



LAW COMMISSION OF INDIA

SEVENTY-FOURTH REPORT

ON

**PROPOSAL TO AMEND THE INDIAN EVIDENCE
ACT, 1872 SO AS TO RENDER ADMISSIBLE CERTAIN
STATEMENTS MADE BY WITNESSES
BEFORE COMMISSIONS OF INQUIRY AND
OTHER STATUTORY AUTHORITIES**

AUGUST 1978

Justice H. R. Khanna

D.O. No. F. 2(14)/78-L.C.

CHAIRMAN

LAW COMMISSION

GOVERNMENT OF INDIA

**Shastri Bhavan,
7th Floor, 'A' Wing,
New Delhi-110 001.**

August 8, 1978.

My Dear Minister,

I forward herewith the Seventy-fourth Report of the Law Commission of India relating to the proposal to amend the Indian Evidence Act, 1872 so as to render admissible certain statements made by witnesses before Commissions of Inquiry and other statutory authorities. The opening paragraph of the Report will explain the circumstances under which the Commission took up this subject for consideration.

With kind regards,

Yours sincerely,

(Sd.)

(H. R. KHANNA)

**Hon'ble Shri Shanti Bhushan,
Minister of Law, Justice and Company Affairs,
New Delhi-110 001.**

"Section 8B (of the Commissions of Inquiry Act).—If, at any stage of the inquiry, the Commission,—

(a) considers it necessary to inquire into the conduct of any person ; or

(b) is of opinion that the reputation of any person is likely to be prejudicially affected by the inquiry,

the Commission shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence:

Provided that nothing in this section shall apply where the credit of a witness is being impeached."

"Section 8C (of the Commissions of Inquiry Act).—The appropriate Government, every person referred to in section 8B and, with the permission of the Commission, any other person whose evidence is recorded by the Commission,—

(a) may cross-examine a witness other than a witness produced by it or him ;

(b) may address the Commission ; and

(c) may be represented before the Commission by a legal practitioner or, with the permission of the Commission, by any other person."

Effect of section 6, Commissions of Inquiry Act.

3. Section 6 of the Commissions of Inquiry Act, reproduced above, relates to the use of a statement against the very person who made that statement. This section obviously has no application to the use of a statement made by a deceased person in civil or criminal proceedings against another person.

Section 32, Evidence Act.

4. Section 32 of the Indian Evidence Act makes statements by a deceased person relevant and admissible in subsequent court proceedings. The statements mentioned in the section, however, are of special nature, like those relating to the cause of death of a person making the statement. The statements of deceased persons with which we are concerned do not belong to that category or nature.

Section 33, Evidence Act—Conditions for applicability.

5. Section 33 of the Indian Evidence Act makes evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, relevant in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, to prove the truth of facts which it states when the witness is dead and in certain other contingencies with which we are not concerned. Before, however, the provisions of section 33 can be invoked, it has to be shown that the case falls within the ambit of the proviso to section 33, according to which it is essential that the earlier proceeding in which the statement was given by the witness was between the same parties or their representatives in interest, that the adverse party in the first proceeding had the right and opportunity to cross-examine the witness and that the questions in issue were substantially the same in the first as well as the second proceeding.

6. No individuals are arrayed as formal parties in proceedings before a Commission appointed under the Commissions of Inquiry Act and no findings recorded by a Commission can be enforced proprio vigore. As the law stands at present, consequently a statement made by a deceased witness in proceedings under the Commissions of Inquiry Act cannot be used against another person in subsequent civil or criminal proceedings. The question which needs consideration is as to whether as a result of amendment such a statement can be made admissible.

On general principles the Law Commission is against the use of such a statement in the course of subsequent civil or criminal proceedings, except in one limited contingency. In case a Commission appointed under the Commissions of Inquiry Act has proceeded under section 8B of that Act because it considered it necessary to inquire into the conduct of a person or because it was of the opinion that the reputation of that person was likely to be prejudicially affected by that inquiry and if, further, that person has had the right and has been afforded all reasonable opportunity to cross-examine the deceased witness as contemplated by section 8C and, further also, if the questions in issue before the Commission were substantially the same as at the subsequent civil or criminal proceedings, in such an event there appears to be no objection to making suitable amendment in law to make the statement of the deceased witness relevant and admissible at the subsequent civil or criminal proceedings against that person. Apart from this limited contingency, the Commission is not in favour of any proposal for making such a statement admissible by amendment of law.

