
APPRECIATION OF HOSTILE WITNESS

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ABSTRACT

Hostile witness is a witness who refuses to testify in favour of the party calling him. Section 154 of the Indian Evidence Act 1872 (IEA) deals with the same. Testimony of a Hostile witness has to be appreciated very cautiously and the mere fact that any witness has turned hostile does not make him totally unreliable and totally rejecting his testimony. The court has to be like a guard while dealing with such testimony. Section 136 of the IEA 1872 deals with Judge's discretion as to admissibility of evidence. Further Section 165 relates to inquisitorial role of a judge in order to ascertain the truth. The primary issue with witnesses turning hostile is that our Judicial system acts solely on Evidences, and testimony of the witnesses constitute a major part of evidences. A party backs his case primarily on such testimony and when their witnesses start turning hostile then it is near to impossible for a party to prove its case, and it at times lead to failure of justice as happened in the case of Jessica Lal murder case and Best bakery case.

Mighty accused use all their money and muscle power to ensure that witnesses and evidence do not come before the court. In the absence of adequate protection and the troublesome and hostile Criminal justice administration system, the witnesses opt against testifying in the court. Therefore, our judicial system must address the basic issues involved regarding witnesses turning hostile so that proper administration of justice is ensured.

Keywords: Hostile Witness, Appreciation of Hostile witnesses, Marshalling of Hostile Witnesses.

INTRODUCTION

“Witness are the eyes and ears of Justice”

-Bentham.

In any Judicial proceeding there are various stakeholders that assist the court in meeting the ends of Justice and these include Pleaders, parties and the Witnesses. Judge's primary function is to decide as to the admissibility of the evidence proposed to be given by the parties and subsequently decide the matter before it by appreciating and giving due weight to the evidences received. The Pleaders play their role as the Officers of the court by performing their duty of bringing all relevant matters before the court with the help of parties and witnesses, so that the Judge may reach a conclusive decision on merit. Witnesses assist the court by deposing in a case and their **role is paramount** as it is the witnesses only who has the first-hand knowledge about the matter or incident. It is important that they testify correctly in the court. However, at times the parties try to prevent them from doing so that evidences prejudicial to their interest does not come in the court. Therefore, if they do not turn up for giving testimony in the court then the case or matter is bound to fail resulting in failure of Justice.

Indian Evidence act 1872, which is an adjective law, applies to both Civil and Criminal cases. It also lays stress on the importance of witness and Part 3rd of the Act majorly deals with different types of witnesses and these includes Child Witness, Hostile Witness, Trap Witness, Solitary Witness. It is only after the witness testify and give evidence in the court that the stage of **appreciation and marshalling** of evidence comes into picture. In general parlance appreciation of evidence can be understood as giving due weight to the evidence and marshalling as the arrangement of evidence under every issue framed in any case.

APPRECIATION AND MARSHALLING OF WITNESS-

Marshalling-

Marshalling of Evidence means 'Arrangement of Evidence of the parties in a proper manner under each issue or charges to be proved'. It is to be noted that it is not mere repetition of the testimony or what have been said by any witness but can be referred as putting all relevant statements of witness that support and oppose any fact together or simply understood as sequencing of evidence in a way which leads to the proper appreciation of evidence by the court. Marshalling of evidence in a proper way is necessary for good appreciation of evidence.

For a proper marshalling of evidence there should be clarity about the 'Facts in Issue' in a Civil case and 'Charges; in a simple cases or other matters are disputed in any case. If the disputed points are not clear then a proper marshalling cannot be done.

Steps to be followed in Marshalling of evidence-

- i. The Judge should examine all the evidence produced by the parties, irrespective of their nature.
- ii. It is only after examining all the Evidence the connected evidences should be put together under the analysis of any issue or point.
- iii. Entire testimony of any witness should not be put under any issue rather only the connected or relevant portions of such testimony should be put under a particular issue that are or may be helpful in proving that particular issue or point.

