

**SECTION 32 - RATIONALE AND SCOPE***Hitesh Kumar A*

National Law School of India University, Bengaluru

The thesis of this paper is 'Section 32 is an exception to the rule against hearsay'.

The Indian Evidence Act, 1872 is designed on the principle of best evidence, i.e., evidence of the person who made the statement or wrote the document himself.<sup>1</sup> Further when a witness appears before the court, he is obligated to take oath, his demeanour observable by the judge and can be cross-examined by the opposite party. Hearsay is an out of court statement, presented in court, to prove the truth of the matter asserted, i.e., It is second hand or derivative evidence.

Under Section 32, the persons whose statements are declared to be relevant are as follows: A dead person, with the death being clearly established; A person who cannot be found, with proof of a diligent search for that person; a person incapable of giving evidence, with the incapacity being established by competent medical evidence; a person whose appearance cannot be gotten, for instance when a witness has moved abroad.<sup>2</sup> These conditions are prerequisites before any sub-section is made applicable.

The multifarious type of statements referred to in the provision fulfil the definition of hearsay; lack the safeguards of oath, demeanour and cross-examination; and are thus exceptions to the rule against hearsay.<sup>3</sup> The person who has first-hand knowledge is not the witness here, but another person who is cognizant of the statement of such person or has second-hand knowledge is the witness. The rationale for the acceptance of such statements is: (1) some circumstances are imposed by the section offering some guarantee of trustworthiness and genuineness<sup>4</sup>; (ii) the clauses are phrased in a technical manner; (iii) these specific type of statements which have a higher degree of probability of truth; (iv) there is a necessity as it is the best evidence available or better evidence is unavailable<sup>5</sup>; (v) the facts for which evidence is allowed is of exoteric nature and not esoteric.<sup>6</sup>

Under Section 32(1), statements made by a person before his death become relevant. Such statements are labelled as dying declarations.<sup>7</sup> A dying declaration is always relevant irrespective of to whom it is made.<sup>8</sup> The reasons for admitting such evidence are: that it is

<sup>1</sup> James Fitzjames Stephen, THE INDIAN EVIDENCE ACT, 1872 WITH AN INTRODUCTION ON THE PRINCIPAL OF JUDICIAL EVIDENCE, 5, (1872).

<sup>2</sup> *Vepa P. Sarathi's Law of Evidence*, 183, (Abhinandan Malik ed., 7<sup>th</sup> edn, 2017).

<sup>3</sup> *Id.*

<sup>4</sup> *Basu's Law of Evidence*, 1424, (P.M. Bakshi ed., 7<sup>th</sup> edn. 2003).

<sup>5</sup> *Id.*, at 1396.

<sup>6</sup> James Fitzjames Stephen, *supra* note 1, at 126.

<sup>7</sup> If recorded on oath by a Magistrate, such a statement is called a dying deposition.

<sup>8</sup> Mukund Sadra and D S Chopra, CASES AND MATERIAL ON EVIDENCE LAW, 209, (2012).

the best evidence available; and that it is a policy decision.<sup>9</sup> The term ‘verbal’ occurring in the provision has been interpreted to mean not necessarily “oral”, but also as including gestures made by a dying man, inept to answer to questions put to him; as was ruled in *Chandrasekhara v. R.*<sup>10</sup> In this context, the case of *Queen Empress v. Abdullah*<sup>11</sup> is also relevant, as it was held that questions and signs taken together can be regarded as a verbal statement made by a person in relation to the cause of death within the meaning of Section 32. To place reliance on a dying declaration, the court must be satisfied that it was true, voluntary and neither because of tutoring or prompting nor through imagination; and made in a fit state of mind. A conviction can be sustained on the sole basis of a dying declaration, without any corroboration, if it is found to be reliable.<sup>12</sup> Such a declaration maybe preferably recorded in a question and answers format; but it is not a strict and emphasis is not on the form, but the substance i.e., reliability.<sup>13</sup> The phrase “*circumstances of the transaction*” includes statements made before a person received any injury. In a trial for murder of the husband, with the wife and her paramour as the accused, letters and diary entries revealing the strained relationship and interference of the paramour were held to be relevant under this sub-section.<sup>14</sup> In *Pakala Narayan Swami v. King Emperor*<sup>15</sup>, the cause of deceased death had come into question; in that context, the statement of the deceased to his wife that he had received a letter asking him to go to the home of the accused to receive due money and that he going so was found to be relevant as it showed the circumstance of transaction which had resulted in his death.

Dying declarations are relevant where the cause of death comes into question, irrespective of the nature of proceedings (Civil or Criminal). Under the English law, the dying declaration must have been made under an expectation of death<sup>16</sup>; but such a requirement does not exist in India. If a dying declaration is in relation to the death of another person and not the declarant, such a statement would not come under Section 32(1).<sup>17</sup> The Supreme Court has laid down certain additional guidelines<sup>18</sup> - dying declarations must be assessed on a case specific basis; a dying declaration must be assessed like any other piece of evidence taking in to other circumstances and principles of weighing evidence; and a dying deposition recorded in a proper manner may be of higher evidentiary value.

