FULL BENCH

Before D. K. Mahajan, H. R. Sodhi and C. G. Suri, JJ.

AMAR SINGH ETC.—*Appellants.*

versus

CHHAJU SINGH ETC.—*Respondents.*

Regular Second Appeal No. 444 of 1965.

January 31, 1972

Evidence Act (I of 1872)—Sections 50 and 60—Disputed relationship of one person to another—Statement of witness in proof thereof—Whether to be confined only to his own conduct as expressive of his own opinion—Such witness—Whether can make a statement to prove the conduct of another person having special means of knowledge about the disputed relationship.

Held, (by majority, Mahajan and Suri; JJ.; Sodhi; J. Contra.) that a statement of a witness in proof of disputed relationship of one person to another is not to be confined only to his own conduct as expressive of his own opinion with regard to the existence of the disputed relationship.

(Para 46)

Held, (per Full Bench) that in cases where it becomes necessary to prove the relationship of one person to another, a witness appearing in Court can make a statement to prove the conduct of another having special means of knowledge about the disputed relationship when that conduct expresses the opinion of the person about the relationship.

Held, (per Mahajan, J.) that what is relevant under section 50 of the Evidence Act and can be proved, is conduct or outward behaviour of a person who has special means of knowledge. The opinion which that person holds is merely the outflow of his conduct. Thus, the material evidence is of conduct, which can be of the witness himself or of another person regarding whose conduct the witness is deposing. It is from the conduct as established on evidence that the Court has to form an opinion as to relationship. It is not necessary that the person whose conduct leads to the opinion relevant under section 50 of the Evidence Act must appear as a witness or he must be dead before some one else can prove that conduct in terms of section 60 of the Evidence Act.

(Para 51)

Held (per Suri, J.) that in matters of pedigree or relationship, the witness who appears in Court to prove the disputed relationship need not in all cases confine his testimony to his own conduct as expressive of his own opinion and that he can retail hearsay within the admissible limits as long as it carries the prescribed guarantees of truth. In cases where

it becomes necessary to prove the relationship of one person to another a witness can make a statement to prove the conduct of another having special means of knowledge about the disputed relationship when that conduct expresses opinion of that person about the relationship.

(Para 46).

Held, (per Sodhi, J. Contra.) that under the restricted rule as contained in section 50 of the Evidence Act when a Court has to form an opinion about the existence of relationship of one person to another, the opinion expressed by conduct about such relationship has been made relevant but before such opinion can be let in as evidence, it has to be proved that the person whose opinion is sought to be made relevant is a member of the family or has otherwise special means of knowledge on the subject. It will be an unsafe and rather a dangerous proposition, save in cases of recognised exceptions, if a witness were allowed to depose with regard to the opinion of another when there are no means to test the correctness of that opinion unless the latter were to appear in Court as a witness and is subjected to cross-examination in regard to the grounds on which that opinion is based. Hence under section 50 of the Act, it is the opinion of the witness appearing in Court to prove the existence of any disputed relationship that is relevant provided he has special means of knowledge on the subject as a member of the family or otherwise and his opinion is expressed by his own conduct and not that the conduct of others can be taken into consideration in determining the relevancy of his opinion.

(Paras 19 and 24)

Case referred by Hon'ble Mr. Justice C. G. Suri, on 5th February, 1971 for decision of the important questions of law to the Full Bench. The Full Bench consisting of Hon'ble Mr. Justice D. K. Mahajan, Hon'ble Mr. Justice H. R. Sodhi and Hon'ble Mr. Justice C. G. Suri after deciding the important questions of law on 31st January, 1972 returned the case to the Single Bench for final decision on merits.

Regular Second Appeal from the decree of the Court of Shri Gurbachan Singh, District Judge, Patiala, dated 9th March, 1965 reversing that of Shri Harbans Singh. Sub-Judge, 1st Class, Patiala, dated 18th August, 1964, and set aside the judgment and decree of the Court below and dismissed the plaintiffs-respondents' suit with costs throughout.

JOGINDER SINGH WASU, R. K. CHHIBBAR AND S. K. PIPAT, ADVOCATES, for the Appellants.

HIRA LAL SIBAL, SENIOR ADVOCATE WITH R. C. SETIA, AND BIRINDER SINGH, ADVOCATES, for the Respondents.

REFERRING ORDER

C. G. SURI, J.—An important question of law that keeps arising in a large number of cases and which has also arisen in this second appeal is whether, in cases where it becomes necessary to prove the

relationship of one person to another, a witness appearing in Court can make a statement to prove the conduct of another having special means of knowledge about the disputed relationship when that conduct expresses the opinion of that person about the relationship. Is it necessary that the statement of the witness is to be confined only to his own conduct as expressive of his own opinion with regard to the existence of the disputed relationship ?

(2) The facts of the case and the circumstances in which these questions have arisen may be briefly stated here. One Bhura son of Hira of village Sidhuwal died on 16th June, 1962, without leaving any widow or children. Mutation of succession of his land was attested in favour of plaintiff-appellants who were described as the children of Mst. Partapi from her wedlock with Mangal of village Bahman Majra. Mst. Partapi who had predeceased Bhura was described as the latter's real sister. The defendant-respondents are collaterals of Bhura deceased. Because of the absence from the village of Partapi and her children, the defendants had been successful in taking possession of Bhura's lands. The appellants had, therefore, filed a suit for the possession of the land alleging that the defendant-respondents were in unlawful and forcible possession. The defendants had denied that the appellants were the children of Mst. Partapi or that their mother was in any way related to Bhura deceased. To prove their relationship with the deceased, the plaintiffs-appellants had examined more than half a dozen witnesses who hailed from the villages in which Mst. Partapi and her two daughters, appellants No. 2 and 3 had been married. Two out of the three appellants had also gone into the witness box to testify to their alleged relationship with the deceased Bhura and Partapi. These witnesses had deposed, amongst other things, that on the marriages of two daughters of Mst. Partapi, Bhura had come with *Nanki-Chhak* or presents that are given to the bride by the maternal relations and that on all such visits, he was being described as *Mama* or maternal uncle by Partapi's daughters and that Bhura had also been treating these girls as his nieces (sister's daughters). Some witnesses had also been examined from village Bahman Majra where Mst. Partapi had been married to depose that Bhura used to visit Mst. Partapi in that village and that he used to call her 'sister'. One or two witnesses have also stated that Partapi used to call Bhura as her brother on such visits. A resident of village Sidhuwal who was a neighbour of Bhura and his father Hira had also deposed that Partapi was the daughter of Hira and that Partapi

