Course Name – LL.B 3rd 4th Sem

Subject –Law of Evidence

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Concept Covered – UNIIT-IV (Whole)

Meaning of Estoppel

Section 115 of the Indian Evidence Act, 1872 incorporates the meaning of estoppel as when one person either by his act or omission, or by declaration, has made another person believe something to be true and persuaded that person to act upon it, then in no case can he or his representative deny the truth of that thing later in the suit or in the proceedings. In simple words, estoppel means one cannot contradict, deny or declare to be false the previous statement made by him in the Court.

Exempli gratia,

1. Simran, a leading entrepreneur, wants to buy a car. Raj is her good friend who owns a classic car of great worth. When Simran contacts Raj to help her in purchasing a car, he says that she can buy his car which he has been planning to sell for some time now. Simran buys his car. Later on, the car becomes Raj's property. Raj takes the defense that when he sold that car to Simran, he had no title over it. The court held that Raj would be liable and will have to prove his want of title.
2. If Thanos is an employee of company XYZ but in court, he denies to be an employee of that company, then, later on he could not claim the salaries and emoluments from that company.
3. A, an agent of C, mortgaged his property to B which he was in the possession of but was not the owner. B, the mortgagee, in good faith, believing the representation to be true took the mortgage. Thereafter, he obtained a decree and the property was sold. The real owner of the

property, C, claimed that it was his property and that A had no power to mortgage them. The court would stop A from making such a claim under the doctrine of estoppel.

4. M, a tenant in the house of N, falsely representing to Q that he had transferable rights over the property and thereafter transferring property to N, later on, cannot claim that he had no transferable interest in the property. He would be estopped from doing so under the doctrine of estoppel.

Principles of Estoppel

Conditions for application of Doctrine of Estoppel

The following conditions are to be satisfied in order to apply the doctrine of estoppel:

- The representation must be made by one person to another person.
- The representation made must be as to facts and not as to the law.
- The representation must be made as to an existing fact.
- The representation must be made in a manner which makes the other person believe that it is true.
- The person to whom the representation is being made must act upon that belief.
- The person to whom the representation would be made should suffer a loss by such representation.

Nature of estoppel

The legal principle of the doctrine of estoppel is viewed as a substantive rule of law, *albeit,* it has been described as a principle under the Indian Evidence Act, 1872.

Types of Estoppel

Estoppel by a matter of Record or Quasi-record

Alike res judicata once a court has given the judgement, the parties, their representatives, their executors, etc. all are bound by that decision. This doctrine stops the parties to a case, from raising another suit in the same matter or to dispute the facts of the case after the decision has been made by the court.

Situations where estoppel by record or quasi record arises are as follows:

1. Where the dispute between the parties on the facts have been decided upon by the tribunal which was entitled to take decision in the particular case, and when the same dispute arises again in the matter subsequent to the first one, between the same parties;
2. Where the issue raised between the parties which has been resolved by the judiciary, incidently comes again into question in the subsequent proceedings between the same party.
3. Where an issue raised on the facts, affecting the status of the person or thing, has been willing determined in a manner that in the final decision it be included as a substantive part of the judgment *in rem* of the tribunal that has been setup to decide the particular case. This should take place when the same issue comes directly in question in subsequent civil proceedings between any party whatever.

For example, if Nano has been held guilty in a murder case, then neither he, nor his representative, Mantro, nor his executor Berna, would be allowed to raise a suit again in the same matter. Parties are stopped from doing so under this doctrine.

This doctrine has been dealt in:

- Section 11 to 14 of the Code of Civil Procedure, and
- Section 40 to 44 of the Indian Evidence Act, 1872.

The judgements by the court can be of two types

Judgements in rem

Delivered by a competent jurisdiction, this type of judgements tells about the status of the person or a thing. For example, family court dissolving or establishing a marriage. Irrespective of whether the parties belong to the case or not, a judgement *in rem* is binding on all.

Judgement in personam

The judgements which are binding on the parties and their privies, and which determines the rights of the parties to a suit or the proceedings are called judgements *in personam.*

Judgement not falling under the said jurisdiction

In case if the judgement given by the court does not fall under the respective jurisdiction then the application of the doctrine of estoppel will have not effect. Section 44 of the indian Evidence Act, 1872 states that in case the party wants to avoid the application of the doctrine of estoppel, he/she can plead that the court delivering the judgement has no jurisdiction over the matter or that it is fraudulently doing so.

