police although could be proved as there would not be any bar under section 162 Cr. P.C for proof of such statement, but it would not be admissible under section 32 of the Evidence Act, and thus it could not have been relied upon by the prosecution to prove the motive for commission of the crime by the accused appellant."[65]

VIII EXPERT EVIDENCE UNDER SECTION 45

Apart from the legislative intervention of inserting section 45A through the Information Technology (Amendment) Act, 2008, there were no changes

[*Ram Manorath* v. *State of U.P,* 1981 (2) SCC 654]; merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected [*State of Maharashtra* v. *Krishnamurti Laxmipati Naidu*, AIR 1981 SC 617]; merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth [*Surajdeo Ojha* v. *State of Bihar*, AIR 1979 SC 1505]; normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscience state to make the dying declaration, the medical opinion cannot prevail [*Nanhau Ram* v. *State of M.P*; AIR 1988 SC 912]; where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon, [*State of U.P* v. *Madan Mohan*, 1989 (3) SCC 390]; where there are one statement in the nature of dying declaration, one first in point of time must be proffered. Of course, if the plurality of dying declaration could be held to be trustworthy and reliable, it has to be accepted, [*Mohalal Gangaram Gehani* v. *State of Maharshtra*, 1982 (1) SCC 700].

62 AIR 2008 SC 1362.

63 *Id*. at para 3.

64 AIR 2008 SC 1558.

65 *Id*. at para 15.

in the law relating expert evidence. However, some cases are summarized below.

In *Thiruvengada Pillai* v. *Navaneethammal & Anr*,[66] the first defendant had denied having put her finger impression on agreement of sale. She died during the pendency of the suit before her turn came for giving evidence. The court said, "When there is a positive denial by the person who is said to have affixed his finger impression and where the finger impression in the disputed document is vague or smudgy or not clear, making it difficult for comparison, the court should hesitate to venture a decision based on its own comparison of the disputed and admitted finger impressions"[67] In such circumstances the courts should rely on experts who can compare the signatures using their specialized knowledge and with the help of modern technology.

On the other hand, in *Ram Swaroop* v. *State of Rajasthan*,[68] the court held that, "Over dependence on such opinion evidence, even if the witness is an expert in the field, to checkmate the direct testimony given by an eyewitness is not a safe *modus* adoptable in criminal cases. It has now become axiomatic that medical evidence can be used to repel the testimony of eyewitnesses only if it is so conclusive as to rule out even the possibility of the eye whiteness's version to be true."[69] The court further added "…to discard the testimony of an eyewitness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice."[70]

Similarly, in *Smt Rayala M Bhuvaneswari* v. *Nagaphanedar Rayala*[71], the husband tapped conversation of his wife with others and sought to produce the tape in the court. The court said "…the act of tapping itself by the husband of the conversation of his wife with others was illegal and it infringed the right of privacy of the wife. Therefore these tapes, even if true, cannot be admissible in evidence."[72] The court further added that when these tapes are inadmissible in evidence "there is no question of forcing the wife to undergo a voice test and then ask the expert to compare the portions denied by her with her admitted voice."[73]

66 AIR 2008 SC 1541.
67 *Id*. at para 15.
68 AIR 2008 SC 1747
69 *Id*. at para 9.
70 *Ibid*. Similar views were taken by the court in *Mange* v. *State of Haryana* (1979) 4 SCC 349; *State of U.P.* v. *Krishna Gopal and Anr*. AIR 1988 SC 2154; *Ram Dev and Anr* v. *State of U.P*, 1995 Supp (1) SCC 547; *State of U.P* v. *Harban Sahai and Ors*, (1988) 6 SCC 50; *Ramanand Yadav* v. *Prabhu Nath Jha & Ors* (2003) 12 SCC 606.
71 AIR 2008 AP 98.
72 *Id*. at para 13.
73 *Ibid.*

IX OCULAR EVIDENCE V. MEDICAL EVIDENCE

The settled position of law[74]was reiterated in *Kapildeo Mandal* v. *State of Bihar*,[75] wherein the court, while appreciating the variance between medical evidence and ocular evidence held that "…oral evidence of eyewitness has to get primacy, as medical evidence is basically opinionative. But when the evidence given by the eyewitness is totally inconsistent to that given by the medical experts, the evidence is appreciated in different perspective by the courts. In such circumstance medical evidence assumes importance.[76] In this case all the eyewitnesses have categorically stated that the deceased was injured by the use of firearm, whereas the medical evidence specifically indicates that no firearm injuries were found on the person of the deceased".[77]

Falling in the settled position of law,[78] in *D. Sailu* v. *State of Andhra Pradesh*,[79] the court held that when medical evidence is at variance with ocular evidence it would be erroneous to accord undue primacy to hypothetical answers of medical witnesses to exclude eyewitnesses account. The evidence adduced by eyewitnesses are to be tested independently and should not be treated as the 'variable' keeping the medical evidence as the 'constant'.[80] The court observed, "It is trite that where the eye-witnesses account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses as Bentham said, are the eyes and ears of Justice. Hence the importance and primacy of the quality of the trial process. Eye-witnesses account would require a careful and independent assessment and evaluation for its credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the 'credit' of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."[81]

74 Through cases like *Mange* v. *State of Haryana*, (1979) 4 SCC 349; *State of U.P* v. *Krishana Gopal*, (1988) 4 SCC 302 and *Ramanand Yadav* v. *Prabhu Nath Jha*, (2003) 12 SCC 606.