and Bhura used to treat each other as sister and brother. Some entries from registers of deaths and births had also been produced by the plaintiff-appellants and so far as these entries go, they may seem to support the testimony of the witnesses examined by the plaintiff-appellants from three or four villages where Partapi or her children had been born or married.

(3) The Court of first instance before whom these witnesses had been examined had critically scrutinised this evidence and had found that it was 'abundantly clear that the plaintiffs had established their relationship with Bhura deceased'. The evidence produced by the defendants was described by that Court as 'simply useless and against the pleas set up in the written statement.' One witness examined by the respondents had admitted that Hira did have a daughter though she was described to have died within a few months of her birth. Even though there is an entry, copy Exhibit P. 2, about the birth of a daughter to Hira of Sidhuwal in January, 1885 and these particulars seem to tally with Mst. Partapi, the defendants have not cared to prove the entry about the death of any daughter of Hira of Sidhuwal. The death entry, copy Exhibit P. 3, shows that a woman named Partapo died in village Bahman Majra in Sambat 2000 (1943 A.D.) and that her age at the time of death was about 60 years. The woman has been described to be the daughter of Mangal Singh which was in fact the name of Partapi's husband. A married woman is generally described by reference to the name of her husband and the word 'wald' could be a slip caused by force of habit. The tallying of the dates and places of the birth and death of the woman and her age at the time of death may seem to leave hardly any doubt that these two entries relate to the woman about whom the appellants had examined direct evidence of witnesses including a resident of village Sidhuwal. The birth entry Exhibit P. 1 shows that a male child was born in village Sidhuwal on 14th July, 1903 and that the father's name and description was given as Mangal, a Hindu Jat. Birth had been reported by One Khiwa and one of the defendants' witnesses had admitted that they did have a Chowkidar by that name in village Sidhuwal. Amar Singh appellant claims that this entry relates to him and that he was born in village Sidhuwal. It is not unusual for a married woman to have the delivery of the first child in her parents' home. Amar Singh appellant had gone into the witness box and had stated that he was born in the village of his maternal grand-parents and that he was about 60 years of age when he was

examined in Court in 1964. This birth entry would also tally in all material particulars with Amar Singh appellant and may seem to go a long way in corroborating the direct testimony of the witnesses examined by the plaintiff-appellants.

(4) The defendants had filed an appeal against the judgment and decree of the trial Court. The learned District Judge; who accepted the appeal, has been rather too strict in the assessment of the evidence examined by the plaintiffs. The lower appellate Court had even been careless enough to observe that the mutation of succession had been attested on Bhura's death in favour of the defendants; which was in fact nobody's case. The plaintiff-appellants have stated that the mutation of succession had been attested in their favour as the sister's children of the deceased. This averment is borne out by a note in the column of remarks in the Fird Jamabandi Exhibit P. 4. This Jamabandi further gives the lie direct to the defendants' plea that they owned or cultivated lands jointly with the deceased. The defendants had also admitted the averment in the plaint that the mutation of succession had been attested in favour of the plaintiffs. All that had been added was that the Collector had remanded the case for *de novo* proceedings. The mutation proceedings had become meaningless because, in the meanwhile, the controversy had been placed before the Civil Court for final determination.

(5) Fortunately for the plaintiff-appellants, the first appeal was not determined simply on a question of fact. If the lower appellate Court had found that the evidence of the witnesses examined by the plaintiff-appellants could not be believed, the matter might have been concluded by a pure and simple finding of fact. The lower appellate Court had further entered upon a discussion about the admissibility of certain portions of the testimony of these witnesses in view of the provisions of sections 50 and 60 of the Indian Evidence Act. Certain observations of the Hon'ble Judges of the Supreme Court in *Dolgobinda Paricha* v. *Nimai Charan Misra and others,* (1), were also relied upon. If the evidence had been put on the weighing scales and had been found deficient to tilt the balance in favour of the party then the assessment of the weight of that evidence by the lower appellate Court could not have been interfered with. If, however, the lower appellate Court rejects the

(1) A.I.R. 1959 S.C. 914.

evidence without putting it on the weighing scales on the ground that the evidence is legally inadmissible then the finding would not be a pure and simple question of fact.

(6) Two sections of the Indian Evidence Act which deal with the admissibility of such evidence about a disputed relationship may be reproduced at this stage :—

"S.50. When the Court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct, as to the existence of such relationship, of any person who as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under sections 494, 495, 497 or 498 of the Indian Penal Code."

* * * *

"S.60. Oral evidence must, in all cases, whatever, be direct; that is to say —

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it ;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it ;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner ;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds ;

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot

be called as a witness without an amount of delay or expense which the Court regards as unreasonable :

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection."

