

THE CROSS EXAMINATION AND ROLE OF COURTS – A REVIEW

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INTRODUCTION:

The word “**cross examination**” plays a predominant role in Courts. In a trial of Sessions case, or a Civil Case including the Motor Accidents Claims Cases, the cross examination of a witness is considered as the major element in a trial. The real test for a trial Judge is that of handling the case during cross examination of a witness. The procedure of recording the evidence of a witness in chief in respect of civil cases was made easier by virtue of the amendment to the Code of Civil Procedure. After amendment in the year 2002, the scope of recording the evidence in chief was permitted to be done by way of affidavit. Hence the long time consumption of Civil Courts was considerably reduced by virtue of filing of proof affidavit. However this has enabled the deponent to elaborate his case to the maximum. Thus the affidavit runs to several pages, which is evident in many cases.

As a matter of right, the defendant/respondent takes up each and every line of the affidavit and makes his cross examination at length. It has also become the order of the day that the evidence during cross examination is being done in piece meal. The major issue revolving around this kind of practice of piece meal cross is that of the repetition of the same questions at the cost of Court’s time. Hence the Presiding Officer of the Court shall have to be very vigilant and should be capable

of remembering or recollecting the evidence recorded during the previous occasion. The responsibility is equally vested with the deponent and his counsel to alert the Court during such instance. This process consumes extra time during cross examination resulting in delay. While the piecemeal cross examinations is one of the reasons for delay in trial, the inability or ill health of the deponent to retain himself/herself for long hours makes him/her difficult resulting in pleading adjournment at a particular stage of cross examination again reflects in piecemeal trial. Again the challenge is posed on the Presiding Officer to identify whether the deponent is really ill or is he attempting to drag on the issue.

As far as Sessions cases/Criminal Cases are concerned, there is no question of pleadings so that the cross examination could be confined to a specific defence. Hence the accused takes the maximum of all the defences, which he/she thinks available to him/her. Hence it becomes a great ordeal to the trial Judge while recording the evidence of witnesses in Sessions cases/Criminal Cases during cross examination.

While the Judge is expected to be very active while recording the evidence, he/she has to face the sudden confrontation in respect of admissibility of the questions put to the witnesses. By and large it is expected that the Judge shall be a silent spectator thereby allowing all the unwarranted questions be put to the witness. More often the questions, which mutually crush the defence of the party concerned are put to the witnesses. In short, the real objective of eliciting the truth during cross examination is totally missed and the parties are on to a different track/version which they themselves would not expect. Hence an attempt is made through this article to analyze the importance of cross examination and the factors affecting the Justice Delivery System.

IMPORTANT ELEMENTS IN CHIEF AND CROSS EXAMINATION:

a) CONTENTS OF AN AFFIDAVIT IN CHIEF:

The evidence in chief shall be on par with the pleadings. It cannot be in the form of arguments or submissions. In this regard a decision is reported in [*H arish Loyalka And Another vs Dileep Nevatia And Others on 7 April, 2014*](#),¹ **Bombay High Court**, wherein it has been observed as follows;

“The provisions of Order 18 Rule 4 of the Code of Civil Procedure, 1908 (“CPC”) require that the “examination in chief” shall be on affidavit. This means that the affidavit in lieu of examination in chief can contain, and contain only, such material as is properly admissible in examination in chief, in a manner no different than if the witness was in the witness box and his direct evidence was being taken by his advocate. An affidavit that contain arguments and submissions is neither an affidavit within the meaning of CPC Order 19, Rule 3, nor an affidavit in lieu of examination in chief within the meaning of CPC Order 18, Rule 4”

Further it has been reiterated in the above decision that, the chief examination affidavit with errors may be permitted to be replaced, and this cannot be a routine practice. The prime reason asserted is that the Court has no power to alter or delete certain portions in the affidavit in chief. The relevant portions are extracted as follows;