7. We may now set out the reasons in support of our view. One of the cardinal rules of the system of jurisprudence followed by us is that a witness who deposes against a party must be brought face to face with that party, so that that party may be in a position to cross-examine that witness. The safeguard is described by Bentham¹ as "confrontation". The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation not for the idle purpose of gazing upon the witness or of being gazed upon by him, but for the purpose of cross-examination which cannot be had except by direct and personal putting of questions and obtaining of immediate answers. There is also a secondary advantage to be obtained by a personal appearance of the witness. The judge is enabled to watch the demeanour of the witness. The principle underlying section 33 of the Indian Evidence Act is that when a statement has already been subjected to cross-examination and is hence admitted, it comes in because the rule is satisfied and not because an exception to the rule is allowed. The statement may have been made before the subsequent trial, but it has already been subjected to proper cross-examination. The principle underlying section 33

¹Bentham's Rationale of Judicial Evidence, Book III, Ch. XIX, cited by Woodroffe & Ameer Ali, Law of Evidence, 12th Edition (1968) Vol. 4, page 775.

has been summed up by Woodroffe and Ameer Ali¹ and the same reads as under:—

"The rule contained in this section is an administrative expedient for doing justice between litigants in a particular situation as a rational compromise between two well-known canons of judicial administration. A presiding judge will require that a party furnish evidence of the primary grade, if it is within his power to do so. So long, therefore, as the proponent can reasonably be required to cause a witness to repeat to a tribunal his evidence regarding admissible facts given on a former occasion, the presiding Judge will insist that the witness himself be produced. In other words, primary evidence will be insisted on until a satisfactory forensic necessity for offering secondary evidence is brought to the attention of the tribunal. At this point, a second administrative canon, yet non-fundamental comes into operation. It is the administrative duty of the court to protect the substantive right of the party to prove his contention, so far, at least, as is reasonably within his power. When the proponent's necessity for producing a secondary grade of evidence is established, the right to submit it will be recognised by the court. The general rule is that the best evidence must be given; no evidence will be received which is merely substitutionary in its nature so long as the original evidence is attainable. Thus, depositions are in general admissible only after proof that the parties who made them cannot themselves be produced. The present section states the circumstances under which secondary evidence of oral testimony may be given. Under these circumstances, the production of primary evidence is either wholly (as if the witness is dead or cannot be found, or is incapable, or is kept away) or partially (as in the case of delay or expense), out of the party's power."

The reasons which led to the enactment of section 33 of the Indian Evidence Act, in our opinion, would hold equally good, in the one limited contingency referred to above.

8. What we have said above would also hold good in case of inquiries on oath under a right of cross-examination of the nature and in the circumstances mentioned above is conferred.

Same principle applicable to other statutory inquiries on oath with right to cross-examination. Earlier Reports of the Law Commission.

9. It may, incidentally, be mentioned here that while the Commissions of Inquiry Act, 1952 and the Indian Evidence Act, 1872 have both been reviewed by earlier Law Commission^{2,3}, the point now under consideration has not been raised so far, and the Law Commission has not therefore had any occasion to consider it.

¹Woodroffe and Ameer Ali, Law of Evidence, 12th Edition (1968), Vol. 4, page 776.

²24th Report of the Law Commission of India (Commissions of Inquiry Act, 1952).

³69th Report of the Law Commission of India (Indian Evidence Act, 1872).

(Sd.) (H. R. KHANNA)

H. R. KHANNA

Chairman

(Sd.)

S. N. SHANKAR

Member

(Sd.)

T. S. KRISHNAMOORTHY IYER

Member

(Sd.)

P. M. BAKSHI

Member-Secretary

NEW DELHI,

Dated the 8th August, 1978.