(7) The Supreme Court ruling in *Dolgobinda Paricha's case* (1) was cited before a Single Bench of this Court in *Ajaib Singh and others*, v. *Mann Singh and others*, (2). Shri Sibal, the learned Counsel for the respondents, argued on the basis of this ruling that the witnesses examined by the appellants could legally depose only to their own conduct and that their testimony in so far as it relates to the conduct of others would be inadmissible in evidence. If this view were to be accepted as correct, the direct evidence of witnesses who are alive today about the conduct of Bhura (since deceased) in going from village Sidhuwal to village Bahman Majra to attend the marriages of his nieces and about his bringing the *Nanki Chhak* or presents given to the brides at the time of such marriages may have to be treated as legally inadmissible. Does it mean that this important piece of evidence, vanished so to say, with Bhura's death ? This, to my mind, is not what is laid down in sections 50 and 60 of the Indian Evidence Act. The Single Bench decision in *Ajaib Singh's case* (2) was then referred to by a Division Bench of this Court in *Mehan and others*, v. *Kishi and others*, (3). The first head-note to this ruling may again appear to be rather misleading even though the paragraph of the judgment on which the head-note purports to have been based does not lead to the conclusion that Shri Sibal would like me to draw in the present case with regard to the admissibility of certain portions of the statements of witnesses examined by the plaintiff-appellalts. It has been held in Ajaib Singh's case that section 50 of the Evidence Act makes the opinion of a witness relevant only if the same was expressed by conduct and that it was the opinion of the witness based on his own conduct, that is to say, his outward or external behaviour towards the person whose relationship was to be established that could be treated as relevant. It was laid down that the witness must depose to his own conduct towards the person whose relationship is in dispute and on the basis of which he had formed

(2) 1968 P.L.R. 83.
(3) 1969 P.L.R. 225.

the opinion about that relationship. The conduct of the persons *inter se* whose relationship was in dispute was held not to be material for the purpose of section 50 of the Indian Evidence Act and what was found to be material was the witness's own conduct towards the parties to the alleged or disputed relationship. This single Bench decision in *Ajaib Singh's case,* (2) has been based on the Supreme Court ruling in *Dalgobinda Paricha's case* (1) but Shri Sibal could not draw my attention to any portion of the Supreme Court ruling which may seem to justify such a restricted interpretation of sections 50 and 60 of the Indian Evidence Act. Without meaning any disrespect, I feel that the conclusions drawn in *Ajaib Singh's case* (2) go beyond, if not altogether counter, to certain portions of the Supreme Court judgment in *Dolgobinda Paricha's case* (1). In another unreported Single Bench decision of this Court in *Bachan Singh and others* v. *Mst. Prem Kaur,* (4), decided by Mehar Singh, C.J., the view taken was just the opposite of the one taken in *Ajaib Singh's case* (2). While dealing with the contention of the appellants' counsel under section 50 of the Evidence Act, it was the conduct of the witness alone that was material to form the basis of his opinion in regard to that relationship about which the witness deposes, it was observed that the argument was misconceived because the witnesses can depose to their own conduct as well as to the conduct of others, which conduct may prove relationship. The witnesses in that case had been deposing about the conduct of others as an external expression of the opinions of those others about the disputed relationship and it was held that once the conduct of those other persons had the effect of proving relationship, nothing more was required and that it was not necessary that the witnesses should have been deposing about their own conduct of having treated the parties to the disputed relationship as such relations. It was further observed that the witnesses may perceive the conduct of others as to relationship between them and may themselves have no reason to do anything in the form of conduct in relation to those other persons.

(8) *In Mt. Parvin Kumari and others,* v. *Gokal Chand Rala Ram* (5), another Division Bench of this Court had taken a similar view. The disputed relationship to be proved in that case was a marriage between A and B. The evidence of witnesses, that people

(4) R.S.A. No. 1757 of 1959 decided on 18th September, 1969.
(5) A.I.R. (36) 1949 E.P. 35.

of the locality in which the couple resided considered them as husband and wife, was treated as a mere expression of opinion and as it was not an opinion expressed by conduct of their part, the evidence was treated as irrelevant; but the evidence of witnesses that the younger brother of the woman B, who was residing with the couple, used to address A as Jija (sister's husband) was found to be covered by the provisions of section 50 of the Indian Evidence Act and was held to be admissible in evidence.

(9) Certain portions of the Supreme Court ruling in *Dolgobinda Paricha's case* (1) would lead to the clear conclusion that a witness could depose about the conduct of an other as expressive of that other's opinion about the existence of a relationship if that other person had special means of knowledge about that relationship. In so far as the witness had seen or heard or perceived the conduct of another as expressive of an opinion about the relationship the testimony of the witness about what he had seen, heard or perceived in the from of conduct of another would be direct evidence within the meaning of section 60 of the Evidence Act. In this connection, the followig observations of the Hon'ble Judges of the Supreme Court in *Dolgobinda Paricha's case* (1) could be reproduced with advantage :—

> It is necessary to state here that how the conduct or external behaviour which expresses the opinion of a person coming within the meaning of S. 50 is to be proved is not stated in the section. The section merely says that such opinion is a relevant fact on the subject of relationship of one person to another in a case where the court has to form an opinion as to that relationship. Part II of the Evidence Act is headed "On Proof". Chapter III thereof contains a fascisule of sections relating to facts which need not be proved. Then there is Chapter IV dealing with oral evidence and in it occurs S. 60, which says *inter alia* :—
>
> "Section 60. * *
>
> * * *
>
> (for provisions of section 60 see page 429)."

