DYING DECLARATIONS IN CIVIL CASES

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ABSTRACT

It is a settled fact that dying declarations are increasingly being used as evidence by the courts in the contemporary times. However, one may have mostly heard of dying declarations being applied in criminal matters. But the question that arises here is – can dying declarations be used in civil suits as well? The objective of this research paper is to determine the principle of the legal maxim "Leterm Mortem" which translates to "words said before death".[1] In the legal parlance, it is referred to as "Dying Declaration". Fundamentally, the term "Dying Declaration" is self-explanatory. However, this paper brings forth those aspects, which have a huge value in the legal arena with respect to this theme like – the comparison of the Indian law and the foreign laws with respect to the application of dying declarations in civil suits, a comparative analysis of the cases and precedents set by Supreme Court in India with those of other countries and many more. Through the medium of this paper, it will become extremely simple to comprehend the present status of the usage of dying declarations in civil cases, not only in India, but also in foreign jurisdictions.

Part I of the paper gives a simple, yet comprehensive introduction to the entire concept of dying declarations. Part II of the paper explores this concept through a comparison between the Indian laws and those of the foreign laws by delving into the pages of history and unearthing the cases which have today become the precedents. This part essentially provides a detailed history of the usage of dying declarations in civil cases in the foreign countries. Part III explicates upon specific rulings from the Supreme Court of India and that from the English law. Last, but not the least, Part IV sums up the entire paper and lays down the essence of this topic in brevity.

Keywords: Dying declarations, civil cases, homicide, criminal cases, admissible.

[1] *Dying Declarations as Evidence in Civil Suits,* 27 HLR 739-741 (1914).

I. INTRODUCTION

The entire concept of dying declarations is based on the maxim "Nemo moriturus praesumitur mentire" i.e. "a man will not meet his maker with a lie in his mouth". Hearsay evidence are not provided with any value in the courts, since the individual who is giving this evidence is not informing about his experiences but that of another individual and who cannot be cross-examined to evaluate the veracity of the facts. In essence, the term 'hearsay' refers to "Something which is not directly heard"[2]. Thus, hearsay evidence refers to the information which is gathered by an individual from another individual who possesses first-hand knowledge with respect to that particular fact. Dying declaration is an exception to this rule because if this evidence is not considered very purpose of the justice will be delayed in certain situations when there may not be any other witness to the crime except the person who has since died.[3]

Dying declaration essentially refers to a statement which can be either oral or written consisting of relevant facts by an individual who is dead.[4] Such a declaration is deemed to be incomplete unless and until the complete address and the names of the individuals who are involved are stipulated in it. Dying declarations are admissible in the court of law not only against those individuals who caused the death, but also those who were participants in causing the death.[5] Section 32 of the Indian Evidence Act, 1872[6] (hereinafter referred to as 'The Act').

There are certain crucial elements when deciding on the relevancy of a dying declaration. They are stipulated as follows:

1. The statement is made by an individual who is in a conscious state and is under the belief or the apprehension that death is imminent.

2. The statement made must be with reference to what the individual believes to be the factor, causes or circumstances behind their death.

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[2] WritingLaw, *What is hearsay evidence under Indian Evidence Act, 1872,* WRITINGLAW (April 18, 2022, 10:02 AM),https://www.writinglaw.com/hearsayevidence/#:~:text=The%20word%20hearsay%20itself%20gives,it%20is%20second%2Dhand%20information.

[3] R.K. Gorea & O.P. Aggarwal, *Critical Appraisal of Dying Declaration,* RESEARCHGATE (April 17, 2022. 9:11 AM), file:///C:/Users/raoul/Downloads/criticalappraisalofdyingdeclaration%20(1).pdf.

[4] Sant Gopal v. State of UP, 1995 Cr LJ 312 (All).

[5] Arjun Kushwah v. State of MP, 1999 Cr LJ 2538 (MP).

3. The statement that is recorded by the court has to be a statement that was made by the concerned person, as dying declarations are considered to be the exception of hearsay evidence.

4. The statements that are made should be reliable, confidence bearing and truthful.[6]

It is noteworthy that the Supreme Court included two other elements in Mallella Shyamsunder v. State of AP[7]:

5. The statements made must not be on either being prompted or tutored.

6. The courts can also examine the statements to verify whether they were made on being prompted under any intention of retribution.