Estoppel by Deed

It is the concept where two parties enter into an agreement by way of a deed as to certain facts. This implies that neither he nor his representatives or any person claiming under him can deny the facts mentioned and agreed in the deed.

For example, Mickey Shroff decided to make his will in favor of his two sons, Lion Shroff and Wolf Shroff, and his daughter's son Deer Shroff. Lion Shroff induced some third person to buy Deer Shroff's share of the property. This deed was attested by Wolf Shroff who was not aware of the facts mentioned in the deed. Deer Shroff died without giving birth to a male child. Lion Shroff filed a suit to recover the property from the third party. Here Lion Shroff would be estopped but not Wolf Shroff as Wolf was not aware of the facts of the deed.

Estoppel by Pais or Estoppel by Conduct

The elucidated meaning of 'Estoppel by Pias' is 'Estoppel in the Country' or 'Estoppel before the public'. It has been discussed in Ss. 115 to 117.

Estoppel by conduct means when a person through agreement, misrepresentation or negligence makes the other person believe in certain things upon which the other person had taken some action causing a change in their current situation, then the first person cannot deny the veracity of the statements given by him in the latter stages.

In the case of *Sardar Chand Singh v. Commissioner; Burdwan Division*, [1] Chang Singh, the Managing Director of Messrs., was denied any revolver license as he was accused in a gruesome murder case and other cases. When the District Magistrate issued an order that he could not hold any revolver license on the grounds of public order and safety, Chand made no appeal. This planted a reasonable belief that he has consented to it. Later on when makes an

application to the District Magistrate to reconsider his case, it was denied following the doctrine of 'Estoppel by Conduct'.

Estoppel by election

Kantabai offers his maid Meena Malhotra her second-hand car. Meena out of generosity says that she would not take it for free. Kantabai says to Meena that she has the freedom to take it as a gift or to make a payment as per her willingness. Meena has the option to either take it as a gift or claim a right over it by purchasing the car. Now, Meena makes the payment and takes the car in her possession. After a year, Meena becomes bankrupt and asks Kantabai to return the money which she had given to her as the payment for buying the car, as she now wants it as a gift.

According to the doctrine of estoppel by election the person receiving the gift or claiming the right can enjoy one of them and not both of them. So Meena cannot now go back upon it and take the other option.

In para 17 in the case of *Revision v. Lekshmy Sukesini Devi*,[2] the court clearly stated that: Parties should not take inconsistent pleas as it makes the conduct far from satisfactory. And also that parties should not take inconsistent stands and lengthen the proceedings unnecessarily.

In another case, the petitioner was given a land on licence and not on interest. In the terms and conditions of the contract it was stated that in case a dispute arises, the decision of the chairman would be the final one. The land was given to the petitioner to build an amusement park on it. While building the park it was found that the necessary actions have not been taken for the establishment of the park and as a result half of the land remained undeveloped, which went on to violate the conditions of the contract. In the suit filed, the court said that the doctrine of estoppel cannot be pleaded in the given circumstances.

Equitable estoppel

When a person tries to take a legal action that would conflict with his previously given statements, claims or acts, this legal principle would prohibit him from doing so. So, the plaintiff would be stopped from bringing a suit against the defendant who acted pursuant to the commands of the plaintiff.

Suppose Tetanus gives his gold jewellery to Vaccine, the most famous jeweller in the town, for repairing. Vaccine, while handing over the jewellery to Tetanus after repair informed that a mark has been made by mistake at the back of the jewellery. Tetanus didn't mind that and took the jewellery happily with her. Later on if she brings a suit against Vaccine, she would be stopped under this principle as her suit would run counter to her earlier statement of forgiveness for the damages caused to her jewellery by mistake.

Estoppel by negligence

This principle allows one party to claim a right over the property of another party who might not be having the possession of it. This reflects that the person being estopped owes a duty to the other person whom he had led into wrong belief.

In the case of *Mercantile Bank of India v/s The Central Bank of India Limited* [3] a firm of merchants committed a series of fraud and until it came to the notice of the authorities, enjoyed high repute in the state of Madras. This firm was known for groundnuts-merchant and exporters. Both the plaintiff and defendant financed the consignments of ground-nuts purchased and each received a 'railway receipt' in respect of their consignment.