If we remember that the offered item of evidence under S. 50 is conduct in the sense explained above, then there is no difficulty

in holding that such conduct or outward behaviour must be proved in the manner laid down in S. 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it; and so on. The conduct must be of the person who fulfils the essential conditions of S. 50, and it must be proved in the manner laid down in the provisions relating to proof. It appears to us that that portion of S. 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of S. 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under S. 50 or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of S. 60. This, in our opinion, is the true inter-relation between S. 50 and S. 60 of the Evidence Act. In *Queen Empress* v. *Subbarayan*, (6), Hutchins J., said :

> 'That proof of the opinion, as expressed by conduct, may be given, seems to imply that the person himself is not to be called to state his own opinion, but that, when he is dead or cannot be called, his conduct may be proved by others. The section appears to us to afford an exceptional way of proving a relationship, but by no means to prevent any person from stating a fact of which he or she has special means of knowledge.'

While we agree that S. 50 affords an exceptional way of proving a relationship and by no means prevents any person from stating a fact of which he or she has special means of knowledge, we do not agree with Hutchins J., when he says that the section seems to imply that the person whose opinion is a relevant fact cannot be called to state his own opinion as expressed by his conduct and that his conduct may be proved by others only when he is dead or cannot be called. We do not think that S. 60 puts any such limitation."

(6) I.L.R. (1885) 9 Mad. 9 at page 11.

(10) The quotations from Hutchins J. reproduced above contemplate the case of a witness deposing about the conduct of another person during that other person's life-time or after his death. There could be no question of a witness deposing about his own conduct after his death. These observations of Hutchins J. would, therefore, clearly imply that a witness can be allowed to depose about the conduct of another as expressive of the opinion about the existence of a relationship. The Hon'ble Judges of the Supreme Court have not agreed with Hutchins J. in so far as he was of the opinion that a witness could depose about the conduct of another only after that other person had died. In this connection, following portion of the Commentary from the Law of Evidence by Woodroffe and Ameer Ali may also be reproduced here with advantage :—

> "That portion of Sec. 60 which provides that the person who holds an opinion must be called does not apply to the evidence dealt with by section 50, namely, opinion expressed by conduct, which, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is so evidenced, or by that of some other person acquainted with the facts which evidence such opinion. As the testimony in both cases relates to such external facts and is given by persons personally acquainted with them, the testimony is in each case direct within the meaning of the earlier portion of that section. In *R. V. Subbaravan*, (6), it seems to be suggested by Hutchins, J., that proof of the opinion by other than the person holding it can only be given when the latter is dead or cannot be called. But if this be so, it is submitted that such a limitation is incorrect, for amongst others, the reason given above."

(11) While dealing with the Single Bench decision in *Ajaib Singh's case*, (2), the Division Bench which gave the ruling in *Mehan and others*, v. *Kishi and others*, (3), was pleased to observe as follows :—

> "The judgment of the learned Single Judge appears to be based on the authoritative pronouncement of the Supreme Court in *Dolgobinda Paricha* v. *Nimai Charan Misra and others* (1). It was held by the Supreme Court that the

essential requirements of section 50 are, (1) there must be a case where the Court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship. Their Lordships held that section 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship, and that the conduct or outward behaviour must be proved by the person who saw the conduct. The conduct has to be of the person who fulfils the essential conditions of section 50 and it must be proved in the manner laid down in the relevant provisions of the Evidence Act. Their Lordships expressly held that the portion of section 60 of the Evidence Act which provides that the person who holds the opinion must be called to prove his opinion does not necessarily delimit the scope of section 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expressed the opinion. Their Lordships observed that "conduct as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under section 50 or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of section 60."

(12) To my mind, there is nothing in the provisions of section 50 and section 60 of the Indian Evidence Act which would make the testimony of a witness 'D' inadmissible in the hypothetical example given below :—

The Court has to form an opinion about the existence of a certain relationship between A and B. C is a person who by virtue of being a family member, friend or neighbour has special means of knowledge about that relationship. As long as he keeps his opinion about the relationship to himself, no one else can possibly be in a position to make

a statement with regard to that mute or invisible state of C's mind. In such a case, C alone can make a direct statement with regard to his opinion and the last sub-para just above the two provisos in section 60 of the Indian Evidence Act contemplates a case of this kind as the holder of the mute and invisible opinion being the only direct witness of that opinion. If this mute or invisible state of mind has found expression in the form of visible or audible conduct and a person D has seen or heard that conduct of C and this conduct could only be consistent with a particular opinion of C about the disputed relationship between A and B, then D may be in a position to give direct evidence of the conduct of C that he had seen or heard even though he may not himself have any such special means of knowledge about the existence of the relationship between A and B. It cannot be said that D's evidence would be second or third degree hearsay because he is deposing to what he has actually seen or heard in the form of conduct of C which conduct was only consistent with the existence of a particular relationship between A and B. The subjective state of C's mind or opinion can find objective manifestation or expression in the form of his conduct which is consistent with his opinion about the existence of the disputed relationship between A and B and if C had special means of knowledge about that relationship then all the conditions laid down in section 50 of the Evidence Act would be found to have been satisfied and C's conduct as the objective manifestation of his opinion would become a relevant fact by virtue of the provisions of the said section. Witness D who sees, hears or perceives by anyone of his five human senses of sight, hearing, touch, taste or smell or by any other means that objective manifestation of C's opinion in the form of his conduct consistent with that opinion can testify in Court as to what he has seen, heard or perceived and D's testimony would be direct evidence of a relevant fact which would fall within one or more of the first three sub-paras of section 60 of the Evidence Act. This would be so even if D has personally no special means of knowledge about the existence of the disputed relationship between A and B because section 60 which deals with the question of mode of proof of a relevant fact by direct evidence does not lay down any such

condition of special means of knowledge beyond saying that the witness D who is testifying to a relevant fact must only have seen, heard or perceived that relevant fact which in this case is C's conduct that has conformed to the requirements of section 50 of the Evidence Act. If D's testimony can be accepted on the question of the disputed relationship then A, B and C would be in a still better position to depose about their own opinion and conduct about the relationship. If C had kept his opinion to himself and there had been no visible, audible or perceptible manifestation of his opinion then no other person could have deposed to that mute or invisible state of C's mind or opinion and it is for cases of this nature that the fourth sub-para of section 60 would come into operation to suggest the mode of proof of that mute or invisible state of mind or opinion by the direct testimony of only the holder of the opinion.