1 CDJ 2014 BHC 789

“How should a court approach such a non-conforming affidavit, i.e., one that contains material that is clearly inadmissible or demonstrably irrelevant? A party may, in a given case, be permitted to replace his affidavit with one that conforms. It is not in every case that a party is required to attest to the correctness of the contents of that affidavit, as the Supreme Court has held in, *Rasiklal Manikchand Dhariwal V Mss Food Products* ². But where an affidavit contains material that, even had the witness attested to it, could not have formed part of his ‘testimony’ properly so-called, it would plainly defeat the interest of expedition to prevent a party from substituting that affidavit with one that meets the rigour of CPC Order 18 Rule 4. Of course, this does not mean that a party should be continually permitted to ‘test the waters’ by filing one non-conforming affidavit after the other. Replacing such an affidavit must, surely, be in a court’s discretion. On the footing that a court’s power to ‘delete’ any portion of an evidence affidavit (even portions that are inadmissible) is completely taken away, a court may still rule on portions of the affidavit to which objections are taken and direct that those portions be excluded from consideration as testimony; i.e., that a cross-examiner will be at liberty to ignore those portions without fear of an adverse inference being drawn”

Hence the Courts, while recording the evidence in chief by way of affidavit shall have to afford time to the other party to peruse the averments in the chief affidavit, enabling him to raise his objections at the time of cross examination.

² 2012 2 SCC 196

b) RECALL OF WITNESSES:

The Provisions of Order 18 Rules 1 and 2 of Civil Procedure Code envisage the order of examination of witnesses and the right to begin. The witness can be examined in chief by way of his affidavit and he can be cross examined. After completion of cross examination, if any aspect to be clarified or ambiguity to be ruled out, the witness may be subjected to re-examination. But this cannot be done by way of Additional affidavit, as it is no where contemplated under the above procedure. The provisions cited above have to be followed *Stricto Senso*. Even if certain left over documents are to be marked during re-examination, they cannot be done by way additional affidavit and instead, the same might be elicited from the witness

The recall of a witness cannot be made just to fill up the gap and to cover the left over aspects. This has been reiterated by Honourable Supreme Court of India in [*K.K. Velusamy v. N. Palanisamy*](#)³ wherein it has been held as;

"9. Order 18, Rule 17of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18, Rule 17can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in

³ 2011(2) R.C.R.(Civil) 875 : 2011(3) Recent Apex Judgments (R.A.J.) 83 : (2011) 11 SCC 275,

appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. (Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate .)⁴

10. Order 18, Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18, Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo motu, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions."

This position has been re-iterated by the Honorable Supreme Court of India in Ram Rati Vs. Mange Ram⁵. Hence the Courts must be cautious while allowing recall petitions, ensuring that the intention to recall was not to fill up the lacuna.

c) HARASSMENT OF WITNESSES:

There is no hard and fast rule in respect of the mode of putting the questions to the witness in a Sessions Case. However it has to be ascertained that the cross

⁴ 2009 4 SCC page 410

⁵ CDJ 2016 SC 216

examination is not done to satisfy the accused to the extent of harassing the witness. The Judges need to play a very proactive role while recording cross examination of witnesses in Sessions Cases. A land mark Judgment of the Honourable Division Bench of High Court of Madras, in *Sampath Kumar and other vs. State by Periyanaicken palayam P.S.* ⁶

exposes the sorry state of affairs in Sessions Cases, where the witnesses are subjected to harassment in the guise of cross examination. The relevant paragraphs though appear to be lengthy, if read in between the lines, would certainly give an alarming message to all the Judges who deal with Sessions Cases and who are likely to deal with the Sessions cases. The relevant paragraphs alone are extracted hereunder which would throw light to the present Judicial System.

