
DYING DECLARATION IN INDIA: ATBIR VS. GOVT. OF N.C.T. OF DELHI

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ABSTRACT

Section 32 of the Indian Evidence Act contains law on the admissibility of dying declaration in India. The admissibility of dying declaration rests upon two principles: necessity and sanctity attached to the words of a dying person. The present paper looks at the judicial decisions on this provision with special focus on the judgment titled ‘Atbir vs. Govt. of N.C.T. of Delhi’ in which the Supreme Court laid down the rules of admissibility of dying declaration besides clarifying its evidentiary value. The Court held that in certain situation dying declaration can be the sole basis for conviction. While it is crucial to respect the legislative mandate as enshrined in Section 32, since huge weight is given to such statements, the courts must be very cautious while dealing with dying declaration keeping in view the rights of the accused in a criminal justice system. As there is no oath or cross examination in the case of dying declaration, the court must be fully satisfied with respect to the contents and manner in which the dying declaration was made.

IMPORTANCE OF DYING DECLARATION

The law relating to dying declaration is contained in Section 32 of the Indian Evidence Act, 1872.¹ Section lays down exceptions to the general rule of non-admissibility of hearsay evidence. Hearsay evidence is not relied upon by the courts because it is always in the interests of justice to get the person making a statement before a court to examine the veracity and authenticity of the statement. It also subjects the person to cross examination by the other party which can expose any inconsistencies in the statement made by a witness. Section 60 states that oral evidence given by a witness must be direct.

Hearsay evidence is not defined anywhere in the India Evidence Act. Halsbury defines it as 'evidence given by a testifying witness of a statement made on some other occasion'.² It may be first hand i.e. the witness says he heard somebody else say it or second hand i.e. when the witness says that he got to know of fact by someone who heard another person saying it. Hearsay evidence can be oral or documentary.³ Hearsay evidence is not admissible generally because of the above mentioned reasons. However, in some cases due to the necessity of situation, such evidence is admitted in a court of law.

The purpose of taking statements on oath and cross examining the witness is to ensure that the statement is honest and free from any tutoring. But this rule needs to be relaxed in some cases where the situation is such that a person would ordinarily not lie. One of such situation is dying declaration in which a person making a statement cannot be put on oath owing to the situation the finds himself in.

The legislature, keeping in view of necessity of bringing such statements within the fold of the law of evidence, has created an exception to the rule of hearsay evidence. It has given an exceptional status to the admissibility of dying declaration which should accorded the status of 'admissibility' unless there are cogent reasons for disbelieving such declaration.⁴ This exception is given effect in Section 32(1) of the Indian Evidence Act which states that a statement made by a person who is

¹ Indian Evidence Act 1872 s32.

² *Halsbury's Law of England* (4th edn) vol 17, 39.

³ Ratanlal and Dhirajlal, *The Law of Evidence* (23rd edn Lexis Nexis Butterworths 2010) 569.

⁴ BB Panda, *Law relating to dying declaration* (1st edn, Delhi Law House 2010) 5.

dead is relevant when it relates to the cause of his death or it explains the circumstances of transaction resulting in death.⁵

There are generally accepted two reasons for admissibility of a dying declaration:

(i) The principle of necessity which states that in certain situations victim is the only eye-witness as offence is committed in an isolated place away from the eyes of general public. This ensures that there are no eye-witnesses who can testify to the commission of the crime. Excluding the testimony of victim (who is dead) would make proving the charge against the accused very difficult. This would also encourage the criminals to commit crimes in places where no witnesses are there. Because of this, the ends of justice dictate that such sole testimony must be accepted.⁶

(ii) The second reason is the sanctity attached to the words of a dying man. One of the primary reasons for non-admissibility of a statement is the want of oath of the witness who has given that statement. This is one of the major arguments put forth against the relevancy of hearsay evidence. However, in dying declaration, a special situation arises where the judicially administered oath is replaced by the sense of impending death.⁷ This sense of impending death creates a sanction that is equivalent or similar to the obligation imposed by administration of a judicial oath. This is based on the principle *Nemo moriturus praesumitur mentire* i.e. a man will not meet his Maker with a lie in his mouth.⁸

