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Evidentiary Value of Expert Opinion under the Indian Evidence Act: A Critical Analysis of Section 45

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ABSTRACT

This paper seeks to evaluate the concept of 'Expert Opinion' under the Indian Evidence Act, 1872. Expert Opinion plays a crucial role in a situation where the Court has to decide on cases, which involve technicalities of other fields apart from law. A relevant example would be medico-legal cases. The purpose of this paper is two fold. First, it will highlight the legal framework that exists with respect to Expert Opinion in India, particularly the relevance and admissibility of such opinions under Section 45 of the Indian Evidence Act, 1872. It will also explore the judicial response in a few landmark cases. Second, it will identify the lacunae in the law with respect to Expert Evidence and suggest some reforms to prevent its misuse.

I. INTRODUCTION

Witnesses are called in a court of law to give their testimony on the facts, which they have seen, heard or perceived.² They are not allowed to testify the conclusions, which they have formed on the basis of those facts. In other words, witnesses cannot testify to something that constitutes their opinion, as the same is irrelevant. This is premised on the 'Best Evidence Rule', which states that the best evidence is the one collected through a direct source. It is the role of the Judge to draw its own inferences based on the testimony of witnesses and decide the case. If the opinions of witnesses were allowed to be admissible in a court of law, it would amount to a delegation of judicial function.³ This is a general rule under the Indian Evidence Act, 1872 ("the Act"). However, the concept of 'Expert Opinion' acts as an exception to this general rule. It is clear that no man is omniscient. Thus, it may happen in a certain case that the issue involves technicalities of other fields, which is beyond the common knowledge of the Judge. Since the Judge is not coherent in that specific field, he will be unable to draw

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² §60, The Indian Evidence Act, 1872

³Déirdre Dwyer, *The Judicial Assessment of Expert Evidence*, Cambridge University Press, (2008).

inferences on that issue. Accordingly, he may seek help of experts who possess the relevant technical knowledge, and ask for their opinion. Section 45 of the Act highlights the concept of 'Expert Opinion'. There are two types of evidence, namely data evidence and opinion evidence and Expert Evidence constitutes the latter.⁴ It is not a hard and fast rule that all cases involving technicalities must require an expert opinion. The necessity of an expert opinion is derived on a case-to-case basis depending on the facts of each case. However, in cases involving murder, medical expert evidence is always required.

In this paper, the author will discuss the nature, scope and evidentiary value of expert opinion under the legal framework. It is argued that the Indian legal framework with respect to 'expert opinion' is not thorough and extensive. There exist lacunae within the law, due to which expert opinion is considered a weak, and not a substantive, form of evidence. It is suggested that the legislature should enact new guidelines or amend Section 45 to fill the legal gaps.

II. NATURE, SCOPE AND VALUE OF EXPERT OPINION

(A) ADMISSIBILITY OF EXPERT OPINION

An opinion is different from a fact. In the law of evidence, according to Black's Law Dictionary, an opinion is "*an inference or conclusion drawn by a witness from facts some of which are known to him and other assumed*".⁵ In other words, an opinion is a person's belief based on a given set of facts, which, unlike facts, cannot be proved.

Section 45 of the Act reads: "*When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts. Such persons are called experts.*" There are two conditions, which must be satisfied before a Judge may admit an expert opinion.⁶ First, it needs be shown that the subject matter of the case is such that it is necessary for an expert to render an opinion. Second, it must be shown that the person who is testifying is an expert. According to Section 45, the opinion by an expert, if proper, is admissible as a relevant fact in a given case. Moreover, any other fact, which was other wise irrelevant, will become relevant if it either supports or contradicts the opinion of the expert.⁷ For example, to determine if a certain poison poisoned A, the fact that other persons who were poisoned exhibited symptoms which experts affirm or deny to be those

⁴Forest Range Officer v. P.Mohammad Ali AIR 1994 SC 120

⁵Blacks Law Dictionary, 5th Edition

⁶Akshay Baweja, *Expert Opinion under the Indian Evidence Act*, Latest Laws, (2018).

⁷§46, The Indian Evidence Act, 1872

poison's symptoms, becomes a relevant fact.

(B) SCOPE OF EXPERT OPINION

The Act does not define 'Expert Opinion'. Section 45 only defines 'expert' and states that an opinion by an expert is a relevant fact. The definition of 'expert' under Section 45 of the Act has been given a wide purview. It defines 'expert' as any person who possesses special knowledge and skills on a point of (a) foreign law, (b) science or art, (c) identity of handwriting or finger impressions. Here, no qualification has been provided with respect to who is 'specially skilled' person, which gives the definition an ambiguous character. In *Sri Chand Batra v. State of UP*,⁸ the issue was whether an Excise Inspector, who used a smelling test to categorise seized liquid as spurious liquor, could be considered as an expert. The Court held that the Excise Inspector was an expert as he had 21 years of experience and had tested lacs of samples of illicit liquor. What can be inferred from the above case is that a 'specially skilled' person can be one who has some professional experience, or has done special study in that subject area, or has gained technical knowledge in that area through a detailed observation.⁹ However, it must be proved by the person before the Court that he has the 'adequate' qualifications to be regarded as an expert in that particular field. In other words, the issue if whether a person is an expert is to be determined by a Judge on a case-by-case basis depending upon the facts of each case.