“53. Above all, the conduct of the accused in this case is highly deplorable and condemnable. The occurrence was in the year 2009. The case was pending before the Court of Sessions from the year 2011 onwards. For four years, due to non cooperation of the accused, charges could not be framed by the trial court. The charges were framed by the trial court only on 29.01.2015. P.Ws.1 to 5 were examined on 04.05.2015 and P.W.6 was examined on 05.05.2015. The records received from the trial court would go to show that on the day of examination of these witnesses, the counsel for A1 to A11 was not present. The counsel for A12 to A23 were present, but, he refused to cross examine the witnesses. Similarly, the counsel for A24 to A27 also did not appear. On an application made, by order dated 15.05.2015, P.W.1 was recalled and he was cross examined on 22.05.2015.

6 CDJ 2017 MHC 154

The counsel for A12 to A23 cross examined him. The cross examination commenced at 10.45 a.m. The learned counsel finished the cross examination at 01.30 p.m. which runs to 15 pages. After lunch break, the counsel for A24 to A24 commenced the cross examination. It went up to 05.30 p.m. which runs to 12 pages. On that day, A1 to A11 did not cross examine P.W.1. They approached the High Court and as per the orders of the High Court dated 18.08.2015, P.W.1 was again recalled on 27.08.2015. On that day, the learned counsel for A1 to A11 cross examined him which runs to 16 pages. Thus, the cross examination of these witnesses covers 45 pages. We have gone through the entire cross examination, line by line and word by word. We are, at a loss to find anything elicited in favour of the accused during cross examination though it runs to 45 pages. Many of the questions are in the nature of harassing the witnesses. It reflected as though there is no law regulating the questions during cross examination. It was ignored by the counsel that the Evidence Act speaks of questions which are lawful during cross examination which could be compelled to be answered by a witness and the questions which could be refused to be answered by the witness. The learned counsel has also ignored when the witnesses could be compelled by the court to answer and when the witnesses can use his discretion to answer though there is no compulsion. The learned counsel had overlooked these statutory mandates contained in the Evidence Act. The learned counsel had virtually harassed P.W.1 for days together by asking all irrelevant, unnecessary and scandalous questions.

54. Similarly, P.W.2 had not implicated any of the accused in chief examination and therefore, he was treated as hostile. But, she was not cross examined by the defence on the same day. After chief examination on 4. 05.2015, he was recalled and cross examined by the counsel for A12 to A23 on 20.05.2015 and A23 to A27 on the same day. A perusal of the cross examination of this witness would go to show that it is nothing but a harassment. When he was recalled on 20.05.2015, the learned counsel for A1 to A11 did not cross examine. On the day of examination in chief though the counsel were present, they were not ready to cross examine him. On 08.09.2015, pursuant to the orders of this court, P.W.2 was recalled and cross examined by A1 to A11. This witness was again harassed and cross examined which runs to 8 pages. Most of the questions appear to be relevant relating to the fact in issue or relevant fact. All unnecessary scandalous and harassing questions have been asked to him. Similarly, P.W.3 was examined in chief on 04.05.2015 on which date no counsel for the accused was ready to cross examine without assigning any reason whatsoever. He was recalled and cross examined and again recalled on the orders of this court and cross examined. This had happened in almost to all the witnesses. When we invited the learned senior counsel appearing for the accused to explain, as to how the counsel for the accused were justified to ignore the ethics of the profession by refusing to cross examine any witness and to recall them on a later date in a phased manner and to harass them by asking such unnecessary questions, the learned senior counsel felt sad about it reflecting his fairness. When we invited

him to point out anything elicited during the cross examination of these witnesses in favour of the accused, he was unable to point out anything. Thus, it is crystal clear that most of the questions were in the nature of harassment to the witnesses.