Appreciation of Evidence-

Appreciation of Evidence means Weighing and analysis of reliability and trustworthiness of Evidence adduced in a case. It can also be referred as assessing the worth, value and quality of any Evidence. Appreciation of evidence in Civil cases is different from that in Criminal cases. In Criminal trials there are three stakeholders of the trial process and these are the Judge, The Prosecution and the defence Counsel. If a trial is conducted in a proper way and the three stakeholders perform their respective roles effectively and with due care and caution then the maxim that 'let 10 guilty men get away but 1 innocent man should not be convicted' can be realized rather '10 guilty men would also be convicted along with 1 innocent man being saved from conviction. In criminal cases the principle of proof beyond reasonable doubt is applicable in order to give effect to **Article 21** of the Constitution. In Civil cases the standard of proof is not that high as is the case in Criminal case and it is the 'proof of balance of probability'. The bar in Civil case is too high because it involves the 'life and liberty' of an individual whereas in Civil cases it moreover deals with monetary, property or other tangible things.

Life and liberty of individuals have been given Paramount value and importance by the Apex court in the cases such as *Maneka Gandhi*,¹ *Arnesh Kumar*,² *Bachan Singh*,³ *Machhi Singh*,⁴

¹ AIR 1978 SC 597.

² (2014) 8 SCC 273.

³ AIR 1980 SSC 898.

⁴ 1983 SCR (3) 413.

etc.

Admissibility is the stage prior to that of appreciation. After appreciation only, reliability and credibility to the evidence admitted is attributed and depending on the reliability and credibility, a fact can be said to be proved, disproved or not proved. [PROVED]

Steps involved in appreciation of Evidence-

- i) For appreciating the Evidence firstly, the relevancy of facts should be established because **Section 5** provides that Evidence may only be given of 'relevant facts' and 'facts in issue'. It is to be noted that facts in issue is a concept of Civil cases only.
- ii) Then the Judge has to decide regarding the admissibility of evidence. He has the power/discretion to decide regarding the same under **Section 136** of the evidence act. Though this discretion is a limited one and restricted only for deciding relevant matters to a case and not otherwise. It is to be pointed that provisions relating to general relevancy is the **core subject matter** of the Indian Evidence Act and it has been expressly provided from '**Section 6 to 55**' of the Act.
- iii) After admissibility comes the stage of appreciation or analysis of evidence in which due weight is given to all Evidence and value or worth of every evidence is assessed.
- iv) If after appreciation, the Evidence seems to be **reliable** then it will prove the relevant facts or facts in issue and after this only the fact is said to be '**duly proved**'.
- v) Then the Judge has to Write the Judgment on the basis of the duly proved relevant facts. **Proviso [1] to Section 165** of the Act provides that "Judgement must be based upon the facts declared by this act to be relevant and duly proved".

MEANING OF HOSTILE WITNESS

Witnesses are of various kinds like Eye witness, Expert witness, Child witness, interested witness, trap witness, hostile witness etc on the basis of their role or standing in any particular case. Their reliability and credibility differs as per circumstances of the case. The basic rule is that an Oath of affirmation is administered to all type of witnesses. The purpose of administering such an Oath was explained in the case of *Rameshwar Kalyan Singh v. State of*

*Rajasthan*⁵ in which it was observed that the purpose is to bring home the solemnity of the occasion and to impress upon him the duty of speaking the truth. Chapter IX of the Indian Evidence Act, 1872, ranging from section 118 to 134 deal with '**Of Witnesses**'. Section 118 deals with "Who may testify". It provides that any person can be a competent witness provided he is able to understand the question put to him and can give rational answers to such questions. Further in the same light a Child or a lunatic is also competent to testify provided the aforesaid condition are fulfilled. The same chapter i.e., Chapter IX also provides for privileged communications. Chapter IX deals with "**Of the Examination of witnesses**". The chapter includes provision as to examination-in-chief, cross-examination, re-examination, leading question, hostile witness etc.