(13) Different Benches of this Court have put different interpretations on the provision of sections 50 and 60 of the Indian Evidence Act. The conclusions drawn from the Supreme Court ruling in *Dolgobinda Paricha's case* (1) are also not uniformly the same. Confusion may also appear to have been caused by a misleading head-note to the Division Bench ruling of this Court in *Mehan and others* v. *Kishi and others*, (3). Sitting alone I would not like to add another discordant note. For the proper guidance of the subordinate Courts, it may be besirable that an authoritative decision is given on these ticklish questions of law by a larger Bench; preferably a Full Bench, as I have cited above two Division Bench rulings of this Court which do not lay down exactly the same propositions of law.

(14) The records of the case may, therefore, be placed before the Honourable the Chief Justice for the constitution of a Full Bench for the decision of the important questions of law involved.

February 5, 1971.

ORDER OF THE FULL BENCH

H. R. Sodhi, J.

(15) The following two questions of law have been referred to Full Bench by my brother Suri, J:—

(1) Is it necessary that the statement of a witness is to be confined only to his own conduct as expressive of his own

opinion with regard to the existence of the disputed relationship ?

(2) Whether in cases where it becomes necessary to prove the relationship of one person to another, a witness appearing in Court can make a statement to prove the conduct of another having special means of knowledge about the disputed relationship when that conduct expresses the opinion of that person about the relationship ?

(16) The necessity for reference arose because of a doubt having been cast in the course of arguments before the learned Single Judge in this Regular Second Appeal about the correctness of a Single Bench judgment of this Court in *Ajaib Singh and others* v. *Mann Singh and others,* (2), purported to be based on the ratio of the Supreme Court judgment in *Dolgobinda Paricha* v. *Nimai Charan Misra and others* (1).

(17) Facts have been elaborately stated in the order of reference but a few of them as are necessary for the disposal of the reference may be stated hereunder. The main case will ultimately be decided by the learned Single Judge, after answers have been given by the Full Bench.

(18) Bhura son of Hira, resident of village Sidhuwal, District Patiala a sonless proprietor died without leaving a widow, on 16th June, 1962. Chajju Singh and others defendant-respondents, claiming to be collaterals of Bhura deceased took possession of his land. Amar Singh and others, plaintiffs, instituted a suit for possession against the defendant it being pleaded by them that the latter were in unlawful and forcible possession of the suit land and that the plaintiff-appellants being the children of Mst. Partapi who was Bhura's real sister and had predeceased him were entitled to recover the possession as heirs of the deceased. The defendants denied that the plaintiffs were children of Mst. Partapi or that their mother was in any way related to Bhura. Relationship of the plaintiffs with Mst. Partapi and that of Mst. Partapi with the deceased, therefore, came in dispute. An issue was framed by the trial Court to the effect whether the plaintiffs are the heirs of Bhura Singh deceased and as such entitled to succeed to the property in dispute. Evidence was led to establish relationship of the plaintiffs with Mst. Partapi and that of the latter with Bhura.

The evidence so produced included statements of witnesses who deposed with respect to variety of facts including conduct of Bhura deceased in regard to the daughters of Mst. Partapi as evidenced at the time of the marriages of the said daughters. For instance, it was stated that Bhura had come with *Nanki Chhak* (presents from the maternal uncle or maternal grandfather). It was said that Bhura had been treating these girls as his nieces. Mst. Partapi was married in village Bahaman Majra and villagers from that village made statements to depose that Bhura used to visit Mst. Partapi in that village and call her as his sister and that the latter would call him as her brother. It is not necessary to refer to the details of the statements of different witnesses as to answer the reference, it is not necessary to do so. The trial Court held the relationship of the plaintiffs with Bhura deceased proved whereas the Court of first appeal took a contrary view. The statements of some witnesses were held by the lower appellate Court to be inadmissible in evidence as they did not conform to the provisions of section 50 read with section 60 of the Indian Evidence Act, 1872, referred to hereinafter as the Act. In discarding evidence regarding disputed relationship, reliance was placed by the Court of first appeal on the judgment in *Dolgobinda Paricha's case* (1) (supra). It was consequently held that the plaintiffs were not proved to be the children of the sister of Bhura. When the matter came up in second appeal before Suri J., the same question about the admissibility of evidence was raised and it is in these circumstances that the questions of law propounded by the learned Judge are before the Full Bench.

(19) Answers to the questions depend on interpretation of sections 50 and 60 of the Act and also on an understanding of the true import of the decision of their Lordships in *Dolgobinda Paricha's case* (1). The provisions of these two sections, it is necessary to reproduce at this stage for facility of reference :—

> "50. When the Court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct, as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :
>
> Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act,

or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code."

* * * * *

"60. Oral evidence must, in all cases, whatever, be direct; that is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it ;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it ;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner ;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds :

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable :

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks it require the production of such material thing for its inspection."