55. Gone are the days that the defence counsel would take trial proceedings so seriously and cross examine the witnesses on the same day and also avoiding unnecessary questions by extending fullest cooperation to the court for trial and disposal of the cases. The case on hand is a classic illustration as to how there is a complete change in the attitude of some of the counsel and as to how they take it as a platform to harass the witnesses. We are really anguished by going through the cross examination of the witnesses in this case. We do not understand as to how the Judge was a silent spectator without making any intervention when the witnesses were harassed like anything. The expression of our anguish in this judgement is only to convey our hope to all concerned that the justice delivery system cannot be taken for a ride by anyone. The time tested system will withstand all such attempts in the war waged against the system by unscrupulous people”

The above observations of Their Lordships happen to be an eye opener to the stake holders, and especially to the Judicial Officers handling the Sessions Cases. If this decision is given the letter and spirit effect, it could be ensured that we have moved one step ahead in the positive direction in the Justice Delivery System.

d) **NON DEVIATION FROM THE SCOPE OF DEFENCE:**

The other vital aspect of recording evidence is to ensure that the ignorance of law on the part of the advocate shall not result in grave injustice to the accused, who, despite being innocent, shall be liable for conviction because of lack of legal knowledge on the part of the advocate. In a typical way if it is to be explained, the Lawyers appearing in Sessions Cases shall have to decide their defence clearly and have to make a homework on the cross examination.

It could be seen from certain the cases, that the questions incriminating the accused himself is put to the witness. In certain cases it is seen that the cross examination questions are framed in such a way that they mutually crush the defence of the accused, leaving a strong presumption against the accused.

The questions are put in the way of suggestions to the witness. While doing so, the sight of the real defence is lost. Admittedly, the suggestive questions would indicate the intention of the accused. Merely stating that it was just a suggestion, the accused is giving a picture to the Court in respect of his defence. It cannot be made whimsically, just like that for no good reason. Hence one should be very careful while framing his suggestive questions to the witnesses, ensuring that those questions do not pull out the legs of the accused. The suggestive questions should be covering the defence and should hover around the defence and it shall emphasize the defence of the accused.

Here are some instances which could be invariably found in depositions. The exact deposition is not reciprocated here. The substance is put in the question and answer form for a better understanding. In order to ensure privacy, the case details are also not mentioned herein.

CASE No. I**(Cross of PW1, Victim in the offense u/s 376 IPC before Mahila Court)**

I put to you that you never had any acquaintance with the accused, and that your maternal uncle had land dispute with the accused and that in order to wreck vengeance on the accused, your maternal uncle has instigated you to lodge a false complaint against the accused and now then you are hereby before this Court deposing false evidence in support of your false complaint.

I deny.

Question:

Answer:

(Thereafter the cross continues on several other aspects. While nearing the end of cross examination, it's very unfortunate that an incriminating question crushing the above defence is put to the witness)

Answer: I deny

Question: You are in the habit of riding bicycle. Is it not?

Answer: No.

Question: I put it to you that by virtue of your cycling habit, the doctor has wrongly concluded that you are exposed.

Answer: I deny.

Question: I put it to you that you developed one sided love affair on the accused and the accused was not interested in your proposal, and since the accused possess vast lands, and other properties, in order to have a wealthy groom, you and your family have falsely implicated the

accused in this case and that the accused has not committed any offence.

Answer: I stoutly deny.

The above mutual crushing of defence would certainly prejudice the accused. How could the accused claim his knowledge on the habits of the victim, and how could he plead one sided love affair, if he pleads that there was no acquaintance with the victim is the core issue which has been mishandled. The counsel has to stick on to any one side of the defence only. When this being the circumstance, the Trial Judge can very well warn the Counsel and make him restrict to his defence.

The Judges shall have to make a cursory glance of the cross examination made by the counsel and shall have to closely follow up till the end of the cross examination. This would certainly help the Judge in identifying such areas where there are possibilities of miscarriage of justice on account of such wrong questions.

The idea behind is not to ensure acquittal of the accused and rather these are emphasized on the sole point that even thousand accused might escape from the clutches of law, but one innocent should not be punished on account of poor cross examination by the counsel. These comments are very much confined to those Lawyers who, without having proper guidance from their seniors are approaching the Court.

CASE No. II (Offence u/s 489 IPC before Additional Sessions Court)

Here, PW1 is the Sub Inspector who conducted raid and seized the counterfeit currency. Cross examination on PW1 is made as follows;

Question: I put it to you that you never arrested the accused nor seized any counterfeit currency from him and he never was available at the place indicated by you in your arrest card.

