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**POWERS OF A JUDGE UNDER INDIA EVIDENCE
ACT-Its Limitation and Extent- A Critical Analysis in The
Light of Observations Made by Malimath Committee and
Law Commission of India**

Submitted by,
Ridhi Ranka
Ankita Mohanty
Abhigna Reddy

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INTRODUCTION

The fundamental objective of a judicial system is to provide for complete justice, that is to provide that justice is met irrespective of the procedural restrictions. By the power given to the judge under the section of this act, the judge can exercise his power to overcome the procedure established in order to attain complete justice. This shows the inquisitorial powers of the court and also shows that the purpose for existence of the courts is for providing for complete justice and it should be inactive or should play a dormant role and should be in complete control. This research paper will provide an overview in regard to the power of judge given under the Indian evidence act, and will also provide for the limitation and to the extent to which these powers are limited and this is explained by analysing the observations given by the law commission of India and the Malimath committee and also with various case laws. It states about various sections under the act where the judge can exercise his powers. But there are certain limits and restrictions for exercising such power. And the law commission report gives its view on this matter of power of judge and also the Malimath committee provides its view in this matter which will help in understanding the powers of the judge.

RESEARCH QUESTIONS

1. What are the powers of the judges under Indian evidence act?
2. Whether the power given to Judges under the Indian Evidence Act, 1872 limited to its application under the Act?
3. What are the limitations on the power of judge provided by the Act, up to what extent can a judge use such power?
4. What are the views given by Malimath committee?
5. What did the Law commission of India observe in its reports about the powers of a judge under Indian Evidence Act, 1872?

RESEARCH OBJECTIVES

- To know the sections which provide for the power of judges under Indian Evidence Act
- To understand the restrictions for such powers provided in the act
- To learn about the view given by the Malimath committee in regard to the power of judge under Indian Evidence act
- To analyse the observation given by law commission report about the power of judge under the Indian Evidence Act

RESEARCH METHODOLOGY

This project has been completed by doing analytical research. We took into account the data already available on this topic like Law Commission reports and observations by Malimath Committee. The paper has undergone conclusive research as it is well-structured in format and we have tried our best to answer the research questions so posed at the starting of the paper. We have discussed about the past and present facts and cases related to the topic so as to give the reader a clearer idea about the same and come to a conclusion. As we have done critical analysis of the given topic, we have given our views on it as well.

LITERATURE REVIEW

Throughout this paper many research papers have been referred to but the main analysis has been done of the Reports of the Government especially the Malimath Committee and Law Commission of India. Further, an analysis was done after reading the Indian Evidence Act of 1872.

From the detailed reading of the Bare Act of the Indian Evidence Act of 1872, we were able to ascertain the powers provided to the courts and judges by the act to ascertain the guilt of an accused. Here, it was seen how greater emphasis was being paid on ascertaining the guilt of an accused. Further, amendments to this act have provided us with details of how the powers of the court and judges have evolved over time.

The Observations made in the report by the Malimath Committee we understood in detail that the committee wanted to place greater emphasis that the judge should by amendment to various acts including the Indian Evidence Act, 1872 be given enough powers to not just ascertain the guilt of an accused but was recommended to be given enough power to ascertain truth. By making perjury a crime, by suggesting that the judge should be given the power to summon almost any person to be a witness in any case, even if such a witness was not enlisted by the counsels, etc. Therefore, after reading the report by the committee we could make out the loopholes in our system due to which justice was being hindered.

The Observations made by the 69th and 185th Law Commission of India were also looked upon in detail. From the 69th report, it was realised how to the Commission was recommending that a power should be given to courts and judges where they would not be held liable for decisions taken by them, these judicial privileges were later on incorporated in the form of section 121 of the Indian Evidence Act. Further, the 69th report laid emphasis on Section 136 stating that it is an important section for understanding the role of a Judge under the Indian Evidence Act for a judges powers in interpretation and collection of Evidence. Under the 185th Law Commission Report, the commission recommended that Section 165 of the Indian Evidence Act, 1872 must be amended and the judge must be given the power to ask any questions to witnesses for ascertaining the truth.