The court further said in *Vikas v. State of Maharashtra* that in conditions of extremity as in the case of impending death, the desire to lie is silenced by the most powerful force and the speaker is under divine obligation to speak nothing but the truth.⁹

The above mentioned reasons give dying declaration the special place in the Indian Evidence Act and confer upon it relevancy despite being hearsay evidence. In the next chapter we will deal with the judicial interpretation of this law in case laws and the evidentiary value placed upon it.

⁵ Evidence (n1) s32(1).

⁶ M Monir, *Law of Evidence* (8th edn, Universal Law Publishing 2011) 145.

⁷ *ibid.*

⁸ *Vikas v State of Maharashtra* (2008) 2 SCC 516 para 22.

⁹ *ibid.*

LAW RELATING TO DYING DECLARATION

This chapter seeks to examine the case laws relating to dying declaration in India and the admissibility and evidentiary value placed upon it in different scenarios. The law relating to dying declaration is also sought to be juxtaposed with the law in England with various key differences between dying declaration in India and England.

DIFFERENCE BETWEEN LAW IN INDIA AND ENGLISH LAW

In England, dying declaration is admissible only in criminal cases of homicide and manslaughter. The applicability of dying declaration is limited only to specific criminal charges in England.¹⁰ However, in India, dying declaration has wide applicability. It is admissible not only in criminal cases but also in civil cases. Section 32(1) makes it clear that such statement would be applicable in any proceeding where cause of death comes into question. Also, another important distinction in Indian and English law is with respect to the expectation of death. Under English law, the person making the dying declaration must be under expectation of death while making the declaration while in India Section 32(1) clearly mentions that expectation of death is not necessary while making a dying declaration.¹¹ Lastly and importantly, in England the person making a dying declaration must be competent as witness. This excludes the dying declaration of witnesses who are not competent to depose due to lunacy or tender age. However, in India, Section 32 (1) contains no limits as to who can give a dying declaration. This brings into fold, as in the case of **Atbir v. Government of N.C.T. of Delhi**, the dying declarations made by minors and holistically encapsulates the rule requiring the admissibility of dying declaration.

The primary requirement of bringing a statement into the fold of a dying declaration is that it must either relate to the cause of the death of a person or it must explain the circumstances of the transaction leading to the death of the maker.¹²

In a recent case decided by Supreme Court *Ramesh v. State of Haryana*, the court after examining the dying declaration held that dying declaration is a **substantive piece of evidence** and can form

¹⁰ Monir (n6) 146.

¹¹ Ratanlal and Dhirajlal, *The Law of Evidence* (23rd edn Lexis Nexis Butterworths 2010) 579.

¹² Panda (n4) 105.

the sole basis for conviction if there is no doubt with respect to its credibility.¹³ If it is shown that the person making the dying declaration was in a fit state of mind while giving the statement and while he gave the statement voluntarily with his personal knowledge without being tutored or influenced by any extraneous factors, then it can become the sole basis of conviction without there being any corroborating evidence. It further laid down that considering the gravity of the situation and the paucity of time, it is immaterial to whom a dying declaration is made. It can be made to a police officer, magistrate, doctor or to a private person.¹⁴

In *Vijay Pal v. Government of N.C.T. Of Delhi*,¹⁵ where a statement made by a woman against her husband who had put kerosene on her and put fire was held to be a dying declaration. The woman made the statement to her brother who had come on being informed by the daughter of the deceased. The Supreme Court said that the oral dying declaration related to the cause of the death and there was no time for the deceased to be tutored against her husband.