Hostile Witness or adverse witness is a witness who refuses to testify fully or in part or testifies in a manner that is **materially different** or prejudicial to the case of the **party calling him**. Evidence of a hostile witness shows that he is not desirous of telling the truth to the court. Similar view was expressed by the court in the case of *Panchanan Gogoi v. Emperor*⁶. Provisions regarding 'questioning by the party to his own witness' that is also referred as '**hostile witness**' have been provided under '**Section 154**' of the Indian Evidence Act, However, it does not define the term 'Hostile witness'. Further a witness need not be declared as a hostile witness before invoking this section.

In case of *Phanindar Nath v. Bhola Nath*, the Calcutta High Court held that "even where a witness appears, he cannot be regarded hostile only because he gives inconsistent or contradictory answers". In the case of *Shatrughan v. Madhya Pradesh*⁷, the Madhya Pradesh High Court was of the view that "it is not that a Hostile Witness is necessarily a false witness". A hostile witness is a witness whose statement is not favourable to the party calling him. He cannot always be considered a liar and a false witness. In *High Court of Andhra Pradesh v. Tummala Janardhana Rao*⁸, the court observed that 'a mere deviation from a previous statement does not make a witness hostile'.

⁵ 1952 SCR 377.

⁶ AIR 1930 Cal 276.

⁷ 1993 CrLJ 120.

⁸ 1998 (2) ALT Cri 479.

Evidentiary Value of Hostile Witness

No doubt the testimony of a hostile witness is clouded with suspicion but it is not so that the evidence of a hostile witness is to be rejected as a whole or part. The basic rule of hostile witness evidence is that any party may base its case on such evidence but here also the court has the discretion to reach to its own conclusion after appreciating all the evidence presented in the case. The courts have also cleared that the portion of evidence of hostile witness that helps either of the two party and the court in reaching a just decision may be admissible. However, such testimony or evidence has to pass the test and rule of prudence that is 'scrutiny and corroboration by other material witness'.

For instance, In the case of *Gulshan Kumar v. State*⁹, the court was of the view that the testimony of a hostile witness should not be rejected in toto and its testimony can be used if it is sufficiently corroborated by other witnesses or evidences. It is to be noted that such testimony can be used by both the parties. Further, in case the hostile Witness does not say, what he spoke in statement under **Section 161 CrPC** and has been declared as hostile by the court then also it is not necessary to reject all his testimony.

It is not necessary that a witness should be first declared a Hostile Witness and then be cross-examined rather the court has the discretion to allow the same without such declaration, in the interests of Justice. In order to declare a witness as hostile the witness should be differing on Material facts or evidences.

Section 132 of Indian Evidence Act 1872¹⁰, may also be related to hostile witness as it provides "a witness may not be excused from any question, the answer to which may criminalize him or impose a penalty or forfeiture on any question which is relevant to the case". It relates to the compatibility of a hostile witness to provide answers to all the questions that are relevant to the case.

Section 164 Code of Criminal Procedure 1973¹¹, can also be referred as a balancing provision between the interests to the investigating agency and that of the witness or the accused. Under this section there is power with Magistrate to recode the confession of parties and accused. In the same light **Section 161 Statement** can be referred which relates to 'examination by police

⁹ 1993 CrLJ 1525.

¹⁰ Act No. 1 of 1872.

¹¹ Act No. 2 of 1974.

of a person whom they think is acquainted with the facts of the case' and **Section 162** which prohibits signing of the statements made by the party and reduced by the police in writing from being signed by the party making it and it shall also not form the part of the record. In the case of *State of Madras v. G. Krishnan*¹², the court was of the view that "the purpose of such a provision [Section 164] is to deter witness from turning on statements later under the temptations, fear and influences".