1. FOREIGN LAW

The law that is not in force in India is called 'foreign law'. Sometimes, it might happen that a party relies upon foreign law as a claim or defense to its case.¹⁰ At this point, the Judge might call an expert to prove a point on foreign law and take judicial notice of the same. In India, an expert in foreign law would be any person coherent with the law of any other jurisdiction except India.

2. SCIENCE OR ART

There has been tremendous development of scientific knowledge over the years, which have made a serious impact on the law of evidence.¹¹ Science and Art are two broad categories given under Section 45. A point of science or art can cover a wide range of subjects. An expert opinion on a point of science or art will include the opinions by medical examiners,

⁸Sri Chand Batra v. State of U.P, (1974) 4 SCC 247.

⁹Ratanlal and Dhirajlal, *The Law of Evidence*, Wadhwa & Wadhwa Company, (21st ed, 2014)

¹⁰120, Sadhana S & K. Roja, *A Study on the Admissibility of Expert Evidence in Indian Evidence Act*, International Journal of Pure and Applied Mathematics, Issue No. 5, 1123-1136, 1129, (2018).

¹¹Vepa P. Sarathi, *Law of Evidence*, Eastern Book Company, (7th ed, 2018).

forensic experts, ballistic experts, DNA experts, Polygraph or Narco-analysis experts etc. It is pertinent to note that, here, science is not limited to 'higher sciences' and similarly, art is not limited to 'fine arts'. It may also include handicrafts, trade, profession or skill.¹² It was the legislative intent to give the phrase 'science or art' a wide interpretation under law.

3. HANDWRITING AND FINGER IMPRESSIONS

It is a rule of forensic science that no two persons can have the same handwriting or fingerprints. Handwriting and finger impression experts can assist the Court with identification of handwriting and fingerprints, respectively. They also help in examining the genuineness of documentary evidence. Section 47 of the Act talks about the relevancy of opinions as to handwriting. The difference between Section 45 and Section 47 is minute. In *Fakhruddin v. State of M.P.*,¹³ Justice Hidayatulla noted: "Both under Sections 45 and 47, the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience." In *State (CBI) v. S.J. Choudhary*,¹⁴ the Supreme Court has held that an opinion by a typewriter expert would be admissible under Section 45 of the Act. The Court noted: "Handwriting should be interpreted as including typewriting, since typewriting is now more common than handwriting." Similarly, with respect to electronic evidence, an opinion by the examiner of electronic evidence will constitute Expert Opinion under Section 45A of the Act.

It must be noted that these three heads are not exhaustive. The interpretation is subjective as ultimately, it depends on the Judge, on a case-to-case basis, to see whether a given set of facts involve a point of science or art, so as to call for an expert to render an opinion.

(C) NATURE OF EXPERT OPINION

It is important to note that expert testimony is only corroborative in nature. In other words, it is used as a supplement to the direct or ocular evidence in a case. Moreover, it is a mere advisory and thus, not binding on the Court. It is for these reasons that sole reliance on expert evidence is not sufficient to convict an accused. However, it is a mere rule of caution and not a rule of law.¹⁵ In *State of H.P. v. Jai Lal*,¹⁶ the accused were charged with criminal conspiracy as they were alleged to have misappropriated government money in a government operation. A Horticulture expert was appointed by the prosecution to lead expert evidence. However, the Court rejected the expert opinion, as neither his opinion was supported by reasons, nor

¹²*Ibid*, at 1131.

¹³ *Fakhruddin v. State of M.P* AIR 1967 SC 1326

¹⁴ *State (CBI) v. S.J. Choudhary* 1996 2 SCC 428

¹⁵ *Magan Bihari Lal v. State Of Punjab*, (1977) 2 SCC 210

¹⁶ *State of H.P v. Jai Lal*, (1999) 7 SCC 280

did he furnish any data or material to support his opinion. Moreover, there was no direct or circumstantial evidence in support of the charge. Accordingly, the accused were acquitted as the Court decided not to rely solely on Expert Evidence. The Court observed: *“The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case.”*

(D) EVIDENTIARY VALUE OF EXPERT OPINION

An Expert Opinion depends on two things. First, it depends on the facts upon which it is based. If the dispute relates to whether A is the father of B, a DNA report by a medical expert is sufficient to settle the dispute. Second, expert opinion also depends on the ‘validity of the process’ to reach the conclusion.¹⁷ In other words, the opinion of an expert must be supplemented by some data or material along with reasons, as noted in *State of H.P v. Jai Lal*. It cannot be solely relied upon to convict an accused. In *State of Maharashtra v. Damu s/o Gopinath Shinde and Ors*,¹⁸ the Court noted: *“Mere assertion without mentioning the data or basis is not evidence, even if it comes from expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value.”*