The merchants needed a loan so what they did was, at first pledged the railway receipt from the Central Bank to obtain a loan and then again fraudulently pledged it to the Mercantile Bank also. The plaintiff, the Central Bank had filed a

suit for conversion of the goods against Mercantile Bank. It was held that there was no negligence as Central Bank didn't owe a duty to the Mercantile Bank and so Central Bank was not estopped from having a prior title as 'pledgees'.

Estoppel by Benami Transaction

Badrinath, the owner of land, decides to hand over the apparent ownership of his property to Kaju Rastogi. Badrinath does so and acknowledges that Kaju has paid him the consideration for the promise. Now, Kaju Rastogi sells this land to Tripti Sanoon, a film actress, in good faith and for a good amount of money, as by gaining ownership over the property Kaju has also gained the right of disposition over that property. Badrinath hates Tripti Sanoon and asserts his title over the property. But he would be estopped from doing so under the given legal principle. And this is what benami transaction means.

In *Li Tse Shi v. Pong Tse Ching*, [4] the husband died in the year 1925. His entire will was made in the name of his wife. In 1930 their son misrepresenting somebody else to be his father bought the property of his father from the same seller who had sold the land to the father. Later the grandson of the person who died, rented the land to a company and when the company stopped paying the rent and the grandson complaint, the wife or the mother claimed the title over the land as her husband had made the will in her name. But it was held that the principle of estoppel by benami transaction could be applied as she was already aware of the fraudulent selling and purchasing of land by her son.

Estoppel on a Point of law

The Doctrine of estoppel does not apply to statutes but only to the facts. Estoppel, if applied to the law would go against public policy and general welfare of the society. The principle of estoppel can never be invoked for the purpose of defeating the provisions of law.

For example, if a minor, representing himself to be a major, enters into an agreement with Mr Kanjilal for the sale of a plot of land, the agreement would be void. And nothing would stop the minor from taking the defence that the agreement was *void ab initio*, as it was true that at the time when he entered into the agreement he was a minor.

In *Jatindra Prasad Das v. State of Orissa & Ors.* [5] the High Court of Orissa laid down that estoppel cannot arise against statutes and statutory provisions. It was further said that statutory provisions cannot be disregarded in any case, not even on the grounds of precedent or previous administrative decision.

In the case of *Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors.*[6], pavement dwellers who migrated to India, because of proximity to their place of work started living on the pavements in Bombay. Bombay Municipal Corporation (BMC) initially allowed them to stay as they constituted the major part of the population of Bombay.

Later on when the pavement dwellers were evacuated, Olga Tellis, a journalist raised questions against this action. It was upheld that no estoppel can arise against the Constitution of India or against the fundamental right, i.e. the right to life and livelihood in this case.

- ## Estoppel and tax laws

In *I.T. Commissioner v. Firm Muar* [7] the court upheld that doctrine of estoppel would not hold in the case where a non-taxable income under Income-Tax Act, has been taxed. Also once it has been said that a tax would be collected then one cannot give up on it. Further, stating that the tax would not be collected would not bind the state government from collecting it, as decided in *Mathura Prasad v. State of Punjab* [8].

- ## Unambiguous laws cannot be dodged

In ***Sales Tax Officer v. Kanhaiya Lal*** [9] it was formulated that the doctrine of estoppel would not arise in cases where the law clearly, without any ambiguity, states that the plaintiff should be given relief. When any law is absolute and has no exception clauses, than anybody acting against it would be acting beyond powers which would be void and the party getting affected by it can file suit claiming estoppel against it. Whereas if any exemption clause exists in the law then relaxation can be given based upon it. The party would not be said to be acting *ultra vires* and estoppel can be claimed as mentioned in the judgement of ***Delhi university v. Ashok Kumar*** [10].

• Principles determining that there cannot be any estoppel against statute

Categories under which the doctrine of estoppel cannot be applied against the state:

- By entering into bilateral agreement parties can contract himself out of the statutory provisions,
- There must exist some provision in the statute which prevents the parties from entering into such types agreements which the parties would have entered into,
- The provision should be such that it satisfies the interest of the public at large,
- The provisions should not be such that only a particular category of people can avail its benefits, and,
- Merging of the agreement between the parties into a court's order where the parties have been discouraged from performing its obligation imposed on them by law, because of certain actions by the parties.