In order to be relevant under Section 32(2), the statement must have been made in the ordinary course of business and not on special occasions, i.e., it must not be a transaction

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<sup>9</sup> Under common law it was accepted on the based on the maxim “*nemo mariturus presumuntur mentri*”, i.e., the occasion was solemn, and a dying man about to meet his maker would have no motive to lie.

<sup>10</sup> *Chandrasekhara v. R.*, LR 1973 AC 220.

<sup>11</sup> *Queen Empress v. Abdullah*, ILR 1885 ALL 385.

<sup>12</sup> *Prempal v. State of Haryana*, 2014 10 SCC 336.

<sup>13</sup> *Kumar Gulati v. State of Haryana*, 2014 14 SCC 646.

<sup>14</sup> *Ranjit Singh v. State*, AIR 1952 HP 81.

<sup>15</sup> *Pakala Narayan Swami v. King Emperor*, 1939 Cri LJ 364.

<sup>16</sup> *R v. Jenkins*, 1869 11 Cox CC 250.

<sup>17</sup> *Ratan Gond v. State of Bihar*, AIR 1959 SC 18.

<sup>18</sup> *Khushal Rao v. State of Bombay*, 1958 Cri LJ 106.

of an exceptional kind such as execution of a mortgage deed, but of professional employment in which the declarant was in ordinary or habitual engagement.<sup>19</sup> The Sub-section also provides for examples such as entries or memorandum in books or records such ledgers, journals, accounts – indicating regularity; further, written or signed acknowledgements for receipt of money or documents of commerce are covered.<sup>20</sup> The assumption here is that a person making such statements would have no motivation to falsify such records, and such statements are admissible as an exception to hearsay. The injury report prepared by a medical officer if proved by his compounder would be admissible under Section 32(2), if the attendance of the Medical officer cannot be procured without any delay or expense.<sup>21</sup> Books and papers kept in usual course of business in companies are admissible under this provision.<sup>22</sup> A statement made by a mid-wife to her paramour that she had attended a confinement and had seen a murder of new-born child. At the trial for murder, the paramour sought to give evidence of mid-wife's statement, as she was dead by the time of the trial. Such a statement was held to be not made in the course of business or during discharge of professional duty.<sup>23</sup>

However, it was held to be relevant under Section 32(3), as the midwife would have exposed herself to prosecution by the having made that statement. It must preliminarily shown that the person making the statement knew it to be against his pecuniary and propriety interest before a statement is admissible.<sup>24</sup> This would depend on case-specific basis; the statement itself and the transaction in which it was made might both have to be considered. A statement by a widow against her propriety interest (estate) was held to be admissible as it was made consciously.<sup>25</sup> Under Section 32(3), a confession of a person who died prior to the beginning of the trail, would not be relevant.<sup>26</sup> He had by that time been arrested as an accused and he would not be exposing himself to prosecution but rather furnishing evidence against himself. Further, such confessions are specifically made relevant under Section 30 and also restricts the use to which such confession can be put to.<sup>27</sup> The jeopardy of exposure to a suit or prosecution is an essential prerequisite. If a statement is made after such risk had passed, say after the expiration of the period of limitation – it would not be relevant under this provision. Similarly, a statement made after the prosecution has commenced, or the statement of a dead police sleuth as such a person would not be relevant.<sup>28</sup> The opinion under Section 32(4) should be about the existence of a public right or custom or matter of general interest and not about the existence of fact

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<sup>19</sup> Ningawa v. Bharmappa, 1899 23 Bom 63.

<sup>20</sup> S.D. Basu, *supra* note 2, at 1395.

<sup>21</sup> State v. Rakshpal Singh, AIR 1953 ALL 520.

<sup>22</sup> Lodna Colliery Co. v. Bholanath Rai, AIR 1954 Cal 233.

<sup>23</sup> Ajodhi v. Emperor, 1919 56 IC 582.

<sup>24</sup> Savitri Devi v. Ram Ran Bijoy Prasad, AIR 1950 PC 1.

<sup>25</sup> Sashi Jena v. Khadai Swain, AIR 2004 SC 1492.

<sup>26</sup> Vepa P. Sarathi, *supra* note 2, at 184.

<sup>27</sup> Vepa P. Sarathi, *supra* note 2, at 184.

