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## Importance of expert opinion for evidence through video conferencing

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### Abstract

In the court parties to the suit or proceeding are permitted to give evidence of a fact only which is either in issue or related facts. The persons who have direct knowledge of the facts are only permitted to give evidence of the existence or non existence of fact. Such persons are called witnesses. The Indian evidence act provides all the facts which are not contained in any document or in any electronic record may be proved by oral evidence<sup>2</sup> and such evidence must be direct<sup>3</sup> that is to say if the evidence is related to such fact which can be either seen, heard or which can be perceived by other senses the evidence must be of such witness who says that he saw it or heard it or perceived it. Therefore the evidence act allows the person only to state the truth and nothing else but this general rule has an exception i.e. the expert opinion. The law of evidence makes the opinion of an expert relevant as well as admissible. Section 45 and 46 of Indian evidence act stating the importance of expert opinion provide that if the court has to form its opinion upon any point of foreign law or art or finger print etc the opinion of the person specially skilled in such field are relevant. Courts are free to take assistance of experts and call them in the courts for their evidence but sometime situation may arise when court has to form its opinion on such matters which it is not easy or possible to produce before the court. As we all know we are crossing the time period of Covid and during this period Hon'ble Supreme Court has issued guidelines regarding video conferencing of the witnesses for the purpose of evidence. What will be the position of expert opinion and whether help can be taken of an expert for analyzing the truth or falseness of the witness.

Key Words: Expert, oral evidence, finger print, Judicial system,

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<sup>2</sup> Section 59 of Indian evidence act, 1872

<sup>3</sup> Section 60 of Indian Evidence Act, 1872

## Introduction

The experts have been given an important place in the Indian Judicial system. Many times when the facts can't otherwise be proved can only be proved with the help of opinion of experts. Section 45 of evidence act provides that the court can form its opinion on any point of foreign law or art or upon any matter relating to handwriting or finger impression. Although the opinion of experts are not conclusive but help can be taken from such opinion. Opinions of experts are relevant in such matters in which there are no direct witness to explain the facts. Moreover the court takes the help of experts on technical issue like symptoms produced by poison are similar to one already shown or otherwise. Although the provisions in evidence act relating to expert opinion were contained from the court point of view but now the importance of expert opinion has been increased during the pandemic period of covid.

## Who is an expert

The term expert may be defined as under.

“A person with special skill or knowledge representing mastery of a particular subject”<sup>4</sup>.

“An individual of recognized knowledge in any particular area confirmed by academic standing and publications is called an expert”<sup>5</sup>.

Expert is a person who gains special knowledge in any particular area on the bases of his education and experience. Such person when draws any inference gives reasons behind the inference and his opinion may be taken in to consideration.

## Expert opinion and its importance

Opinion of expert is the conclusion drawn by the expert on the bases of his study and given facts and circumstances. The expert gives his opinion only on such matters in which he has special knowledge or skill like foreign law or art of finger impression etc. The expert gives his opinion without being biased with anyone. In the judicial proceedings (civil or criminal) the importance of experts can't be overlooked specially in the present cyber era when most of crimes are being committed through computer and internet. In that case the experts play an important role in understanding the mentality as well as mode of committing the crime. Although the evidence act was drafted much earlier before independence but after independence the parliament was quite aware of the importance of experts and therefore the provisions relating to expert and expert opinion was not omitted from the act but section 45 A providing provision relating to opinion of examiner of electronic record was inserted in the act.<sup>6</sup> However the provision relating to expert opinion and

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<sup>4</sup> William Webster

<sup>5</sup> Webster's law dictionary

<sup>6</sup> Amendment in 2009

opinion of examiner of electronic record were incorporated in the act for the purpose of proving any fact in issue in the court but today after breakout of pandemic of covid. Hon'ble Supreme Court has issued guidelines on April 6, 2020 taking suo moto action in its original civil jurisdiction which is to be followed by the courts below the apex court for the purpose of examining of the witnesses or the accused.