By saying that there can be no estoppel against the statute it is meant that where the converse of a provision mentioned in a statue exists, the party would not be estopped by his previous given statement(s).

In ***Jai Jai Ram v. Srimati Laxhmi Devi*** [11] the court gave a verdict that what appears to be a law is actually a law or not is dependent on the truth of the facts and on the situation of the parties which keeps on changing. Whether what impersonates a law is really a law or not has to be decided by the courts.

In ***National Oxygen Ltd., Madras v. Tamil Nadu Electricity Board*** [12] relying on the Schedule mentioned in the Act a new industry was given concession on tax for the next five years from the days of its commencement. The state Government of Madras under a section of the Act had the power to bring amendments to the schedules of the Act. Pursuant to this, the State government brought an amendment to the above-mentioned schedule and made it a subject to certain conditions. This was done before the completion of 5 years of that industry. The industry in his suit pleaded estoppel to which the court said that no estoppel would arise against the government.

Proprietary Estoppel

We often see promises being made and later broken. While in some cases we can do nothing about it, but in certain circumstances, particularly in matters related to land or property, there is a possibility to bring a claim to enforce a broken promise. This is called proprietary estoppel. In *Thorner v. Major* [13] it was laid down that in order to claim a right under proprietary estoppel these things have to be proved:

- That representation has been made.
- That the party believed it to be true and acted upon it.
- That the party suffered a loss as a result of such representation.

In *James v. James* [14] Allen and Sandra had two daughters and one son. The son worked for the major part of his life with his father eventually becoming a partner. When making the will, Allen gave some land to one of his daughters which created a dispute in the family leading to the dissolution of the partnership. Later Allen distributed his property amongst the three ladies of his

house, cutting down the name of his son. Son brought a case of proprietary estoppel against the women and also challenged the validity of Allen's will. It was held that nothing has been shown or said with clarity that Aleen would transfer his entire will to him.

In *Gyarsi Bai v. Dhansukh Lal*, [15] it was established that in case the first two conditions are met but the third one is not and hence the doctrine of estoppel cannot be evoked.

Estoppel by Convention

In the case of the *Republic of India v. India Steam Ship Company Limited*, [16] it was observed that estoppel by convention arises when parties to a transaction assume the facts or the law. This assumption might be made by both the parties or either of the parties. Under this principle, parties to an agreement could not deny to the assumed facts, because if the party or parties are allowed to go back on their assumptions, it would be unfair and lead to injustice.

In a meeting between the landlord and the lesses, it was decided that the landlord would send demands at the end of the year and the receipt would be given to any one of the lessees. However, certification was not made a requirement for the recovery of the service charged under the agreement. The doctrine of estoppel by convention would apply whereby the landlord could recover the service charges which could not be challenged by the lessee as there was no certification. This was decided in the case of ***Clacy & Nunn v. Sanchez & Others.*** [17]

Estoppel by Acquiescence

When one party, through a legitimate notice, informs the other party about the facts of a claim, and the other party fails to acknowledge it, that is, neither

he/she challenges it nor does refute it within a reasonable period of time. The other party now would be estopped from challenging it or making any counterclaim in the future. The other party is said to have accepted the claim though reluctantly, that is, he/she has acquiesced it.

Contractual Estoppel

Pappi Lahari from Bihar entered into a contract with Batman from Chennai whereby Pappi would supply 100 bales of cotton to Batman in exchange of 25,000 rupees. While signing the contract they agreed to the fact that in case of any dispute between them, the case would be filed in the court of in Tamil Nadu. Once agreed the parties cannot, later on, assert to change the jurisdiction in the particular case. They are bound by the principle of contractual estoppel.

This principle would apply even when the original statement made by the parties is not true.

Order of production and examination of witnesses

It is a lawyer’s privilege to check the order in which he examines the witnesses. According to the experience and skill witnesses are arranged. Prosecutor has the freedom to produce his witnesses in order which he likes. Section 135 of the Indian Evidence Act gives the power to the court to command or order in which the witnesses may be produced.