<sup>28</sup> Vepa P. Sarathi, *supra* note 2, at 184.

from which an inference can be drawn.<sup>29</sup> Additionally, it must be the person's own opinion and not what he heard. Another prerequisite of this sub-section is that the statement must have been *ante litem motam*.<sup>30</sup> This condition is applicable to the subsequent two sub-sections as well. In the case of *Pranballav v. Tulsibai Desai*<sup>31</sup>, the fact in issue was whether certain premises was leased out and was being used as a brothel. The opinion of a family physician, shop-vendor, a person who lived in the vicinity of that premises for a long-time on the reputation of the locality, street and the visitors of such premises were held to be relevant under Section 32(4).<sup>32</sup>

The category of persons under sub-section 5 must have special means of knowledge with regard to the relationship in question. The special knowledge is by virtue of the declarant being either being a member of the family or was intimately connected with it.<sup>33</sup> If the basis of a case is the genealogy, such a party has the burden of proving every link to be fully proved.<sup>34</sup> In a suit was filed for recovery of certain properties by the plaintiffs as nearest heirs of the last male holder and for that purpose a pedigree was filed in court.<sup>35</sup> To prove the accuracy of the pedigree, reliance was placed on a petition filed in an earlier in which the same pedigree was given, it was held that since one of the persons who had filed the earlier suit was dead, and the statement was made at the time when the question in dispute in the present litigation had not arisen, his statement in the pedigree mentioned would be relevant under Section 32(5) of the Evidence Act even though the other two persons were alive.<sup>36</sup> Other guidelines to keep in mind under Section 32(5) are – the nature of special knowledge that the witness knows about the pedigree; the witnesses' interested nature; and corroboration of the testimony of such witness as far as possible.<sup>37</sup> The use of horoscope as a relevant fact to prove the date of birth under this provision was not allowed; instead the admission registry of a school was found to be relevant under this provision.<sup>38</sup> Sub-section 6 is applicable in cases where – the persons whose relationship is sought to be given are dead; the persons having special means of knowledge are dead; and further the persons to whom a statement of such a relationship had been made is dead. In such circumstances, the only available evidence of such a relationship would be that contained in pedigrees or other forms of writing described in the sub-section; and moreover it is the best evidence available.<sup>39</sup> The term "relationship" present in these two sub-sections includes date of birth or death, minority or seniority and names of relations, because the time of one's birth relates to the

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<sup>29</sup> Vepa P. Sarathi, *supra* note 2, at 185.

<sup>30</sup> *Read*, "Spoken before a lawsuit was brought".

<sup>31</sup> *Pranballav v. Tulsibai Desai*, AIR 1958 Cal 173.

<sup>32</sup> AIR 1958 Cal 173.

<sup>33</sup> Vepa P. Sarathi, *supra* note 2, at 185.

<sup>34</sup> *Dashrath v. State of Maharashtra*, Writ Petition No.927 of 2009, (High Court of Bombay).

<sup>35</sup> *Dalgobinda Paricha v. Nimai Charan Misra*, AIR 1959 SC 914, ["Dalgobinda"].

<sup>36</sup> *Dalgobinda*, AIR 1959 SC 914; *Chandramohan Ramchandra Patil v. Bapu Koyappa Patil*, 2003 3 SCC 552.

<sup>37</sup> *State of Punjab v. Mohinder Singh*, AIR 2005 SC 1868.

<sup>38</sup> *State of Bihar v. Radha Krishna Singh*, AIR 1983 SC 684.

<sup>39</sup> Vepa P. Sarathi, *supra* note 2, at 186.

beginning of one's relationship by blood as was held in *Oriental Govt. Security Life Assurance v. Narasimha Chari*.<sup>40</sup> The statement made by the testator in the will with regard to the defendant as his adopted son would be relevant under this sub-section.<sup>41</sup>

Under Section 32(7), a statement contained in a deed, will or other document would be relevant, if the document was transaction by which a right or custom was created, modified, claimed recognised or asserted (in accordance with Section 13(a)). It was held in *Nagammal v. Shankarappa*<sup>42</sup>, that on the question as to whether an adoption by a person who had two sons living on the date of adoption was valid as the sons were suffering from a virulent form of leprosy, a recital in the registered deed of adoption would be relevant under clause (3) or (7) because the deed creates a right in the adopted son. Parole evidence may not be introduced under this sub-section, but it can be introduced under sub-section 5. The principle of *ante litem motam* is applicable here as well. Under sub-section (8), it is not merely the statement made by a number of persons that is made relevant, but a statement by a number of persons conveying their feeling or impressions.<sup>43</sup> The mere voice of the multitude should not be admitted as legal evidence.

To conclude Section 32 covers various type of statements which are made out of court and introduced to prove the truth the statement itself. Further, such statements are deficient of the basic safeguards as well. Therefore, these statements must be taken with caution and be corroborated by other evidence.

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<sup>40</sup> *Oriental Govt. Security Life Assurance v. Narasimha Chari*, ILR 1902 25 Mad 183.

<sup>41</sup> *Dwarkanath v. Lalchand*, AIR 1965 SC 1549.

<sup>42</sup> *Nagammal v. Shankarappa*, ILR 1930 54 Mad 576.

<sup>43</sup> *Vepa P. Sarathi*, *supra* note 2, at 187.