Cross-Examination of Hostile Witness-

A Hostile Witness can be Cross-Examined as per **Section 154** of the Indian Evidence act. Cross-Examination of hostile witness is not the prerogative of the party calling him, it means that the party calling the witness does not have a right to cross examine the hostile witness rather it is the discretion of the Judge and the Judge must exercise this discretion sparingly and it is not so that a witness be declared hostile only due to the fact that he has given a testimony which does not suits the case of the party calling it. In case the prosecution witness differs materially and substantially from the prosecution's case then the prosecution can only pray from the Judge to declare that witness as hostile. It is due to the fact that hostile witness is itself called by the party calling it and it is a rule provided under **Section 137** of the Act that the party calling a witness, Examines-in-Chief his witness but here under Section 154, a hostile witness refuses to testify in the favour of the party calling him so in order to **break or nullify the testimony** of such witness the party calling such witness requests the court to allow cross-examination of a hostile witness and then it is open to the court to 'either permit or not' for the same. The court generally permits for such cross-examination if it thinks that doing so is in the interest of justice and will facilitate fair hearing. In the case of *R.K. Dey v. State of Orissa*¹³, the court held that "if the witness is speaking the truth and his testimony goes against the interest of the party who has called him then he cannot be necessarily called hostile".

It is to be kept in mind once cross-examination is allowed it is treated as the hostile witness is the opposite party and all those questions that can be asked to an opposite party in cross examination can be asked and these include-

- i) Leading questions under **Section 143** of the Indian Evidence act and that is for testifying the truthfulness of the witness. Leading questions are those questions which suggest in itself the

¹² AIR 1961 Mad 92.

¹³ 1977 SSCR (1) 439.

answers to the questions asked and these are generally not allowed in Examination in chief and Re-examination, if objected by the opposite party.

- ii) Questions referring to previous statements given in writing under **Section 145** of the Act. These questions may be asked for the purpose of contradicting any former statement of the hostile witness made in writing.
- iii) Questions which have the capacity or are intended to test the veracity of the witness and his standing in life as per **section 146** of the Act.

For guiding a court or a judge regarding admissibility of the statement of a hostile witness the Judge should be satisfied that-

- i) It is made by the witness himself.
- ii) The statement made by the witness is made voluntarily.
- iii) The statement made by the witness is admissible in the court.
- iv) The statement is reliable after passing the test of cross-examination and material corroboration by other evidences.
- v) The witness has signed an affirmation that the statement is true In his knowledge and not otherwise.

Why do witnesses turn Hostile?

There may be various reasons due to which Witness may turn hostile out of which include-

- i) Not being enough protection or safeguards for the Witnesses which makes it easier to threaten them.
- ii) Long pendency of cases or Prolonged trials which means that the witnesses have to attend the court again and again.
- iii) Easy bail being available to the richer and prestigious accused.
- iv) Coercion and undue influence arising out of use of money and muscle power by the accused.
- v) Miscellaneous factors such as fear of the police, legal system, Political might etc.

Witness turning hostile is a big issue and at times it leads to failure of justice particularly in Sexual Offences against rape, even the family of the victim does not support the victim either due to the threat of life given by the accused in case the accused is mightier and powerful or since the families of victims think that it will affect their respect and dignity. The courts have also shown their concerns on witnesses turning hostile for instance, in the case of *Anjanappa v. State of Karnataka*¹⁴, “even parents did not stand by their daughter. We do not understand how a woman, particularly a mother, turned her back on the daughter”. Further, it was observed “Such conduct displays greed and lack of compassion”. The court also accepted that “If they were threatened by the appellant and were forced to depose in the favour it is a sad reflection of our system which leaves witnesses unprotected”.

Regarding importance of protection of witness the Apex court again in the case of *Zahira Habibullah Sheikh [5] v. State of Gujarat*¹⁵, held that “Witness are the eyes and ears of Justice. Hence, the importance and primacy of the quality of trial process. If the witness is himself incapacitated from acting as eyes and ears of Justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial”.