Judge to Decide as to Admissibility of Evidence

Judges have the power under Section 136 of Indian Evidence Act for the admissibility of evidence in the examination of witnesses and also check the statement of the witnesses which is given by the witnesses during the examination of witnesses that is relevant or irrelevant. Relevant evidence decided by the judges on the basis of In assessing an observer's oral or composed declaration, uncommon consideration is to be paid to the accompanying:

(i) What is significant is the thing that an observer can relate concerning the focuses at issue based on his own insight or perspectives, and whether he has useful involvement in the field being referred to. Recycled statements dependent on something got notification from outsiders are generally useless all alone. It is additionally significant from the perspective of the assessment whether the observer has engaged with the occasion himself or just is aware of it as an eyewitness or audience.

(ii) In case of long interims of time (quite a long while) between the occasion being referred to and the declaration, it ought to be borne as a main priority that a great many people's capacity of review is restricted without the help of narrative proof.

(iii) Where declaration seems to struggle, the writings of the announcements concerned are intently contrasted and each other.

Evident logical inconsistency in the declaration of observers may here and there be settled along these lines. For instance, a nearby assessment of evidently conflicting proclamations by observers about whether a substance X was usually utilized for a specific reason may demonstrate that there is in actuality no logical inconsistency by any stretch of the imagination, in that while one

observer was stating explicitly that substance X was not utilized for that specific reason, the different observer was staying close to that substances like X, or a specific class of substances to which X had a place, were ordinarily utilized for this specific reason without expecting to own any expression in regards to substance X itself.

(iv) A representative involved with the procedures can be heard as an observer. The conceivable prejudice of an observer decides how the proof is surveyed, not whether it is allowable.

Examination in Chief

Examination in chief is defined under Section 137 of the Indian Evidence Act, when the party calls a witness in the examination of witnesses that is called examination in chief. Examination in chief is the first examination of witnesses after the oath. It is the state in which party called a witness for examining him in chief for the purpose of eliciting from the witness all the material facts within his knowledge which tend to prove the party's case. It is also known as Direct Examination.

The objective of Examination in Chief

1. It overcomes the burden of proof legally sufficient.
2. Remembered and understand.
3. Persuasive.
4. Hold the cross-examination.
5. Contradictory and anticipatory and of evidence that the opposition will present.

Cross Examination

After finishing the examination in chief, cross-examination will start. In the cross-examination defendant lawyer asks the cross-question which was asked by the prosecutor. Defendant lawyer may ask the questions which are related to the facts and the defendant can also ask the leading question in the cross-examination which were not allowed in the examination in chief. Cross examination is very important in the examination of witnesses, due to the cross-examination many facts get clear because in the cross-examination defendant analyse all the statements of the witnesses then asks cross question related to the statement which was given by the witnesses in the examination in chief. The Defendant can also ask the question which was not related to the examination in chief but related to the facts of evidence.

In **Union of India v. T.R Verma,** it was held that if in the deposition of the witnesses, there was no cross examination because there was no record made, it can be said that, in fact, the party entitled to cross examine did not cross examine and not that the opportunity to cross examine was not admitted. But there are five exceptions in this rule:

1. Where the witness had noticed early.
2. Where the story itself is of unbelievable or romantic characters.
3. Where the non cross examination is from the motive of fineness.
4. Where the counsel indicates that the witness is not cross examined to save time.
5. When some witnesses are examined on the same point, there is no need to cross examined all the witnesses.

Re examination

The party re examine the witness who called the witness may if he likes and if it be essential. The re examination must be confined to the explanation of matters grow in cross examination. The proper intention for re examination is by asking questions as may be proper to pull forward and explanation or meaning of

expression used by the witness in cross examination, if they are questionable. New matters may be introduced only by the permission of the court, and if that is done, the opposite party has a right to cross examine the witness on that point.

In re examination of witness examination in chief cannot be added to the very end by starting totally new facts for the first time. The intention of re examination is only to get the clarification of some questions created in the cross examination.

Section 139 of the Indian Evidence Act

Cross examination of person called to produce documents

"A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross examined unless and until he is called as a witness."

Section 140 of Indian Evidence Act

Witnesses to character may be cross examined and re examined.