### **Supreme Court guidelines during Covid pandemic regarding functioning of courts**

Hon'ble Supreme Court exercising its original civil writ jurisdiction issued guidelines on the matter of covid and court functioning<sup>7</sup> which are mandatory to be followed by the courts below to the apex court. The guidelines are as under:

1. Hon'ble Supreme Court stated that after the outbreak of covid it is the necessity of maintaining social distancing and reduce the physical presence of every person including the lawyers, staff members, and litigants in the court.
2. Every individual as well as the institution is expected to contribute their efforts in the implementation of the measures suggested to reduce the transmission of the disease. The apex court stated that access to justice is the fundamental right as well as the rule of law. Right to health and safety is an enshrined fundamental right and therefore following the measures is the duty of every person to preserve the fundamental right of every people.
3. The apex court emphasized upon the use of technology in court proceedings. The court opined that technology has enhanced the effectiveness of courts and Indian judiciary has incorporated information and communication technology system through e-courts which e-court system is now to be introduced in whole of the country through National e-Governance Plan (NeGP).
4. The apex court allowed use of technology in court proceedings such as recording of evidence through video conferencing by citing one of the judgments in the matter of State of Maharashtra vs. Praful Desai.
5. Court states that it is not the matter of discretion but duty of all the people as well courts to respond to the need of social distancing. Using its inherit power under article 142 the apex court directed all the courts including the apex court itself to take evidence through video conferencing.
6. The apex court authorized all the courts below to take all measures for reducing physical contact of people in court. The courts are authorized to restrict the entry of people ahead from the point of argument spot. The court can prevent the entry of all such people in court room who are infected from cold or influenza.
7. In last the apex court stated that all the directions and guidelines are issued for the purpose of providing justice to all the people. Therefore the courts and people should follow the directions and guidelines.

<sup>7</sup> Re: Guidelines for court functioning through video conferencing during covid-19 pandemic

## Importance of expert in evidence of witnesses and accused

Provisions relating to expert opinion have been incorporated in the evidence act from the very beginning<sup>8</sup> which were retained after independence by the parliament and by the passing of time after passing of the Information technology act<sup>9</sup> section 45 A was inserted in the evidence act pertaining to admissibility of opinion of examiner of expert of electronic record. Although specific provisions are provided in the evidence act relating to expert opinion but not much importance has been given to it. Section 45 provides that the court can form its opinion on any question of foreign law or science or art or relating to the matter of finger impression or handwriting. It means the opinions are not conclusive and the court is bound by such opinions. But situation has been completely changed. In the recent past after the outbreak of pandemic disease of Covid-19 the apex court has issued guidelines which are mandatory to be followed by the lower courts. The apex court suggested for maintaining social distance in the court for the purpose of reducing the transmission of the disease. The apex court suggested for conducting the functioning of court through video conferencing including recording of the statement of witnesses. In para 4 of the guidelines the apex court recognized the examination of witnesses through video conferencing through the case of *State of Maharashtra vs. Praful Desai*<sup>10</sup>. The apex court permitted to examination of witnesses through video conferencing and therefore the importance of experts has been increased. It is easy to judge the conduct of a person appearing as witness in the court whether he is telling lie or truth or he is giving his statement under any pressure or with free consent. But on camera possibility may arise of his telling lie or giving his statement under the pressure of other person. Cruelty may also have been caused against him. In such circumstances the importance and need of two types of experts has been increased i.e. medical expert and psychological expert. The medical expert will examine the witnesses before or during recording of his statement to ensure that the witnesses about to be examined has any marks of injury upon his body or he is quite healthy and sound. If he finds any marks of injury upon the body of the witness he will report to the court. Similarly the importance of psychological expert can't be denied. He plays an important role for understanding the mentality and conduct of the witness. He helps the court in understanding whether he speaking truth or lie or under any mental or physical pressure of other person. The process of recording of evidence can't be completed without the help of experts.