Answer: I deny

Question: You have secured the counterfeit notes from some other person and made him to escape and nabbed this innocent accused.

Answer: I deny

Now the scientific expert is called as PW3 and cross examination is done as follows;

Question: What type of analysis did you make to certify that the notes are counterfeit.

Answer: The thickness of paper, the silver line in between, and the micro engraving of the Reserve Bank of India differ in the above notes with that of the standard guidelines given by the RBI. (Witness explains in detail)

Question: I put it to you that the notes verified by you are genuine, and authenticated rupee notes and that you have not applied your mind in verifying the notes properly and rather you have mentioned them to be counterfeit notes in a mechanical way.

Answer: I deny.

The sum and substance of the above question certainly crushes the defence of the accused. When the first suggestion to PW1 was that the accused was not at all present at the scene of occurrence, and that when it is pleaded that nothing was recovered from the accused, then what would be the necessity to cross examine the expert remains unexplained by the defence. Using what soever method(s), the rupee notes might have been testified by the expert, and whatsoever the technique is used by the expert, how does it affect the accused also remain unexplained. While denying the mode and technique of examination of currency notes, the accused is attempting to crush his defence by impliedly admitting his knowledge to the seizure of currency notes.

The approach to hostile witnesses is also a yet another concern. The witnesses are to be cross examined by the Public Prosecutor touching upon the substance in the statements recorded u/s 161(3) Cr.P.C. Without putting the questions touching upon the elements of the substance found u/s 161(3) Cr.P.C., the mechanical recording of evidence in cross by simply reciprocating the statement u/s 161(3) Cr.P.C. would be improper.

e) PIECE MEAL CROSS EXAMINATION:

The practice of piece meal cross has been condemned by the Honourable Supreme Court of India in [*Vinoth Kumar Vs State of Punjab*](#)⁷, where in the Trial Court Judges who are handling the Sessions cases are given with strict guidelines to be followed while examining the witnesses and that the cross

7 CDJ 2015 SC 11

examination of the witness shall be completed on the same day. At the most, for want of time, the cross examination could be extended to the next day. The above Judgment has been circulated to all the Judicial Officers across the country. The key portion in paragraph 41 of the above Judgment alone is extracted hereunder which would speak in volumes.

“The trial courts are expected in law to follow the command of the procedure relating to trial and not yield to the request of the counsel to grant adjournment for non-acceptable reasons. In fact, it is not all appreciable to call a witness for cross-examination after such along span of time. It is imperative if the examination-in-chief is over, the cross-examination should be completed on the same day. If the examination of a witness continues till late hours the trial can be adjourned to the next day for cross-examination. It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, “Awake Arise”. There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the

defence counsel, for it eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute.”

The important duty cast upon the Trial Judges is to ensure that there is no miscarriage of Justice on account of unnecessary adjournments. The above Judgment is a salute to the Justice Delivery System, which the Judicial Officers shall have to follow in it's true sense.

f) UNWARRANTED APPROACH:

The Rules laid down in the Tamil Nadu Motor Accident Claims Tribunal Rules emphasize the conduct of trial in a motor accident claim by following summary procedure. This is evidenced on a conjoint reading of the provisions of Section 140, 165, 166 and 168 of the Motor Vehicles Act. But this has not been given a practical approach so far. The witnesses are subjected to cross examination at length which is totally unwarranted.

In cases of violation of the terms of Insurance Policy, wherein the driver has operated the vehicle without license or without badge, the agony of the witnesses go high as the witnesses are grilled to the maximum only to satisfy the Insurance Companies. This cannot be done at the cost of the precious Court Time.