Jessica Lal murder case-

This is a highlighted case regarding ‘**hostile witness**’. In this case the accused Manu Sharma fired two gunshots on the deceased Jessica in a bar. In this case firstly the accused got acquitted because of involvement of celebrities and prominent person and the evidences were erased and **prosecution witness turned hostile** one after another. In addition to this Police and Judiciary tried to save the accused. The complainant who was the eye-witness, **Shyam Munshi also turned hostile** and stated that he did not see the accused kill Jessica and gave the excuse that the statement was recorded in Hindi, a language that he was not conversant with. In the absence of witness and non-recovery of murder weapon etc the accused was acquitted. A mockery of criminal trial was made in this case.

It was later due to the media and public pressure the Delhi Police commissioner made a special team and investigate again in the case. The Delhi High court entertained the case as an appeal and re-examined the evidence which were considered by the trial court. It was here that the accused was given life sentence and co-accused were given four years rigorous imprisonment.

¹⁴ 2013 [4] Crimes 552 [SC].

¹⁵ [2006] 3 SCC 374.

This case shows that how mockery can be made of the Criminal Justice system in India with witnesses turning hostile and police and Judiciary shaking hands with accused.

Stages in which Witness may turn Hostile-

A witness may turn hostile at any stage of the trial and the stage at which the witness turns hostile will not matter to the case much. In the case of *Dahyabai Chhaganbhai Thakkar v. Gujarat*¹⁶, the court was of the view that Section 154 is referred as dealing with 'hostile witness' but the term has nowhere used in either this section or any other section in the whole Evidence Act. Further, a witness may favour the party calling him in Examination-in-Chief and subsequently testify adversely in Cross- Examination therefore Section 154 cannot be restricted to apply to any particular stage and a witness may therefore turn hostile at any stage.

Regarding the reliability of the witness, once a witness is declared to be hostile under Section 154 of the Indian Evidence Act the same procedure shall be followed that if evidence of such witness can be corroborated then it can be made admissible.

RELIABILITY OF HOSTILE WITNESS-

On the point of reliability of Hostile witness, the stand of our higher courts is that even the evidence of a hostile witness, if credible, form the basis of conviction in a criminal trial and if the testimony of the hostile witness is independent and natural and they do not have any reason to falsely implicate the accused.

The Apex Court in the case of *Krishna Chander v. State of Delhi*¹⁷ cleared that the fact that any witness is declared hostile by the party who called him and has been permitted to cross-examine him in itself does not mean that such witness has become unreliable and his testimony cannot be considered. In the case of *Gura Singh v. State of Rajasthan*¹⁸, it was held that testimony of a witness who has turned hostile is not to be excluded entirely or rendered unworthy of consideration. Conviction can be based solely on the testimony of the hostile witness if it is sufficiently corroborated by another Witness. Further in the same case¹⁹, the Apex court held that "It is a misconceived notion that merely because a Witness is declared hostile his entire evidence should be excluded or rendered unworthy of Consideration". Similarly, in the case of

¹⁶ 1964 SCR (7) 361.

¹⁷ CrI. Appeal No. 14 of 2016.

¹⁸ [CrI] 1184 1998.

¹⁹ AIR 2001 SC 330.

*Koli Laxman Bhai Chana bhai v. State of Gujarat*²⁰ it was cleared by the court that the testimony or Evidence of a hostile witness is admissible and the court is allowed to rely on the dependable part if duly corroborated by other evidences on record. However, it is to be pointed out that the testimony of a hostile witness is a clouded one and the court has as a matter of prudence closely scrutinize the same and it totally depends on the facts and circumstances of the case, whether after such scrutiny the court will accept or reject such a testimony or Evidence. In the case of *Govindaraju v. State by Srirampuram PS*²¹, the Apex court held that “in case evidence of a hostile witness, the court has to act with greater degree of care and caution for ensuring that Justice alone is done”.