Section 60 lays down the basic rule of law of evidence that to prove any fact in a Court it is the best evidence that must be produced and such evidence is always the direct one. Evidence is direct when a witness deposes to a fact which he has perceived with his own senses, as stated in the said section. This excludes evidence of reputation, opinions and beliefs of individuals in order to prove the existence of any fact to which such reputation, opinion or belief relate unless reputation, opinion or belief is itself relevant. Evidence of reputation, opinion or belief falls in the category of what is commonly called hearsay evidence. This section further specifically provides that whenever an opinion evidence

is made admissible, it must be the evidence of a person who holds opinion on particular grounds ruling out thereby the admissibility of evidence about the opinions of others. The first proviso permits the production of treatises commonly offered for sale and containing opinions of experts if the author is dead or cannot be found or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which a Court, in the circumstances of the case, considers unreasonable. Sections 45 to 50 deal with cases where opinions are relevant to assist the Court to form its own opinion with regard to the fact or facts in issue before it. Since the weight to be attached to the opinion must necessarily depend on the reasons on which the opinion is founded, section 51 provides that whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant. "Opinion", as observed by their Lordships of the Supreme Court in *Dolgobinda Paricha's case* (1) (supra) means "something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question." Opinions of person who are dead or cannot be found or have become incapable of giving evidence or whose evidence cannot be procured without an amount of delay or expense considered by the Court to be unreasonable have in certain cases been made admissible under section 32 of the Act. Whenever an opinion is made relevant, conditions have been laid down by the legislature to provide a check to the letting in of all loose gossips or hearsay to reasonably assure that opinions so expressed may help the Court in arriving at a conclusion about the existence of a fact in issue. To establish genealogy evidence of repute prevailing in the family and neighbourhood is admissible under the common law of England and treated as a presumptive evidence thereof. Family conduct and treatment indicate acknowledgement of a particular relationship in the family and declarations or statements made by family members or by any knowledgeable sources are used to prove the truth of the matter stated therein. It is indeed considered to be original evidence showing the conduct of the person who made such a declaration amounting to acknowledgement by the family but all that is necessary is that the sources from which the declaration about family relationship came must be competent sources. Such evidence carries with it the circumstantial probability of trustworthiness. Evidence of general reputation as such is not made admissible as proof of relationship and position in this country where the law of evidence has been codified is not different in this respect. Under the

restricted rule as contained in section 50, when a Court has to form an opinion about the existence of relationship of one person to another, the opinion expressed by conduct about such relationship has been made relevant but before such opinion can be let in as evidence, it has to be proved that the person whose opinion is sought to be made relevant is a member of the family or has otherwise special means of knowledge on the subject. It will be an unsafe and rather a dangerous proposition, save in cases of recognised exceptions, if a witness were allowed to depose with regard to the opinion of another when there are no means to test the correctness of that opinion unless the latter were to appear in Court as a witness and is subjected to cross-examination in regard to the grounds on which that opinion is based. The cross-examination of the witness deposing to the opinion of another can only weaken his statement but the assertion of the witness will still stand without there being means available to counteract the same. This is why section 60 provides that the opinion evidence must also be direct or, in other words, it must be the evidence of the person who holds that opinion. What is important under section 50, therefore, is the conduct of the witness, such conduct being the outward manifestation of the state of mind of that witness. It is such conduct which can reasonably be supposed to have been willed by the belief or opinion that is made relevant. The following observations were made in *Chandu Lal Agarwala* v. *Khalilar Rahman* (7), which decision was approved by their Lordships of the Supreme Court in *Dolgobinda Paricha's case* (1) :—

> "The offered item of evidence is 'the conduct', but what is made admissible in evidence is 'the opinion', the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision: its immediate effect is only to move the Court to see if this conduct establishes any 'opinion' of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer 'the opinion', the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the 'opinion'.
>
> When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, 'the opinion of a

(7) I.L.R. (1942) 2 Cal. 299=A.I.R. 1943 Cal. 76.

person'. It still remains for the Court to weigh such evidence and come to its own opinion as to the 'factum probandum'—as to the relationship in question."

The combined effect of sections 50 and 60 of the Act came up for consideration before their Lordships in *Dolgobinda Paricha's case* (1). A dispute arose in that case as to whether the plaintiffs who were respondents in the appeal were the sons of the daughters of Lokenath Parichha. It required further determination of the question whether Ahalya, Brindabati and Malabati were daughters of Lokenath Parichha or daughters of Baidyanath Misra. Satyanand was the last male owner of the property in dispute on whose death his mother Haripriya succeeded to the estate. Lokenath Parichha was the husband of Haripriya. Haripriya sold a portion of the property inherited by her and a suit was instituted by the reversioners of Lokenath Parichha challenging the alienation. This suit was decreed and the alienation declared to be without necessity and not binding on the reversioners after the death of Haripriya. Oral and documentary evidence was led to prove the alleged relationship of the plaintiffs and on a consideration of the same the Subordinate Judge reached the conclusion that they were proved to be sons of the daughters of Lokenath Parichha and on that finding the suit was decreed. The High Court affirmed the finding on appeal and an appeal to the Supreme Court on a certificate granted by the High Court met with no success. Oral evidence about relationship consisted of the testimony of three witnesses, namely, Janardan Misra, Sushila Misrain and Dharanidhar Misra. The High Court relied only on the evidence of Dharanidhar Misra which it considered to be admissible but rejected that of the other two on the ground that it did not conform to the requirements of section 50. The view taken by the High Court was that the depositions of the two witnesses, Janardhan Misra and Sushila Misrain were "based upon their having heard the declarations of such members of the family as were their contemporaries or upon the tradition or reputation as to family descent handed down from generation to generation and recognised and adopted by the family generally. This may partly, if not wholly, be based upon conduct within the meaning of section 50, such as treating and recognising the mothers of the plaintiffs as Lokenath's daughters, and the plaintiffs as his daughter's sons. They, judged from their respective ages, could not be considered to have direct knowledge of the matters in issue." The learned Judge who delivered the judgment of the Court scanned the evidence of each

witness closely and observed that "they have in no way deposed about such conduct of the members of the family of Lokenath as could be attributed to the knowledge or belief or consciousness of those who had special means of knowledge of the relationships or that the relationship was recognised and adopted by the family generally".