POWERS OF A JUDGE UNDER THE INDIAN EVIDENCE ACT

The power of judges under the Indian Evidence Act is given under section 165 of the act. It states about the power of judge to put questions or order productions. It provides that

“ The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.” (act B. , 1872)

*“**Provided** that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.”* (act B. , 1872)

*“**Provided** also that this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive , if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted.”¹* (act B. , 1872)

Section 165 has provided extensive power for the judges on interest stating administration of justice. It provides that the judge can question the witness or the party at any questionable if he thinks that this is necessary in order to know the truth about the case or to make the case clearer.

This section provides the judge the following powers:

1. To ask any question to the witness or the party to the case in any form and about any fact whether they are relevant or not.
2. To able to order for production of document or thing which is related to the case.

This section states that when the exercising of power is being done by the court then a party or his agent can provide for any objection. And it further states that the witness cannot be cross

¹ The Indian Evidence Act, Section 165

examined by any party on the answer given by them. If a judge asks a question then no party can examine or re-examine or recall any witness on the grounds of interest of justice without the permission of the court. The judge has an extensive power of participating in the trial for to bring out the truth in a case.

The power provided under section 165 of the evidence act compliments the person which is given under section 311 of Criminal Procedure Code. It was held by the Supreme court it was not irregular to put questions to bring out the truth in a case by the trial court. But, when the witness is rebuked and threatened to be prosecuted for perjury by the judge if their statements re changed then, the court held that this exceeded the power given to the judge under this section. A judge under this section can only exercise his power for obtaining proof and in discovery of fact which are relevant to the case. The power to examine the parties at the pre-trial stage is given under Order 10, Rule 2 of Civil procedure code and it is different from the power given under this section of the act.

Section 165 provides for power of judge to ask questions as he pleases, which may be in any form, time and to any witness or the parties or any fact which may be relevant or irrelevant and can order to produce any document or thing in order to obtain evidence and discover the truth of the case and the party or the agent to the case cannot present any objections to such ordered questions. But this can be done only when the judgement is based upon facts which are stated to be relevant and which have been proved. The fact that the judge has been given this power to ask relevant questions whenever he pleases irrespective of its relevancy it can be viewed that by the exercise of such power by the judge, he rises above the procedure in order to meet the ends of justice. The role of the judge here is complimentary as he asking additional questions to the parties and the witnesses and also asks to produce a document or thing which is relevant to the case.

In the case of “*Nepal Chandra Roy Netai Chandra Das & State of Rajasthan*”² the Hon’ble Supreme Court held that the purpose of Section 165 is for providing the court “*evidence of evidence*” that is evidence which indicates regarding the evidence which have been proved by the parties. It is to make the evidences more comprehensible but the main burden lies on the parties. The court unnecessarily shall not interfere when evidence is being given by one of the

² Nepal Chandra Roy Netai Chandra Das V. State of Rajasthan, 1977 SC

parties. It is believed for the court to remain active but normally it should for the parties to examine the witness and then only it can interfere in that matter.

In “*Meera Devi & Others V Jitender & Others*”³, it was held that the highest ideal of the court must be nothing but the quest of truth. It stated that Section 165 of the Indian Evidence Act provide the judge the power put in order any question to the witness or the party to the case irrespective of form and relevancy of facts if the judge decides for finding out the truth.

Section 136 of Indian Evidence Act provides for the judge to decide the admissibility of evidence. It states that the evidence has to be relevant for it to be admitted in the court and the relevancy is determined by the judge.