75 AIR 2008 SC 533.

76 *Id*. at para 11.

77 *Id*. at para 10.

78 *Babulal Bhagawan* v. *State of Maharashtra*, (2005) 10 SCC 404; *Salim Saheb* v. *State of M.P,* (2007) 1 SCC 699; *Krishan* v. *State represented by Inspector of Police,* (2003) 7 SCC 56.

79 AIR 2008 SC 505.

80 *Id*. at para 19.

81 *Id*. at para 20

X LEDGER ENTRY IN BANK AND ELECTRONIC RECORD IN AN ATM MACHINE

The interesting question that was answered by the court in *P. Padmanabh* v. *M/s Syndicate Bank Ltd*,[82] is as follows. The contention of the bank was that the appellant had withdrawn money from his ATM account irrespective of the fact that there was no sufficient balance in the account. The bank based its claim on extracts of ATM machine and the ledger entry in the bank. The bank admitted that there was a malfunction in the ATM machine at the time when the appellant withdrew money. It was also an admitted fact that the ledger entry was reflective of ATM extracts. The court held that since it was an admitted fact that there was a malfunction in the ATM machine, the ATM extracts could not be trusted. The ledger entry also could not be valid evidence since it was prepared on the basis of corresponding ATM extracts, which was already rejected by the court as non-admissible. The court held "It was the very case of the plaintiff that there was malfunctioning of the ATM machine; that link between the ATM machine and the computer got snapped and therefore the ATM machine allowed withdrawals notwithstanding the savings bank account not having sufficient balance to allow the withdrawal. Apart from the merits of the contention, this is a clear admission of the malfunctioning of either the ATM or the computer in which event the provisions of section 65-B cannot be pressed into service by the plaintiff, as if at all it acts against the claim of the plaintiff in the present situation as admittedly either the computer or the ATM was malfunctioning at the time of the drawal of the amount, in which event the acceptability of the extract of the statement of accounts in the Savings Bank account of the defendant in terms of the provisions of section 65-B (2) b read with section 65-B (3) (b) is also not possible, as the entries are admittedly due to the sharing of data between the computer responsible for entries in the savings bank and the information in the ATM machine…"[83]

XI PRESUMPTIONS

Presumption as to reasons of suicide by a pregnant woman

In *Rameshwar Dass* v. *State of Punjab and Anr*,[84] a dowry death cases it was the contention of the accused that the deceased committed suicide while she was pregnant due to problems in her mental health. Rejecting this contention the court observed, "A pregnant woman ordinarily would not commit suicide unless relationship with her husband comes to such as pass that she would be compelled to do so."[85]

82 AIR 2008 Kar. 42.
83 *Id*. at para 15.
84 AIR 2008 SC 890.
85 *Id*. at para 23.

Presumption as to marriage

The facts of *Tulsa & Ors* v. *Durghatiya & Ors*,[86] show that a woman named 'L' was living with a man 'R' without marriage, after her husband's death. This continuous living together was an established fact. The question of law was L had any legal right over the property of R after his death? The court relying on the decision in *Badri Prasad* v. *Dy. Director of Consolidation and Ors*.,[87] observed thus: "Where the partners lived together for long spell as husband and wife there would be presumption in favour of wedlock. The presumption was rebuttable, but a heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place. Law leans in favour of legitimacy and frowns upon bastardy".[88]

No presumptions other than statutory presumptions in criminal cases

In *Kailash Gour and Others* v. *State of Assam*,[89] the court held thus: "The court may or may not raise a presumption that an official act having been done was not in due course of its business, but in a criminal case, no presumption should be raised which does not have any origin in any statute but would cause great prejudice to an accused."[90]

XII PREGNANCY BEFORE MARRIAGE

In *Maya Ram* v. *Smt Kamala Devi*,[91] the wife asserted that the child born within six months of marriage was that of the husband. At the same time the husband led sufficient evidence to show that he had no access to the wife at the time of conception of the child. The wife also refused to undergo DNA test. The court held that in such circumstances an adverse inference could be drawn against her as she refused to undergo the DNA test. The court further held that the fact of pregnancy "was not disclosed by her to her husband or his family and therefore the husband is entitled for a decree of annulment of marriage."[92]

XIII PROMISSORY ESTOPPEL

In *State of Arunachal Pradesh* v. *Nezone Law House, Assam*,[93] the court held as follows. "In order to invoke the doctrine of promissory estoppel clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expression without any

86 AIR 2008 SC 1193.
87 AIR 1978 SC 1557.
88 *Id*. at para 13.
89 AIR 2008 SC 2467.
90 *Id*. at para 43.
91 AIR 2008 HP 43.
92 *Id*. at para 38.
93 AIR 2008 SC 2045.

supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the government would not be sufficient to press into aid the doctrine. The courts are bound to consider all aspects including the results sought to be achieved and the public good at large, because while considering the applicability of the doctrine, the courts have to do equity and the fundamental principles of equity must forever be present in the mind of the court."[94]

XIV CONCLUSION

The survey of various decisions on evidence law rendered by various courts in India in 2008 reveals that the Indian judiciary favors a non-technical application of evidence law. The rigid procedural requirements were applied with a humanist approach wherever and whenever the factual situation so demands. The cases surveyed above reveals this fact.

94 *Id*. at para 17.