The petitioner makes his claim against the Owner of the Vehicle and the Insurer of the Vehicle. In case when the driver of the vehicle had no valid driving license, the terms of Insurance Policy is said to have been violated. Hence the Insurance companies tend to exonerate themselves from the liability. However the

Hon'ble Supreme Court of India in the case of [Oriental Insurance Company Limited Vs Nanjappan and others](#)⁸ has emphasized that even in case of violation of the terms of the Insurance Policy, the payment of compensation to the claimant shall have to be made by the Insurance Company initially and thereafter the Insurance company shall have to recover the same from the owner of the vehicle.

“8. Therefore, while setting aside the judgment of the High Court we direct in terms of what has been stated in Baljit Kaur's case (supra) that the insurer shall pay the quantum of compensation fixed by the Tribunal, about which there was no dispute raised, to the respondent-claimants within three months from today. For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the insured, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount, which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing court shall, take assistance of the concerned Regional Transport authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to

8 2004 13 SCC 224

the Executing court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured. The appeal is disposed of in the aforesaid terms, with no order as to costs.”

Based on the above decision, there are a series of decisions from The Honorable Supreme Court of India and also from various Honorable High Courts. When this being the settled position, the petitioner need not pay his attention to the fact whether the driver of the vehicle had valid driving license or not. In a case where the driver had no driving license or valid driving license, the owner of the vehicle who is cited as the first respondent might not contest the case and rather he would allow the decree to be passed in his absence. He would approach the Court at a later point of time to set aside the decree, when the award is about to be executed on him by the Insurance companies.

In the mean time, during the trial proceedings, when the Insurer pleads the non availability of driving license of the driver of the offending vehicle and examines his witness, the petitioner tends to cross examine the witness and makes an attempt to prove that there was valid driving license for the driver of the vehicle.

It is quiet surprising to note that the petitioner steps in to the shoes of the owner of the vehicle and takes up his defence and attempts to prove that the driver of the offending vehicle had driving license and puts questions to the witness such that the Regional Transport Officer has not made proper verification.

When a witness from either the Insurance Company's side or from the Transport Authorities is examined by the Insurance Company, it is done only to

safeguard the interest of such Insurance company. Only if such examination is made and proved that there was a violation of Insurance Policy on account of either non availability of Driving License or Invalid Driving License, the Insurance Company could proceed against the owner of the offending vehicle for recovery by way of execution petition.

The above stand of the Insurance Company is totally misunderstood by the petitioner and he tends to cross examine the witnesses on the Insurance Company's side and tries to emphasize that the driver had valid driving license. This is totally unwarranted and it is nothing but the waste of time of Court. The Trial Judges can very well curtail this practice which would definitely save time of the Court.

g) SUBSTANTIATING ESTOPPEL – WHETHER ESSENTIAL IN CROSS EXAMINATION?

It is also invariably seen during trials that the witnesses are cross examined at length. The real objective of cross examination is to elicit the truth. It is not a tongue twister play or a test of talent for the witness. At times, there might be some falsehood apparently evidenced from the statement of the witness. This falsehood could be evinced very well when the witness gives an answer to a question at the beginning of the cross examination and contradicts himself at a later part by giving a different answer to the same question. The Trial Judges should be much more alert in avoiding the repetition of questions. However, when an indirect question resembling the earlier question is put to the witness, the Trial Judges might not be able to have much vigil on that aspect.

However when a question is put to the witness and an answer is obtained, when the witness tends to give a different answer at a later point of time during cross examination, the counsel should make a safe play by stopping at this point itself. Thus the evidence gives an inference to the Court that the witness has stopped from his previous stand which could be challenged in the arguments. But unfortunately, having lost sight to this aspect, the witness is asked further more in respect of his previous statements and both his answers are compared and an attempt is made to make the witness agree that he has not come out with truth.

In such cases there is possibility for the witness to bring about a new answer, which crushes the two earlier answers. Might be the witness would not possess that much of IQ to withstand the cross examination. Even in genuine cases too, the witness tumble to such questions and the burden cast on the Court goes very high, as the credibility of the witness becomes the first issue to be decided, before going into the merits of the case. In simple words, all these would result in loss of time to the Court which could be very well avoided.