³ (2012) 5 SCC 777

EXTENT AND LIMITATIONS TO THE POWER OF A JUDGE

1. The presiding officer is not only a spectator and recording machine, he will participate in the trial and ask intelligent questions in order to ascertain the truth but he has to do it without interfering or trespassing upon the functions of the counsel of the parties or without coming as threaten to the witnesses. So the Judge can pose question in between the trial and when the counsel is questioning but he should not pose so many questions so as to start its own interrogation and not let the counsel continue with the examination, and derail from the track of the case. He cannot ask questions that will make an effective examination or cross examination impossible. As observed by the Law Commission of India, in its report that the Judge has the power to unravel the truth but should do so within the ambit of the section and within the limitations.

2. The Judge has the power to pose irrelevant questions or fact to the witness but cannot base the judgment on that irrelevant fact. What is relevant and irrelevant is given by the sections of this Act and thus the Judge has cannot decide whether the fact is relevant or not. Any judgment base on irrelevant cannot be sustained under this Act.

3. Though the Judge under the wide ambit of Section 165 has the power to ask questions or ask for documents, he/she cannot force or compel the witness to answer them or produce. The court can only ask the questions but cannot except answer to the question if the witness isn't comfortable in answering the question. The Judge cannot pose a question which falls under section 148 and 149 of the Act. The judge cannot ask a question or ask for a document which is improper to witnesses.

4. The Judge or Magistrate as under Section 121 cannot be questioned on his conduct in court acting in his judicial capacity, except when a special order is passed by a court to which his court is subordinate. So this is a limitation to his powers, if any special order is passed, he can be questioned on his conduct and he is answerable. Not only this, he can be questioned on any other matter that has occurred out of his knowledge. For example, A murdered B and C was the Judge in the Court of Sessions, is also accused of murder of a police officer whilst the case is ongoing. Then the Magistrate can be put to questioning.

5. Under section 148 of the Act, it is given that any Judge or Court has the power to decide which question are relevant and therefore, necessary to be answered by the Witness and it has the power to decide the cases under which these questions are not very relevant and therefore,

not necessary and compulsory to be answered. But, this power can be exercised to extent that the judge is obliged by Sub clause 1 to 4 of Section 148 which gives a list which states the types of questions which are relevant and the type of questions which are not relevant this list needs to be adhered to by the judge. Therefore, the judge can use his discretion only to the extent that he also abides by the sub clause 1 to 4 of Section 148 of the Act.

6. The Judge's power to compel a person to produce documents or electronic records is limited to the extent that no person can be compelled to produce any electronic record under his possession unless such a person agrees to produce the same, he is given a right to refuse the production of any electronic document.

IEWS OF THE MALIMATH COMMITTEE

The Malimath Committee was constituted by the Indian Home Ministry and Deputy Prime Minister, Mr. LK Advani, it was headed by Justice Malimath, the former Chief justice of High Court of Kerala and Karnataka for reforms in the Criminal Justice system of India, it also came to be known as the Malimath Committee of 2003. The committee gave many suggestions for reforming the Indian Criminal Justice System. Major suggestions included changes to be made in Indian Evidence Act, Criminal Procedure Code, and the Indian Penal Code. A few of the recommendations which affected the powers of Judges under Indian Evidence Act include:

This Committee suggested that the Judges be Assigned Pro Active roles in Right of Silence of accused

It suggested that an amendment must be made to the right of silence given to the Accused under Article 20(3) of the Indian Constitution. This right protects an accused from answering any questions which would lead to his own guilt, it is a right against self-incrimination of any accused before the court of law. The committee suggested that the court should take an active role in determining the guilt of the accused by asking him a few questions if necessary to check the guilt of the accused, this information so obtained by the court upon its own discretion will be admissible to determine the guilt of the accused and if the accused refuses to answer any question then such refusal can be used adversely against him by the court of law.

Further, the committee recommended that the Code of Criminal Procedure be amended and a clause should be added where it becomes necessary for the accused to clear his or her stand, that is whether they are guilty or not, should file a statement before the prosecution.