Scope

The character of a party to a civil suit cannot be relevant to decide an issue in that suit under Section 52 of Indian Evidence Act. The good character of the accused is relevant in criminal cases under Section 53 of Evidence Act. Under

Section 54 in criminal cases the bad character of the accused is irrelevant but when the evidence of his good character is given, the evidence of bad character becomes relevant. Under Section 55 of the Evidence Act where the character of a person is such as to affect the amount of damages which he should receive it is relevant. The person who gives the testimony regarding the character of a person may be cross-examined and re examined, the act of causing something to move up and down with quick movements his credit. The character evidence helps the Court to estimate the value of evidence given against the accused in criminal cases.

In **Haagen Swendress Holt C.J** stated that a man is not born a jack, there must be time to make him so, nor is he shortly discovered after he becomes one. A man may be regarded as an able man this year, and yet be a beggar the next, it is unfortunate that happens to many men and this former reputation will signify nothing to him upon this event.

Section 141 of Indian Evidence Act

Leading questions

Any question which make a proposal to the answer which the person putting it wishes to receive, is called a leading question.

Scope

Section 141 of Indian Evidence Act defines “leading question”. Section 142 of Evidence Act lays down that leading questions must not be put in examination in chief and re examination without the permission of the Court. It also lays down that the court should permit leading questions in examination in chief or re examination only as to the matters which are begin, which are unchallenged or which are already been sufficiently proved in the opinion of the Court.

Leading questions may be put in cross examination under Section 143 of Indian Evidence Act.

Section 142 of Indian Evidence Act

When they must not be asked

If objected by the opposite party leading questions must not be asked in examination in chief, or in a re examination without the permission of the Court.

The Court shall permit leading questions as to matters which are begin or unchallenged or which have in its opinion been already sufficiently proved.

Exceptions to this rule

Section 142 of Indian Evidence Act provides exceptions to the general rule stated above. By the order of the Court, examiner may put leading questions in examination in chief or re examination.

1. As to matters which are begin.
2. Which are unchallenged.
3. Matters in which the opinion of the Court have already been proved.

The Court can allow a party examining his own witness to put leading questions by way of cross examination. These are exceptions under Section 154 of Indian Evidence Act.

Section 143 of Indian Evidence Act

When they may be asked Leading questions may be asked in cross examination.

No misleading question in cross examination

A counsel cannot asked a question in cross examination forward that some facts have been proved or admitted. Imagine a witness appears for the plaintiff, the defendant tries to show that the witness is a driver of the plaintiff so he is a curious witness. The proper question to be asked by the defendant in cross examination would be "Are you a driver of the plaintiff?" A question "How long have you been in the service of the plaintiff?" is not proper as it take for granted that the fact the witness is a driver of the plaintiff has either been proved or it has been admitted by the witness.

Imagine, the case of a wife against her husband is that he misbehaves and beats her but the husband did not accept the allegation. The husband appears in court for not accepting the allegation. The cross examiner cannot asked a question "May I ask if you have left off beating your wife?", this type of questions are misleading.

Section 147 of Indian Evidence Act

When witnesses to be compelled to answer

If any such question connected to a matter applicable to the suit or proceeding the provision of Section 132 shall apply to that.

Scope

The word 'such' in this Section mentioned in the last clause of the above Section. Relevancy of character is of double: it may be directly to the point in its

bearing on proving or proving to be false the very virtue of the points in issue. If any witness is asked a question in cross examination about his character and that character is directly to the point in proceeding the witness is not secured from answering under Section 147 of the Act. He will have to answer the question all the same that the answer may accused him because Section 132 is made relevant to this case. Where questions are asked to a witness not for the intent of proving or proving to be false a point in issue but entirely and merely to show what is the character of a witness. The Court is to determine whether the question is to be answered or not as per the rules given under Sections 148,149 and 150.

Section 148 of Indian Evidence Act

Court to decide when question shall be asked and when witness compelled to answer

If any such question about to matter not applicable to the suit or proceeding excluded in so far as it impacts the credit of the witness by injuring his character. The Court shall determine whether or not the witness shall be obliged to answer it. In exercising its prudence the Court shall have consider the following considerations:

- Such questions are proper if they are of such a nature that the truth of the statement attributing something dishonest conveyed by them would seriously impact the idea of the Court as to the believability of the witness on the matter to which he certify.