(20) Before the Supreme Court an argument was raised that evidence of none of the witnesses was admissible within the meaning of section 50 of the Act. Their Lordships discussed the scope of Sections 50 and 60 and accepted as correct the observations of the Privy Council in *Rokkam Lakshmi Reddi and another* v. *Rokkam Venkata Reddi and others* (8), wherein it was stated that section 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship. The essential requirements of section 50 have been laid down by their lordships in the following terms :

> "(1) There must be a case where the court has to form an opinion as to the relationship of one person to another ;
>
> (2) In such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact ;
>
> (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words the person must fulfil the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct."

Reference was then made by their Lordships to section 60 appearing in Chapter IV of the Act and in this context it is useful to quote their observations hereunder *in extenso* :—

> "It appears to us that that portion of section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of section 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact,

(8) A.I.R. 1937 P.C. 201.

> may be proved either by the testimony of the person himself whose opinion is evidence under section 50 or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of section 60."

Hutchins J. had observed in *Queen-Empress* v. *Subbarayan and another* (6), "that proof of the opinion, as expressed by conduct, may be given, seems to imply that the person himself is not to be called to state his own opinion, but that, when he is dead or cannot be called, his conduct may be proved by others." This observation was not accepted by their Lordships as a correct enunciation of law it being observed that "we do not agree with Hutchins J. when he says that the section seems to imply that the person whose opinion is a relevant fact cannot be called to state his own opinion as expressed by his conduct and that his conduct may be proved by others only when he is dead or cannot be called." The specific rejection of the limitation placed by Hutchins J. leaves no room for doubt that a witness can, under section 50, be called to state with regard to his own opinion but such opinion will be relevant only if it is expressed in conduct. The Supreme Court reiterated what it had observed earlier in *Sitaji and others* v. *Bijendra Narain Chowdhary and others* (9), some observations from which may be reproduced here as well with advantage :—

> "A member of the family can speak in the witness box of what he has been told and what he has learned about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay derived from deceased, not living persons) and is not merely repetition of the hearsay opinion of others, and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge (for example, whether before the dispute or not) would affect its weight but not its admissibility. This is, therefore, legally admissible evidence which, if believed, is legally sufficient to support the finding."

(9) A.I.R. 1954 S.C. 601.

(21) The tests as indicated above were applied by their Lordships to the statements of all the three witnesses, namely, Janardan Misra, Sushila Misrain and Dharanidhar Misra in *Dolgobinda Paricha's case* (1) and the same were held to be admissible. Janardan Misra and Dharanidhar Misra were held to have special means of knowledge. Janardan Misra had said that he attended the marriage of Malabati, daughter of Lokenath, when Lokenath was living. He further said that he was present when the first two daughters of Malabati were married and also at the time of the Upanayan ceremonies of plaintiffs 1 and 2. According to this witness, Shyam Sunder Pujari, son of a sister of Lokenath, acted as a maternal uncle at the time of the marriage of the eldest daughter of Malabati and Dayasagar Misra carried Radhika, second daughter of Malabati, at the time of her marriage. The evidence of the opinion of Janardan Misra as expressed by his conduct, namely, his attending the marriage of Malabati as daughter of Lokenath and his attending the marriages and Upanayan ceremonies of the grand-children of Lokenath, was held to conform to the requirements of section 50. It was observed that Janardan Misra could not be deemed to have attended the marriages and ceremonies as a casual invitee, but as a member of the family who was present since he believed that Malabati was a daughter of Lokenath and the other were grand-children of Lokenath with regard to whom he deposed in Court. Dharanidhar Misra was the maternal uncle of Janardan Misra. He too had attended the marriages of Radhika and Sarjoo, and the "thread" ceremonies of Lakshminarayan and Nimai. He had also attended the "gansana" and marriage feasts of Mandhata's daughters. The attendance of the witness on these occasions was held to be evidence of conduct expressive of his opinion. It was the conduct of the witnesses that was throughout being considered by their Lordships in judging the relevancy of the statements of those witnesses under section 50. P. C. Pandit, J., if it may be said with all respect, was, therefore, right in holding in *Ajaib Singh's case* (2) (supra) that "it is the witness's opinion based on his own conduct—his outward or external behaviour towards the persons whose relationship was to be established—that would be relevant. The conduct must be of such a type that must show to the Court that the witness himself was convinced about the said relationship". The condition precedent to admissibility of such evidence, of course, is that the witness must have special means of knowledge with regard to the existence of the disputed relationship whether as a member of the family or otherwise.

(22) The result is that it is the opinion of the witness that is relevant provided that opinion is expressed by conduct.

(23) After considering the matter in the light of the ratio of the decision in *Dolgobinda Paricha's case* (1), it is wholly futile to refer to other decisions either taking the same or the contrary view as it is the law as laid down by their Lordships of the Supreme Court that is to prevail.

(24) For the foregoing reasons the answer to the first question must be in the affirmative it being held that under section 50 of the Indian Evidence Act it is the opinion of the witness appearing in Court to prove the existence of any disputed relationship that is relevant provided he has special means of knowledge on the subject as a member of the family or otherwise and his opinion is expressed by his own conduct and not that the conduct of others can be taken into consideration in determining the relevancy of his opinion. In other words, it is the opinion of the witness expressed by his own conduct that is relevant under section 50.