On the point of reliance of testimony of hostile witness by the accused in the case of *Mukhtiar Ahmed Ansari v. State (N.C.T of Delhi)*²², the Apex court held that “accused can rely on the evidence of hostile witness when such witness did not support the genesis of the prosecution story”. It gets clear from this judgement that the accused can also cash on the testimony of the hostile witness.

Consequence of False testimony of a Hostile Witness-

Testifying falsely, giving false Evidence or fabricating false evidence is punishable under **Chapter XI** of the **Indian Penal Code 1860**. In case a hostile witness testified falsely then he may be subjected to the Offense of perjury. It is to be pointed here that a hostile witness will be subjected to perjury **only and only** when he is giving false testimony or evidence. In case he is testifying against the party calling him and he is stating the truth then he can be **declared as hostile witness** under **Section 154** of the Indian Evidence Act and on such declaration by the court he shall only be subjected to cross-examination and cannot be subjected for any Offense.

Section 191, 193 to 195, 202 and 203 may be invoked for punishing a hostile witness who gives false testimony in a court. Section 191 provides for definition of giving false evidence whereas Section 193 provides punishment for the same. Section 194 provides for “Giving or fabricating false evidence with intent to procure conviction for capital Offence”, Section 195 provides for “Giving or fabricating false evidence with intent to procure conviction of Offence punishable with imprisonment for life or imprisonment”, Section 202 relates to “Intentional omission to

²⁰ AIR 2000 SC 210.

²¹ AIR 2012 SC 1292.

²² AIR 2005 SC 2804.

give information of Offence by person bound to inform” and Section 203 relates to “Giving false information respecting an Offence committed”.

In the case of *G.S. Bakshi v. State*²³, the court was of the view that hostility of a witness can be inferred from the answers given by the Witness and the same can be inferred up to some extent from his ‘demeanour’.

CONCLUSION

In common parlance Witness turning hostile is prejudicial to the interests of justice. It is also considered that a witness who refuses to testify in favour of the party calling him is untrustworthy and unreliable but from the above discussions and judicial precedents such witness is not totally untrustworthy and there may be cases that a party calling the witness may have induced or threatened him to testify falsely but when he comes to the court, he reveals the actual truth rather than stating what the party calling him wanted him to testify. In such cases it cannot be said that his testify should be condemned as he is testifying in contradiction or inconsistently with the case of the party calling him.

The court has made it clear from various Judgements that the testimony of a hostile witness shall not be rejected in toto and it can be relied upon and used by any of the party if it is corroborated by other evidences. However, the court must act with utmost care and caution while appreciating and giving weight to testimony of hostile witness and it is only after close scrutiny, cross-examination of the party calling him and material corroboration that his testimony be relied upon. Malimath committee report on “Committee on Reform of Criminal Justice system.” Emphasized on the Judge’s obligation to search for the truth and that the Judges should be assigned pro-active role as is done in the inquisitorial system instead of acting as a mute spectator. Section 165 of the Evidence Act 1872 and Section 311, 313 of the Criminal procedure code 1973 also provides for such inquisitorial role to be performed by the judge.

It is pertinent to mention that witness turning hostile may be prejudicial to the interest of Justice as did happen in **Best Bakery case**, **Jessica Lal murder case** etc. Therefore, it is the need of the hour that certain steps be taken by the court to prevent witnesses turning hostile and ensuring the proper testimony and evidences come to the court and these steps include holding in-camera trial wherever deemed fit. Provision of in-camera trial are provided under Section 327

²³ (1978) 4 SCC 482.

of CrPC. Extending the support and protection of the Judicial system and the police to the witnesses which include compensation for time and money spend in coming to court. Ensuring that their identity is kept secret, treating them with respect and dignity. The Supreme court in the case of *Tessta Setalvad v. State of Gujarat*²⁴, directed the lower courts not to use loud and offensive languages against the accused.

²⁴ 2004 Cri LJ 771.