It has already been discussed that the expert opinion must be in consonance with the direct or ocular evidence. Expert opinion is different from a testimony given by a witness. While an expert gives rules and reasons to support his opinion by either citing a book or an authority, the witness gives his testimony solely on the basis of what he has perceived through his senses. Since an Expert Opinion is used as a corroboration device, what will happen in a situation where the Expert Opinion is inconsistent with the direct or ocular evidence? It has been held that, in a case of inconsistency between expert opinion and ocular evidence, the latter shall prevail over the former. In *Darbara Singh v. State of Punjab*,¹⁹ the Supreme Court reiterated this position in the context of medical expert evidence and noted: *“So far as the question of inconsistency between medical evidence and ocular evidence is concerned, the law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy.”* However, if in a situation where the inconsistency between both, the ocular and medical evidence, is so extreme that the medical witness totally rules out the possibility of the ocular evidence being true, then the

¹⁷ Ramesh Chandra Agarwal v. Regency Hospital Ltd., (2009) 9 SCC 709.

¹⁸ State of Maharashtra v. Damu s/o Gopinath Shinde and Ors, (2000) 6 SCC 269

¹⁹ Darbara Singh v. State of Punjab, (2012) 10 SCC 476

ocular evidence must be disregarded.²⁰ For example, if A testifies to the fact that B attacked C with a sharp weapon and that C died on the spot due to the injuries, but the post mortem report reveals of no such injuries on C's body, then the testimony given by A is completely ruled out.

Normally, the Courts tend to rely on that expert opinion, which gives a better and detailed reasoning. But, what happens if the opinions given by two medical experts contradict each other? Whose opinion will prevail in this conflict? In *T.P. Divetia v. State*,²¹ the Supreme Court held that, if there is a conflict of opinion between two medical examiners, then the opinion of the medical expert who examined the injury and conducted the post-mortem will prevail over the opinion of the other doctor, who only used X-Ray Reports, injury reports, post mortem reports to form his opinion.

Another question that often arises is whether an expert opinion requires cross-examination by the opposing party. It must be kept in mind that an expert opinion is not a gospel truth. It is only given respectful consideration, and is not conclusive. This is because an expert is a human being and it is human to make mistakes. Thus, a cross examination of an expert witness is required to be conducted like for any other witness. The Judge will then decide the probative value of the expert opinion.

III. THE LACUNAE IN LAW AND SUGGESTED REFORMS

In India, there exist lacunae in law with respect to Expert Opinion. There are various challenges and problems faced in the application of Section 45 and the same have not been addressed by the Indian legislature. First and foremost, the definition of 'expert' under Section 45 is ambiguous and incomprehensive. It does not provide any qualifications or guidelines with respect to who is a 'specially skilled' person.²² Moreover, there is no definition of 'expert opinion' under Section 45. The provision in itself is not reflective of the vast jurisprudence surrounding this aspect of evidence law. Secondly, the rule with respect to the primacy of ocular evidence over expert evidence is prone to misuse as it might happen that an ocular witness falsely implicate an accused in a case. The ocular witness can exaggerate the facts and provide a distorted view to the Court.²³ Thirdly, an expert opinion is also subject to bias. This is problematic as it can sometimes lead to wrongful convictions. It

²⁰ State of U.P v. Hari Mohan, (2000) 8 SCC 598

²¹ T.P. Divetia v. State of Gujarat, (1997) 7 SCC 156

²² Prateek Deol, *Section 45 of Law of Evidence and its Lacunas*, Legal Service India.

²³ M.R. Zafer, *Scientific Evidence-Expert Witnesses*, Journal of the Indian Law Institute, (1972).

reduces the accuracy of the expert's opinion and the public's faith in the legal system.²⁴ For example, if an expert exerts emotional bias towards a rape victim in a particular case, one can say that the accuracy of the expert's opinion is reduced. Lastly, it is often presumed that it is the duty of the Judge to call for expert evidence. People are unaware of the fact that they have a right to present on record expert evidence.²⁵ This ignorance of law also needs to be tackled. Due to these infirmities within the law, expert evidence is often regarded as weak evidence, rather than a substantive form of evidence. It is suggested that the government amend Section 45 to make it more comprehensive. It is suggested that the legislature formulate some guidelines with respect to the qualifications of an expert and the relevant procedure for rendering an opinion before the Court.

IV. CONCLUSION

In conclusion, expert opinion plays a significant role in criminal proceedings. It assists the court in understanding the facts of the case in a better fashion and to make a decision. Expert Opinions are corroborative in nature. It is a rule of caution that a Judge not solely rely on expert evidence to convict an accused. The experts must supplement their opinion with relevant data and material, and should not make a mere assertion. If there is an inconsistency between direct or ocular evidence and an expert opinion, the former shall prevail. A cross examination of expert witness is an integral part of criminal proceeding. Section 45 of the Act consists of various infirmities, because of which expert evidence is considered as weak evidence. There exists lacunae within the legal framework, and it is the need of the hour that the legislature amends this provision and makes it more comprehensive.

²⁴ Jason Chin, Michael Lutsky & Itiel Dror, *The Biases of Experts: An Empirical Analysis of Expert Witness Challenges*, Manitoba Law Journal, (2019).

²⁵*Supra*, note 16.

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