As stated previously, Section 32 of the Indian Evidence Act stipulates the provisions for the inclusion of dying declarations as evidence in civil and criminal cases. In cases such as Khushal Rao v. State of Bombay[8] and Panneerselvam v. State of Tamil Nadu[9] the courts have clarified that dying declarations are not be taken absolutely, i.e., it cannot be the only grounds for convicting an individual. This fundamentally leads us to the fact that corroborative evidence is required to substantiate such declarations. However, a voluntary and a true declaration does not necessitate any corroboration.[10]

II. COMPARITIVE JURISPRUDENTIAL POSITIONS

In American law he must be under expectation of death only then this declaration is valid. This declaration is valid both in civil and criminal cases whenever the cause of death comes into question.[11]

In Thurston v. Fritz, the Kansas Supreme Court held the opinion that the dying declarations of an individual can be utilized in civil cases as well so as to prove any of the facts for which the declarant would have had permission to testify if they were alive. Such adjudication by the court essentially meant the overruling of cases such as State v. Bohan and State v. O'Shea

[6] Laxman v. State of Maharashtra, (2002) 6 SCC 710.
[7] Mallella Shyamsunder v. State of AP, (2015) 2 SCC 486.
[8] Khushal Rao v. State of Bombay, 1958 SCR 552.
[9] Panneerselvam v. State of Tamil Nadu, (2008) 17 SCC 190.
[10] R Rajshekhar Rao, *Courts can reject suspicious dying declarations in civil and criminal cases,* INDIAN EXPRESS (April 17, 2022, 11:09 PM), https://www.newindianexpress.com/opinions/2020/jan/06/courts-can-rejectsuspicious-dying-declarations-in-civil-and-criminal-cases-2085698.html#:~:text=contains%20the%20truth.,A%20dying%20declaration%20is%20relevant%20evidence%20as%20declared%20by%20Section,conviction %20on%20it%20without%20corroboration.
[11] R.K. Gorea & O.P. Aggarwal *supra* note 3

which had been given by the Supreme Court itself, where the doctrine had been established that dying declarations will only be considered admissible in cases dealing with the commission of homicide.

The debate and discussion with respect to the admissibility of dying declarations in the cases of civil suits dates back to the 18th century, it is pertinent to note that the counsels back in 1744 generally considered them to be admissible in the court of law[12], albeit there came certain cases where the opposing counsels had insisted that dying declarations were valid only in criminal trials.[13] With the passing of time, however, there were two American cases and two American books[14] which settled the basis that dying declarations could be admitted in civil actions as well.

Specially taking into cognizance the American court systems, it seemed that dying declarations were a commonplace in cases of homicide to such a large extent that it evaded the hearsay form of evidence, including others. When such exceptions to the hearsay rule were scrutinized and began to be questioned on their rationale, it was argued that this found its base on a principle which was applicable to civil cases as equally it was to criminal ones.[15]

There are certain landmark cases such as McCarthy v. Sirianni[16], which essentially dealt with the interpretation of the statute, where the bar on the admissibility of dying declarations was only restricted to criminal cases was held to be invalid and was held to be valid in civil suits as well. It has been widely argued that dying declarations were taken into account in all cases, both civil and criminal, before 1800. Post this period, there are relatively less incidents which are found where dying declarations were used in civil cases. Acknowledging the current sufficiency of the guaranty of truth, there seems to be no rationale whatsoever behind not extending the validity of this exception to civil cases also under the perspective of this necessity principle.[17]

Certain scholars have argued over the years that the significance given to "public necessity principle" is the consequence of the feeling of inadequacy which permeates one's mind when analysing the theological sanction put on the admissibility of dying declarations in civil suits.

[12] Omichund v. Barker, 1 Atk. 21, 38.
[13] Annesley v. Anglesea, 17 How. St. Tr. 1140, 1161.
[14] MCNALLY, EVIDENCE, 381, 386(1802); SWIFT, EVIDENCE, 124(1810).
[15] Carlton E. Spences, *Dying Declaration in Civil Cases,* 9 Or. L. Rev. 174 (1929).
[16] McCarthy v. Sirianni, 285 Pac. 825 (Or. 1930).
[17] W.E.M., *Evidence. Admissibility of Dying Declarations in Civil Actions,* 16 VLR 825-829 (1930).

If at all such declarations are to be trusted, then they should be trusted across all cases, since there is the same level of necessity, as under any statutory interpretation, in either civil or criminal cases. This view, however, is critiqued by many. The scholars advocating the view that dying declarations are immaterial in civil actions argue that in a civil suit, the testimony of the witnesses can be taken through deposition, and in situations where the actions are anticipated, the testimony can be perpetuated. This, however, does not hold true for criminal cases. If such a distinction was not created, then the murderers may often be acquitted of their charges, stating that as per the Federal Constitution, the accused has the right to be confronted with the witnesses who will testify against him. It is noteworthy that it is under Section 804(b)(2) of the Federal Rules of Evidence under which the concept of dying declarations is embodied under American law.