In *Babu Bhai v. State of Gujrat*, the court held that mere apprehension of death would not be sufficient to bring a statement into the fold of dying declaration. In this case, the deceased had written a letter, an year before he was murdered, implicating the food minister explaining that he might get killed because of the enmity with the minister. However, the Supreme Court held that this statement did not mention the cause of death or the circumstances of the transaction resulting in the death of the accused. It merely signified his apprehension of death in a particular manner which did not have a proximate connection with the cause of death.¹⁶

In another landmark case of *Pakala Narayan Swami v. Emperor*, the court defined the term ‘circumstances of the transaction resulting in death’. The court held the circumstances of the transaction resulting in death is wider than ‘cause of death’. In this case, the accused went to the house of the accused with the purpose of receiving the money he had given to him. However, his body was cut into 7 pieces and found in a tank. He had told his wife before leaving that he was going to the house of the accused to take the money after receiving a letter from him. The court

¹³ *Ramesh v State of Haryana* MANU/SC/1517/2016 para 26.

¹⁴ *ibid* para 28.

¹⁵ (2015) 4 SCC 749.

¹⁶ Criminal appeal no. 735 of 2014.

defined the ambit of the term ‘circumstances of transaction resulting in the death and laid down:

“‘Circumstances of the transaction’ is a phrase, no doubt, that conveys some limitations. It is not as broad as the analogous use in ‘circumstantial evidence’ which includes evidence of all relevant facts. It is on the other hand narrower than “res gestae”. Circumstances must have some proximate relation to the actual occurrence: though as for instance in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose.”¹⁷

It is well accepted principle in the cases of dying declaration that when the statement does not inspire the confidence of the court or suffers from inconsistency then it cannot be admissible under Section 32(1). In the case of *Surinder Kumar v. State of Haryana*,¹⁸ the deceased had suffered 95% burn injuries and had given a statement with her thumb impression. The court said that it was possible to have a thumb impression in 95% burn injuries and pointed at the glaring inconsistencies. It enquired as to why the statement of the children and neighbours was not taken who were at the place where the crime took place. Finally, the court disbelieved the statement as it was full of suspicious circumstances and was inconsistent with the case of the prosecution.

The above mentioned cases suggest that though dying declaration is an important piece of substantive evidence, the authenticity and voluntariness of the statement must be closely examined before making it the sole basis of conviction. Since there is no power of oath or cross-examination in such statements, the court must ensure there was no possibility of tutoring and it was made out of one’s sweet will.

ATBIR v. GOVT OF NCT OF DELHI – CRITICAL ANALYSIS

The case of *Atbir v. Govt. of N.C.T. of Delhi*¹⁹ deals with the admissibility and dying declaration and maintainability of death sentence. Only the first issue is within the scope of this paper.

In this case, one Jaswant Singh had 3 sons including Atbir with his first wife and one son and one daughter, Sonu with his second wife Sheela Devi. There was a property dispute in the family with

¹⁷ *Pakala Narayan Swami v. Emperor* AIR 1939 PC 47.

¹⁸ (2011) 10 SCC 173.

¹⁹ (2010) 9 SCC 1.

respect to Atbir and Sheela Devi and her children. Atbir along with his mother Chandrawati and Ashok, his brother, went to the house of Sheela Devi and killed her and his son and inflicted fatal injuries on the minor girl, Sonu. Sonu was admitted in a hospital soon after but later succumbed to the injuries inflicted upon her body. However, in the interim she gave a statement to the investigating officer explaining how the incident took place and the role played by Atbir and others in killing her entire family.

The statement given by Sonu was called into question by the defence since it was the sole basis on which accused was convicted. The defence raised various grounds impugning the validity of the dying declaration. Some of them are:

1. That the dying declaration cannot be the sole basis of conviction without there being any corroborating evidence.
2. That dying declaration not made to a magistrate is not admissible.

The court while dealing with plethora of cases relating to dying declaration laid down the rules of admissibility and evidentiary value of dying declaration under Section 32(1) of the Indian Evidence Act. It held that there is no rule that dying declaration cannot be the sole basis for conviction. The rule requiring corroboration is merely a rule of prudence. It recognized the substantive value of dying declaration and held that dying declaration is an admissible when the court is satisfied with respect to the voluntariness and authenticity of the statement. While taking dying declaration of a deceased, the court must consider the medical state of the maker along with the alertness of mind and memory of the person giving the dying declaration.