The eliciting of a fact from the witness and his subsequent contradictory answer is certainly an estoppel on the part of the witness, and the witness is estopped from making a contradictory answer. The doctrine of estoppel play an important role in deciding the credibility of the witness. But this has to be substantiated only during arguments and not by further cross examination. Hence the cross examination on the point of *estoppel in evidence* becomes unwarranted totally.

h) OBJECTIONS RAISED DURING CROSS EXAMINATION:

It is one of the very vital areas to be addressed. It could be seen invariably in many of the trials in civil cases, that objections to certain questions put to the witness are raised during cross examination. Equally it is to be noted that without answering to such objections, the trial is proceeded by mechanically recording that “**RECORDED WITH OBJECTION**”. This is improper. The provisions of Order 18 Rule 11 of The Code of Civil Procedure is lost sight during recording of evidence. The provisions of Order 18 Rule 11 are extracted hereunder;

ORDER 18 RULE 11: QUESTIONS OBJECTED TO AND ALLOWED BY COURT:

Where any question to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Hence it is mandatory on the part of the Judges to follow the above provision and to record the reasons in the deposition itself as to the reasons for overruling such objections. This is because, when a Judge ceases his office either by retirement, transfer or death and when the next Judge takes up the office, he could have no idea of what did it meant or what was intended by recording as “**RECORDED WITH OBJECTION**”. This is also an area where miscarriage of justice occurs when the real sense of objections and the reasons for allowing or disallowing are not recorded.

i) **RE-EXAMINATION OF WITNESS:**

The provisions of Order 18 Rule 4 (2) of the Code of Civil Procedure, envisage the sequence of recording of evidence. It clearly lays down that the party commencing the evidence shall have to be examined in Chief by way of affidavit and the cross examination and re-examination shall have to be taken down by the Court or by the Commissioner appointed for such purpose by the Court. The cross examination and re examination of the witness has to be taken down by the Court as how deposed by the deponent.

It is ironical to note in many Districts, that the procedure of filing additional affidavit for chief examination is made, which is totally inconsistent with the provisions of Order 18 Rule 4 (2) of The Code of Civil Procedure. The above procedure shall be exercised with fullest caution by the Trial Judges. The procedure of recording of evidence during re-examination shall have to be recorded directly by the trial judge , according to the provisions of Order 18 Rule 4 (2) of the Code of Civil Procedure which is extracted hereunder.

ORDER 18 RULE 4 (2):

“The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination in – chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it;”

Thus when the provision itself is clear, the procedure of re-examination by affidavits shall not be entertained by the Trial Judges and instead the evidence during re-examination or rebuttal evidence shall have to be taken down by the Courts directly.

j) SOME PRECAUTIONS TO TRIAL JUDGES:

The term demeanor of witness refers to the non-verbal cues given by a witness while testifying, including voice tone, facial expressions, body language and other cues such as the manner of testifying and the witnesses' attitude.

Demeanor of witnesses in both Civil and Criminal Laws are enunciated as follows;

CODE OF CIVIL PROCEDURE:

ORDER 18 RULE 12 CPC: Remarks on demeanour of Witnesses:

“ The Court may record such remarks as it thinks material respecting the demeanor of any witness while under examination ”

CRIMINAL PROCEDURE CODE:

SECTION 280: Remarks respecting demeanour of witness:

“ When a presiding Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination ”

Thus in both Civil and Criminal cases when a Judge finds that the answers given by the witness are evasive and not straightforward, it is his duty to record the evidence of that witness in the form of questions and answers so as to bring on the record sufficient material for the appellate Court to form its own opinion as to the demeanor of the witness whilst under examination. The above observation was held in [Amar Singh Bakhtawar Singh vs The State](#)⁹ on 17 June, 1954. Rule 12 of Order 18, Civil P. C., provides that the Court may record such remarks as it thinks