- Such questions are incorrect if the statement attributing something dishonest which they convey about to matters so remote in time or of such a character that the truth of the statement attributing something dishonest would not impact or would impact in slight degree the idea of

the Court as to the believability of the witness on the matters to which he certify.

- Such questions are incorrect if there is a great disproportion between the importance of the statement attributing something dishonest made against the witness’s character and the importance of his proof.
- The Court may if it sees fit pull from the witness’s refusal to answer the illation that the answer if given would be critical.

Witness under the Indian Evidence Act, 1872

A witness is a person who has personally seen an event happen. The event could be a crime or an accident or anything. Sections 118 – 134 of the Indian Evidence Act, 1872 talks about who can testify as a witness, how can one testify, what statements will be considered as testimony, and so on.

Capacity of witness

A witness who needs to testify before the Court must at least have the capacity to understand the questions that are posed to him and answer such questions with rationality. Sections 118, 121 and 133 of the Act talks about the capacity of a witness.

Who may testify?

Any person who has witnessed the event is competent to testify, unless – the Court considers that they are unable to understand the questions posed to them, or unable to give rational answers as prescribed in Section 118.

Rational answers should not be expected from those of tender age, extreme old age, or a person with a mental disability.

The section says that generally, a lunatic does not have the capacity to testify unless his lunacy does not prevent him from understanding the question and give a rational answer.

Can a child testify?

A small child of even 6 or 7 years of age can testify if the Court is satisfied that they are capable of giving a rational testimony.

In the case of *Raju Devendra Choubey v. State of Chhatisgarh*, the sole eyewitness of murder was a child of 13 years old, who worked as a house servant where the incident took place.

He identified the accused persons in the Court. However, the accused persons had no prior animosity with the deceased and were acquitted as the case could not be proved against them beyond reasonable doubts.

The Supreme Court on this matter held that – the child had no reason to falsely implicate the accused, as the accused raised him and provided him with food, shelter, clothing, and education.

Therefore, the testimony of a child cannot be discarded as untrue.

In *Dhanraj & ors v. the State of Maharashtra*, a child of class VIII was a witness to the event. The Apex Court observed that a student of 8th standard these days is smarter, and has enough intelligence to perceive a fact and narrate the same.

The Court held that the statement of a child who is not very small is a good testimony for the same reason.

Therefore, a child can testify provided that he is not a toddler.

Witness unable to communicate verbally

Section 119 of the Act says that a person who is not able to communicate verbally can testify by way of writing or signs.

A person who has taken a vow of silence and is unable to speak as a result of that vow will fall under this category for the purpose of this Section.

In the case of *Chander Singh v. State*, the High Court of Delhi observed that the vocabulary of a deaf and dumb witness may be very limited and due care must be taken when such witness is under cross-examination.

Such witnesses may not be able to explain every little detail and answer every question in detail using the sign language, but this limitation of vocabulary does not in any way mean that the person is any less competent to be a witness. A lack of vocabulary does not affect her competence or credibility in any way.

If a dumb person can read and write, the statements of such persons must be taken in writing. The same was held by the Supreme Court in *State of Rajasthan v. Darshan Singh*.

Can judges testify?

A judge or a magistrate is not compelled to answer any question regarding his own conduct in the Court, or anything that came to his knowledge in the Court – except when asked via special order by a Superior Court as stated in Section 121.

He may, however, be subject to examination regarding other matters that happened in his presence while he was acting as a judge or a magistrate.

For a better understanding of this provision, let's look into the illustrations provided.

- Harry is being tried before the Court of Session. He says that deposition was improperly taken by Magistrate Draco. Draco is not obligated to answer unless there is special order by a Superior Court.
- Hermoine is accused of having given false evidence before the Court of Magistrate Draco. He cannot be asked what Hermoine said unless there is a special order by a Superior Court.

- Ron is accused of attempting to murder a witness during his trial in the Court of Magistrate Draco. Draco may be examined regarding the incident.

This section gives a judge or a magistrate the privilege of a witness and if he wishes to give it away, no one can raise any objection.

So, if a magistrate has been summoned to testify regarding his conduct in the Court, no one can raise any objection if he is willing to do so.

A magistrate or a judge is a competent witness and they can testify if they want to but they are not compelled to answer any question regarding their conduct in the Court.

Can a Judge testify in a case being tried by him?

We have already seen that a judge can be a competent witness if he wants, but what if the case is being tried by himself?