Empowering judges 'to give directions to investigative agencies in the matter of investigation'

Here, the committee suggested that the we should borrow from the inquisitorial system where the judiciary supervises the investigation of the Executive Officers. Here, the committee suggested that all the investigation should be supervised by the Judicial Magistrate of that District.

Further, the court should have the power to summon anybody even whether they are listed as a party; it includes Witnesses, Accused and State; to the case or not. Here, the committee suggests that the powers of the Judiciary or Judges should be expanded and therefore suggests

that the Judges must be given the power to summon any person to examine them to ascertain the truth and whether such a party was listed as a party to the case or not should not come in the way to ascertaining the truth, wherever necessary. Here emphasis was paid more on ascertaining the truth rather than ascertaining the guilt of the accused.

Empowering judges further with the duty of “leading evidence with the object of seeking the truth and focusing on justice to victims and not just determining whether the Accused is guilty of the offence or not”

The committee expanding the power of the judges gave a recommendation that the Judges must allow the Victims or the Legal Representatives, where the victim is dead, to become a part of the trial and they can themselves also hire a lawyer, or the state must appoint an advocate of their choice, and where the victim can't afford the lawyer, the State is bound to make such a payment. Further, it was recommended that a Victim Compensation Fund must be created by the state. Further, the amount of compensation to be paid to the Victim was suggested to be determined by the Judges, therefore, expanding their powers.

Judge must try some cases Summarily

The committee suggested that, instead of giving the power to judges to decide which cases must be tried Summarily, the committee said that all the offences which have a maximum prescribed punishment of three years of life imprisonment or lesser, such case MUST be tried summarily. Therefore, the power of the judge to decide in which way the case will be tried was suggested to be taken away and to make it mandatory that the judges try these cases summarily.

Perjury was recommended to be criminalised

The committee recommended that during the cause of trial if it is found that any witness commits perjury, i.e., tries to give wrong evidence, then the judge was given the power to try that person summarily and further, it was recommended that the prescribed punishment for such perjury would be imprisonment up to three month or fine of Rupees 500 or both. Therefore, here the committee tried to expand the powers of the judge by giving him the option of trying any witness who gives false evidence, further, such a punishment would prevent witnesses from giving false statements to the judge increasing the powers of the judges.

LAW COMMISSION REPORT

Power of the judge- section 165

The introductory paragraph of the report on the powers of the judge, specifically talks about why the judges are given certain powers under Section 165 of Indian Evidence Act. Basically, the whole truth cannot unfold itself and justice cannot be met with the materials and evidences produced by the parties. So, the judges are given power and it is their right and duty to bring out all the facts and evidence in the case by way of questioning. This questioning can be done at any time the judge deems necessary and when examination has not been conducted properly. This interrogation has to be done within the limitations which have been well established.

According to this report section 165 is wide in nature and can be used liberally to a certain extent but it also has limitations given. Under this section, the judge can and has the power to “*put questions or order production.—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing...*”⁴ The Law Commission of India is of a view that the judges were given such a power because at that time in 1872, in the lower courts the cases were not prepared properly and the examination of witnesses were not done properly. Hence it was required to give the judges a power where they can take the truth out by asking questions. The Law Commission cannot deny that even though the section though has remained in the act after the time lapse, it is not required in the present era. So as said by Stephen in Introduction to Evidence Act, due to this section a judge is not just an umpire of two lawyers of the parties but he is also someone who has the duty to “*explore all avenues open to him in order to discover the truth.*”⁵ The object of the section as explained in the report is that the judge can ask any kind of question he pleases to about an irrelevant fact so as to excrete any information or evidence about a relevant fact. As observed in a case, the aim of this section is to find “*indicative evidence*” which lead to the discovery if relevant evidence.⁶ The Law Commission’s view is that the main objective for the enactment of this section is to obtain indicative evidence.