9 AIR 1954 P H 282

material respecting the demeanor of any witness while under examination. An advocate commissioner can also record the demeanor as per the amended Civil procedure Code as held in [Salem Advocate Bar Association vs Union Of India](#).¹⁰

Certain Factors that needs to be considered by a Court to determine a witnesses' credibility such as Do's and Don'ts are enumerated below:

Do's

- Court shall note the capacity of a witness to perceive, recollect, or communicate;
- Shall note the nature of bias or interest of the witness.
- Shall note the prior statements that are consistent or inconsistent with the testimony
- Shall note the admission of untruthfulness.
- Must be noted in the presence of the witness and counsel for both the parties in question-answer form.
- Shall be recorded at the time of recording the evidence itself under what context and circumstances and with reference to the type of question posed to him, so that, the appellate court while appreciating his evidence could note about it as it had no opportunity like the trial court to note the demeanour of witness.

10 AIR 2005 SC 3353

It has been held in [R.Palanisamy vs State By Inspector Of Police](#).¹¹ that , “ In the absence of the trial court's recording in the deposition itself about the nature of his demeanor, if such a comment is made while appreciating the evidence of a witness, it is nothing but an exercise in air. This will not be judicial way of appreciating the quality of the evidence of a witness.”

Don'ts

- Courts not bound to note the demeanour upon demand by the defense.
- Trial Court should not record the impressions left on the mind of a judge by a witness such as, appearing uncomfortable, hesitant, nervous, hollow insincere, avoiding to tell the truth, and a witness answering questions confidently in an unruffled, straightforward manner giving the true ring.' '*The impressions are bound to fade with the passage of time especially when a judge is busy noting the demeanor of witnesses day after day in our other cases. And these become utterly useless in a piecemeal trial spread over a long period of time where various judges come to record the evidence and the judge deciding the case, perhaps, having no advantage of looking at the demeanour of witnesses.* 'This has been held in [Kishan Lal Gupta vs Dujodwala Industries And Ors.](#)¹² on 19 February, 1976.
- Trial Judges should not be carried away by emotions

11 Unreported judgment dated 23 April, 2013,MHC

12 ILR 1976 Delhi 442

- Trial Judges have to ensure the neutrality and shall not evince any interest and prompt questions to the defense.
- Confession statement of the accused shall not be marked during the Investigating Officer's Evidence. At the most, the admissible portions of confession statement could be marked after the admission of the witnesses to the confession theory.

CONCLUSION:

The examination of witnesses in chief is made simpler. However the cross examination of a witness becomes the real test for the Trial Judge. It is expected from the Trial Judge to follow the provisions of section 165 of The Evidence Act, which gives enormous powers to the Trial Judge so as to keep the proceedings under the control of the Court. The trial judge should understand that the noting the demeanor is to assess the truthfulness or believability of a witness's testimonial statement offered in a judicial proceeding to prove or disprove a disputed issue of fact. It is also imperative to point out that the litigant cannot take shelter on his ignorance of Law. It would be very much appropriate to quote the Legal Maxim "*Ignorantia facti excusat, ignorantia juris non excusat*" which clearly contemplates that ignorance of a fact can be excused, but not the ignorance of Law.

The Courts of Justice should be cautious in rendering justice to the litigants. Though the Judges exercise their discretion based on the facts and circumstances of each and every case, and though they adhere to their own wisdom, it also shall be imperative on the Judges to warn the litigants of the consequences of their

wrongful approach towards Law, which may result in miscarriage of justice. At the same time, the responsibility of a litigant who approaches the Court is also much more. The litigant shall have to be due diligent and shall have a careful approach towards the relief sought by him. The Legal Maxim "*Vigilantibus non dormientibus jura subvenient*" reminds the responsibility of the litigants. The Courts of Justice require the parties to the litigation shall exercise due vigilance and caution. The above maxim means that Law would help those who are vigilant and would not help those who are asleep over their rights. The duty is cast on all the stake holders to ensure that there is instance of miscarriage of Justice and also shall ensure that the Justice Delivery System is properly approached.