On comparing the English law with that of the Indian law, where also dying declarations are accepted in both civil and criminal cases, it is settled that as per the English law, the relevancy and the credibility of a dying declaration is taken into consideration only when the individual making such a statement is in a hopeless situation and is expecting imminent death, when it is not so in the Indian laws. In India, the proximity to the time varies from case to case.[18] The declarant must have been in real danger at the time that they had made such a statement, s/he must have been in actual danger of death at that particular point of time and they would have died after making such a statement. The Indian law, however, differs on the aspect that it considers dying declarations to be relevant irrespective of whether such an individual was not expecting death at the time of the declaration. Further, dying declarations are valid in both civil and criminal cases.[19]

III. RULING BY THE INDIAN SUPREME COURT V. RULING BY FOREIGN COURTS

It is well settled by now that dying declarations are admissible evidences in both civil and criminal cases in the American jurisdictions. However, it is equally pertinent to look into the applicability of dying declarations in civil cases in our own country and compare them with those of the foreign jurisdictions.

[18] 1 MP JAIN, INDIAN CONSTITUTIONAL LAW (8 ed. 2018)
[19] Kishan Lal v. State of Rajasthan, AIR 1999 SC 3062.

In KV Subbaraju v. C. Subbaraju[20], the court had established that a statement which had been made by a testator in his will was accepted as a valid evidence. In the present case, there were essentially 3 considerations before the court, out of which one of them was with regards to the one dealing with the age of Somaraju as had been stipulated in the will. The Supreme and the High Courts were perplexed over the admissibility of the statement that Somaraju was 19 years of age when he had executed the will. Sub-clause (5) and (6) of Section 32 necessitate that that such statements are admissible only if they had been raised before the question which is disputed. Albeit the fact that Section 32(5), if understood in its literal sense, stipulates that it may be plausible to contest that a statement that has been made with regards to the age of an individual is unrelated to the existence of any relationship, either by blood or marriage, or even adoption. However, such literal interpretation is not a proper one. It is also imperative to consider at this junction that in Oriental Government Security Life Insurance Co. Ltd. v. Narsimha Chari[21], it was held that a statement made by a sister with regards to the age of a member of her family, was admitted as an evidence, post the death of the family member.

When we look into the international arena, we come across similar cases like these. One of the most crucial cases which come to light at this juncture is Wilson v. Boerem[22], where the court had held that dying declarations can be used in cases dealing with contracts, wills, property deeds etc. This case essentially dealt with a promissory note, made by Schieffelin in the respondent's favour, endorsed to another individual Brown, and by Schieffelin to the plaintiff.

It was contended by the defence council that the note had been written for Schieffelin's benefit, by discounting the note, and had been delivered by brown to the plaintiff for the same objective, who had, however, put it to his own use. The plaintiff, however died of consumption and when he got to know that he was about to die and there were no hopes of him recovering, he told his wife that the promissory note in dispute had been endorsed for Schieffelin. It had been delivered to him for the same purpose and he had not paid any value for it and he had used the note for his own use by pledging the note for a debt. In this case, the presiding Judge had adjudicated that the very principles which enabled dying declarations to be used as evidence in criminal cases, make dying declarations admissible evidences in the civil cases as well.

[20] KV Subbaraju v. C. Subbaraju, AIR 1968 SC 947.
[21] Oriental Government Security Life Insurance Co. Ltd. v. Narsimha Chari, (1901) 25 Mad 183.
[22] Wilson v. Boerem, 15 Johns. 286 (1818).

IV. CONCLUSION

As seen previously, it has taken decades and centuries for dying declarations to be accepted as admissible evidences in civil suits and cases. It has been extensively discussed that the usage of dying declarations in civil suits was restricted to cases of homicide only and the courts, both in the foreign and Indian jurisdictions refused to take such declarations into consideration. The departure from the diverse principles consists in admitting the proof in homicide cases or restricting it to that class is a topic which has been refuted by the scholars and writers since times immemorial. Nonetheless, they have come to be incorporated under the ambit of certain sections such as Section 32 of the Indian Evidence Act, and Section 804(b)(2) of Federal Rules of Evidence, and more. This not only shows a more open and broad-minded judiciary, but in the long run, ensures that justice is adequately delivered to the needy.

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