In the case of *Empress v Donnelly*, the High Court of Calcutta stated that a Judge before whom a case is being tried must conceal any fact that he knows regarding the case unless he is the sole judge and cannot depose as a witness.

It was held that such a judge cannot be impartial on deciding the admissibility of his own testimony. He will not be capable of comparing his own testimony against that of others.

If he has to testify, then he must leave the bench and give away his privileges in order to act as a witness in the case.

Can accomplice be a witness?

Section 133 of the Act says that an accomplice to a crime is competent to be a witness against the accused. The conviction made on the basis of such testimony is not illegal.

An accomplice is a person who is guilty of helping the accused to commit a crime. He can be appropriately described as a partner in the crime of the accused.

In the case of *C.M. Sharma v. The State of A.P*, it was held that if a person has no other option than to bribe a public officer for getting his work done, such a person will not be considered as an accomplice.

Cases of bribery are difficult to corroborate as bribes are usually taken where no one else can see, but, in this case, there was a shadow witness who accompanied the bribe giver (a contractor in this case) and the case could be corroborated with his help.

The public officer pleaded to treat the contractor to be treated as an accomplice, but his plea was rejected on the ground that the money was extracted from the contractor against his will.

Therefore, an accomplice is someone who has either wilfully participated in committing a crime with an accused or helped him in some manner. If he has been forced to break any law against his will, then he may not be regarded as an accomplice.

It is also clear from this case that an injured person or a victim will be a competent witness in a case. This type of witness is called ‘injured witness’.

In the case of *Khokan Giri v. The State of West Bengal*, it was held by the Apex Court that even though an accomplice can be a competent witness, it would not be very safe to make a decision solely relying on his testimony.

The Court suggested that the testimony of an accomplice should not be accepted by any court without corroboration of material facts. Such corroboration must be able to connect the accused with the crime and it must be done by an independent, credible source. This means that one accomplice cannot corroborate with another.

With respect to corroboration of statements given by an accomplice, in another case of *Sitaram Sao v. State of Jharkhand*, the Supreme Court held that Section 133 must not be read by itself, but, should be read with Section 114(b) which says that an accomplice is not worthy of credit unless corroborated with material particulars.

This Apex Court further says that the Court should always presume that an accomplice is unworthy of credit, and no decision must be made solely based on his testimony unless the facts have been corroborated.

What is privileged communication?

When two individuals enter into a legally recognized relationship, all communication that takes place between them is protected. This communication is known as privileged communication. It is called so because whatever information that is disclosed in this kind of setting is protected i.e. the courts cannot force the individual to disclose the details of such communication.

Section 126 to 129 of the Indian Evidence Act deal with privileged communication associated with professional relationship between an attorney and his client.

This privilege is necessary because if the client cannot trust his lawyer with the information, then he will not disclose all the facts of his case and the lawyer will not be able to defend the client in court.

Section 126 states that no legal advisor or a lawyer can be permitted to disclose the confidential information that,

1. The client revealed to him, or
2. Any advice that the lawyer gave to his client.

It also states that, the lawyer cannot disclose any contents of the documents that he became familiar with during the course of his employment. This privilege exists even after the termination of employment.

Exceptions

There are certain exceptions to the above stated rule. These are,

1. Any communication which takes place in furtherance of any illegal purpose;

Illustration: "A", a lawyer has been asked by his client, "B" to forge some documents so that he can be granted possession of a property. This communication is made in furtherance of an illegal purpose, and thus is not protected from disclosure.

1. Any fact observed by a lawyer in the course of his employment, showing that any crime or fraud has been committed by the client since the commencement of his employment.
2. Express consent of the client. If the client himself gives permission to the lawyer to disclose the information, then that information will not be protected from disclosure.

Only those communications which are made with the purpose of getting professional advice from the lawyer are considered as protected. This privilege exists only when both are in a confidential relationship and not before that.

Section 127 broadens the scope of the privilege and extends it to the servants, helpers, interpreters and clerks of the lawyer.

Section 128 is the continuation of the privilege, it protects the legal advisor or the lawyer from disclosing any information which comes under the ambit of section 126, unless the client himself calls the legal adviser as a witness.

Section 129 of the Act states that the client is protected from disclosing any confidential information unless he himself offers to be a witness.