More importantly, there is no necessary requirement that the statement must be made only to a Magistrate. When there is no opportunity to call a magistrate, a police officer or a doctor can take the dying declaration provided that the person giving the dying declaration was in a fit state of mind while giving the statement. Only in the cases where statements made are contradictory or going against the case of prosecution can one question the police as to why Magistrate was not called to take the statement. However, in all the other cases, anyone can take the dying declaration.

In the present case, the doctor certified that the deceased was in a fit state of mind while giving the

dying declaration. The time between giving the dying declaration and death of the deceased was also not very much so as to call for the Magistrate to take the statement. In cases, where the person is in a critical stage, a rule requiring Magistrate might lead to disastrous consequences for the prosecution case. Sonu, after giving dying declaration was quickly moved to the emergency room and soon succumbed to the injuries inflicted upon her. If one might have asked for the availability of Magistrate, she might not have got a chance to depose as getting Magistrate takes more time than getting police or for that matter any other person.

This attains more importance because as per the declaration made by Sonu, Atbir locked the door before inflicting fatal blows upon the body of Sheela Devi, Manish and herself. This ensured there was no eye-witness to the crime except Sonu. In such situations, dying declarations must be taken as soon as possible without waiting for the Magistrate. This is because of the gravity of medical condition and also because without such declaration, which has huge weight in the eyes of law, it becomes very difficult to convict the accused. In such cases, there are hardly any eye-witnesses and any corroborating evidence. This can be very well understood from this case.

However, since huge weight is given to such statements, the courts must be very cautious keeping in view the rights of the accused in a criminal justice system. Since there is no oath or cross examination in the case of dying declaration, the court must be fully satisfied with respect to the contents and manner in which the dying declaration was made. This is because dying declaration being substantive piece of evidence, entire life of accused hangs in the balance and the court cannot afford convicting the accused on the basis of a false dying declaration. So, before admitting a statement as dying declaration, the court must check it for any discrepancies and anomalies that might lead to any inconsistency or might suggest coercion or tutoring. Only when the court is satisfied that the statement was made voluntarily with sweet will with the personal knowledge without being influenced by any extraneous factors should the court give due weightage to the dying declaration.

CONCLUSION

The general rule is that hearsay evidence is not admissible because of the lack of oath and cross examination of the witness who perceived such fact. However, there are certain exceptional

situations where one has to depart from the general rule. Such is the situation of dying declaration in which it is practically not possible to examine a person on oath and cross examine him. Principle of necessity calls upon the justice system to admit such statements as the want of oath is replaced by a divine sanction equivalent to the legal sanction of oath. This leads us to the inference that a person making a dying declaration would not tell a lie.

Dying declaration because of such pragmatic reasons is considered to be a substantive piece of evidence which can form the sole basis of conviction even if there is no corroborating evidence. This is possible only when the dying declaration inspires full confidence of the court and is free from any inconsistencies or discrepancies. A statement which is full of suspicious circumstances and goes against the case of prosecution cannot be admitted as dying declaration.

Since dying declaration occupies such an important place in the Indian Evidence Act and because of its substantive value, it becomes very important to recognize the rights of accused in a criminal justice system. Since the accused does not get to cross-examine the evidence given by dying declaration and it also has the potential to convict without any corroborative evidence, the courts must not get carried away with conviction of the basis of dying declaration. Only when the courts are completely satisfied with respect to the truthfulness of the declaration, it should not be made sole basis of conviction of accused.

Dying declarations should not be seen only from the side of victim but should be balanced with respect to the rights of the accused. Indian criminal justice system is based on due process model which gives due emphasis to the rights of the accused and fair trial. Dying declaration, with all its situational necessities has potential to cause huge injustice especially because Indian rule has departed from the English one where there has to be expectation of death in order for a statement to qualify as dying declaration.

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