## Judicial point upon the point of video conferencing

Hon'ble Supreme Court through various judgments has decided the importance of recording of evidence through video conferencing. The most important case decided by Hon'ble apex court on the issue of recording of evidence through video conferencing is *State of Maharashtra vs. Praful Desai*<sup>11</sup>. In this case

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<sup>8</sup> Section 45 of evidence act

<sup>9</sup> Information Technology Act, 2000

<sup>10</sup> 2003 (4) SCC, 601

<sup>11</sup> 2003 (4) SCC, 601

hon'ble Supreme Court allowed the recoding of evidence through video conferencing. In this case the complainant filed a complaint against the accused/respondent for medical negligence as well as under section 338, 109 and 114 of IPC. The case of the prosecution is that wife of the complainant was suffering from cancer with last stage about which she consulted Dr. Ernest Greenberg who was practicing doctor in Sloan Kettering Memorial Hospital, New York. He examined the complainant's wife and expressed his opinion that she can't be operated and she can only be treated by medication. She came to India and she consulted the respondent about her disease. The respondent was also made aware of the opinion of Dr. Greenberg the respondent suggested her for surgery. The complainant and his wife agreed for surgery on the condition that only the respondent will operate her but the operation was performed by Dr. A.K. Mukhejee. During the operation Dr. A.K. Mukherjee faced some complications he contacted to the respondent. The respondent asked the doctor to close the stomach of the lady. After the surgery the lady felt extreme pain and complaint of open wounds due to which she required 20 to 25 times dressing every day for more than 3 months and lastly she died. During the proceedings of the case the respondent contended that the complainant's wife was not his patient and he also refused to accept the disclosure of opinion expressed by Dr. Greenberg. The prosecution produced the bill which were charged from the complainant and also applied before the court for examining of Dr. Greenberg as witness. Dr. Greenberg agreed to give his statement but refused to come India. In the trial court as well as high court the application of examining of Dr. Greenberg was rejected. In the appeal the apex court allowed the application of the prosecution directed the trial court to have the evidence of Dr. Greenberg recorded by way of video conferencing by issuing a commission of experts. The apex court held that interest of justice is the aim of law. The medical council of Maharashtra held the respondent liable for medical negligence.

Another important case relating to recording of evidence through video conferencing has been recently decided by Hon'ble apex court is *Manju Devi vs. State of Rajasthan*<sup>12</sup>. In this case the appellant's daughter was got married with the accused. After marriage the accused (husband of deceased) stayed in India for some time and after some time they shifted to Nigeria. The prosecution contended that the deceased was continuously harassed for dowry. One day the daughter of appellant was found dead by hanging with the ceiling fan. The first post mortem was conducted by Dr. I. Yusuf in Nigeria who opined that her death was caused due to strangulation. After that her body was brought to India where FIR was lodged. In India a medical board was constituted for conducted post mortem but the medical board could not state definite opinion about the cause of her death. During trial the prosecution made an application for calling Dr. I. Yusuf as witness and recording his evidence through video conferencing. Trial court rejected the application against which the prosecution went to High Court of Rajasthan under section 482 of Cr.p.c. but High court also rejected the application. The matter came before Supreme Court. The apex court stated that for the interest of justice it is necessary to call Dr. Yusuf as medical expert witness and therefore allowed the application of

<sup>12</sup> AIR 2019 SC

prosecution and directed the trial court to issue a commission for recording the evidence of Dr. Yusuf through video conferencing.

### Conclusion and suggestion

Being a welfare state India has provided fundamental rights to the people and become a guardian of all the rights itself. Hon'ble Supreme Court has fulfilled its duty as guardian of fundamental rights very effectively and therefore during the period of pandemic disaster of breakout of Covid-19 issued guidelines keeping in view the interest of both people as well as their rights. The apex court is in favour of making India strong in the field of information and communication technology issued directions for providing e-court system in whole of the country. The planning of establishing e-court system has enhanced the role and importance of experts in the judicial proceedings because the recording of statement of witnesses with their free consent and the truth or falseness can't understand without the help of experts. The apex court however issued directions and guidelines for e-court system but the set up of e-court can't be completed without the help of experts for ensuring complete end of justice. It is therefore suggested that the apex court as well as the parliament should take steps and make proper law for increasing the participation of experts in the court process so that the health and safety as well as the interest of justice can be ensured.