The Commission is of the view the judge might overlook certain aspects while examining the witness. So it thinks that the power has to be exercised with care by the Judge so as to get rid

⁴ Section 165, Indian Evidence Act, 1872

⁵ 69th Law Commission Report on Indian Evidence Act, 1872, Page No. 866

⁶ K.L. Krishna Ayyar vs T. Balakrishna Iyer, (1934) 66 MLJ 498

of this disadvantage of the section. The Commission also recommended certain changes and wanted the section to be redrafted. They do not want to change the substance of the section but they way it has been structured. In 185th Law Commission Report, they agreed to such a recommendation. So they gave a draft of the same and wrote it under as revised section 165 which goes as follows,

*“(1) Subject to the provisions of sub-sections (2), the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: Provided that the parties or their agents shall not be entitled—(a) to make any objection to any such question or order, or, (b) without the leave of the court, to cross-examine any witness upon any answers given in reply to any such question.”*⁷

*“(2) Nothing in sub-section (1) shall authorize a Judge to—(a) ask or compel a witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce, under the provisions of this Act or under any other law for the time being in force, if the questions were asked or the documents were called for by the adverse party; or (b) dispense with primary evidence of any document, except in the cases hereinbefore excepted. (3) Notwithstanding anything contained in this section, the judgment of the Court must be based upon facts declared relevant under this Act and duly proved.”*⁸

So the Commission in its 69th Report laid down the object as to why the section was be put in the Indian Evidence Act, 1872, followed by what are their views and some other scholars view like Stephen’s and they said recommendations.

The Law Commission in its 69th report has also mentioned about judicial privileges under Section 121 of Indian Evidence Act. It says that no judge or magistrate is answerable to any question about his conduct in court of law except when a special order by a superior court but he can questioned for other matters. This means the matters coming not in the knowledge, when he is acting as a judge, can be put forward as questions to the judge. So the question is here whether the judge can be a witness or not in his own court, and the commission thinks he cannot be.

⁷ Chapter III, Summary of Recommendations, 185th Law Commission Report, Review of Indian Evidence Act, 1872

⁸ Chapter III, Summary of Recommendations, 185th Law Commission Report, Review of Indian Evidence Act, 1872

The Commission also talks about Section 136 of Indian Evidence Act, stating that is a important section so as to understand the role of a Judge in the sphere of evidence. As the section talks about how the evidence needs to be relevant to be admissible, the report states that the reliance of facts or evidence is to be decided by the Judge himself and give grounds of objection but at the same time the Judge in India has no power to discard an evidence if it is relevant and admissible and not excluded by any other provisions of law. The report goes on to explain as to how the trial judge in England has discretion in the same matter. The commission is of the opinion that the section needs no change.

The report also talks about section 148 of Evidence Act. The report says that section 148 gives the court or the judge power to decide the propriety of questions that are not relating to suit but injure credibility of the witness to be posed. This section gives the court the power to use its intelligent observing skills and interest to disallow any improper, scandalous or insulting question. But also the court has to allow such questions if it is necessary to determine whether the fact are true or not. This was observed in one case in Calcutta, where the counsel asked a woman whether she was pregnant by any other person other than hr husband and such a question was allowed.⁹ The commission had no recommendations for the sections 148 to 152 as the questions raised against them was based on its application and no content.

⁹ Subala v Indra Kumar, AIR 1923 Cal 315(2)

CONCLUSION

This research paper has been written with a vision to analyse the powers of a Judge under the Indian Evidence Act, 1872. This paper has given us a clearer view about what all powers the Judge or Magistrate has and how they can make the best of use of them. Some powers like the main one under section 165, has a few limitations like he cannot compel the witness. but in the end the Judge is the one who has to use the power with a lot of care an honesty with the best of his knowledge. Section 165 has a wide ambit and scope as observed on the reports of Law Commission, but the Judge has to be careful in interrogating the witness so that the questions are not improper and threat to the witness. As we have also learnt in the paper how the Judge has the power to decide the relevancy of facts and how the evidence has to be produced depending upon the relevancy and dependency on other facts.