(25) There are cases when statements of other persons to establish the existence of any relationship by blood, marriage or adoption become relevant as for instance as provided for in section 32(5). Section 32(5) reads as under :—

> "32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—
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> * * * * * *
>
> * * * * * *
>
> (5) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriag or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

It follows from the above quoted provision that if a person having special means of knowledge about the existence of a disputed relationship made a statement before any dispute about such relationship was raised, his statement can be proved by others provided the person making the statement sought to be proved in Court is dead or cannot be found or has become incapable of giving evidence or his attendance cannot be procured without an amount of delay or expense which under the circumstances of the case the Court considers to be unreasonable. Such a statement is in the nature of hearsay evidence but whatever weight may be attached to it ultimately it is rendered admissible thereby meriting consideration on the ground of the likelihood of its being true as the same was made at a time before any controversy about the existence of the disputed relationship had arisen. Similarly, conduct of a person other than a witness appearing in Court is relevant to prove a disputed relationship but not as an opinion of the witness expressed by his conduct within the meaning of section 50. A witness deposing to the conduct of another person as seen by him is not deposing to his opinion or, to that of the other person but to a fact observed by him and the Court will decide in each case where the conduct so observed by the witness, by itself or in conjunction with other facts renders the existence of the fact in issue, namely, relationship probable or improbable or is in any way inconsistent with it. Such evidence will be relevant under section 11 though obviously a foundation has to be laid for admitting the same and unless the conduct is of a person who is a family member or could have special means of knowledge about the disputed relationship, the evidence of conduct cannot be of any assistance so as to make existence of the fact in issue probable or improbable. The language of section 11 is indeed very wide but it is not intended to let in every collateral fact so as to create confusion in determining the real issue. The evidence, sought to be produced, must be logically relevant and whether any evidence of conduct in a particular case is of that nature, which can render probable or improbable the existence of a fact in issue, has to be determined on the circumstances of each case. The conduct of a person wholly unconnected with the family or having no special means of knowledge about the alleged relationship will be absolutely irrelevant and not lending any assurance in determining the relationship. The offered item is the conduct of a third person and it is not admitted under section 50 as the opinion of the witness who gives evidence with regard to that conduct but only as a fact observed by the witness whatever be the state of mind of the person to whose conduct

reference is being made. In other words, it is not evidence of the opinion of another. On the other hand, section 50 deals with a different situation altogether and permits a witness to express his own opinion about the disputed relationship provided there is conduct on his part in support of that opinion, but it does not follow that a witness is prohibited from stating about other facts which may in a proper case include conduct of another as observed by him.

(26) The view of Hutchins, J. in *Subbarayan's case* (6) that a witness could not give his own opinion and that his conduct could be proved only by others, was not accepted in *Dolgobinda Paricha's case* (1) but it does not emerge as a corollary therefrom that the admissibility of any evidence of conduct if it is otherwise relevant under the law must be ruled out. For instance, if a question arises whether 'B' is the son of 'C' and 'A' has seen 'B' conducting himself in a particular manner towards 'C', 'A' is not barred from deposing as a witness in Court what he has seen in regard to the said conduct of 'B'. The statement of 'A' to this effect will be direct and original evidence within the meaning of section 60 and section 50 of the Act has no bearing. With this approach, my answer to the second question too is in the affirmative it being held that a witness appearing in Court can make a statement to prove the conduct of another about the disputed relationship—no matter such conduct may by a logical reasoning be said to be expressive of the opinion of that person about such relationship but such evidence will not be admitted as opinion evidence under section 50.

(27) With these answers, the case should go back to the learned Single Judge for disposal in accordance with law.

C. G. Suri, J.

(28) I have read the judgment that my learned brother Sodhi, J. proposes to deliver in this case. I agree that the answer to the first part of the question, passed in the order of reference, should be in the affirmative but I would like my answers to both the parts to be a little more consistent.

(29) My question in the order of reference had received its shape and form from certain observations made by a Single Bench of this Court in *Ajaib Singh's case* (2) (supra). My impression was that the

answers to the latter part of the question would follow as a corrollary from the answer to the first part but the re-arrangement of the matter by my learned brother gives the impression that two distinct points have been referred for the decision of the Full Bench. I would, therefore, repeat at this stage my question in the order of reference which may be read as a part of this judgment :—

> "Whether, in cases where it becomes necessary to prove the relationship of one person to another, a witness appearing in Court can make a statement to prove the conduct of another having special means of knowledge about the disputed relationship when that conduct expresses the opinion of that person about the relationship. It is necessary that the statement of the witness is to be confined only to his own conduct as expressive of his own opinion with regard to the existence of the disputed relationship?"

(30) Unindicated references in my judgment are to the sections and provisions of the Indian Evidence Act. *As Dolgobinda Paricha's case* (1) is the only Supreme Court ruling that has been discussed in this judgment, I would be referring to it hereafter simply as the Supreme Court ruling and references to any observations of the Supreme Court would be as derived from the said ruling.

(31) One of the contentions raised by Shri Sibal, the learned counsel for the respondents, which was based mainly on the Single Bench decision of this Court in Ajaib Singh's case was that it was the opinion of a person that was the relevant fact to be proved under section 50 and that in view of the fourth clause (just above the provisos) of section 60, the holder of the opinion had to appear personally in the witness box to prove that opinion or the conduct that had taken shape from that opinion. Reliance was also placed on the setting or the chapter in which section 50 had been placed in the Act. If the language of the section or its setting in the context of the scheme and arrangement of various sections, parts and chapters and their headings give us the impression that the relevant fact under section 50 is the opinion, then illustration (b) under that section gives the clear impression that it is the conduct of the family members who treat 'A' and 'B' as father and son which is relevant as this conduct has conformed to the requirements of section 50. A cue or guidance can be had from the scheme of arrangements or headings of parts and chapters in the Act only if the language of the

section to be interpreted is not clear enough but where the Legislature has itself tried to make its meaning clear by providing illustrations under the section, then those illustrations may appear to furnish a better clue to the meaning sought to be conveyed by the language of the section than the setting in which the section appears in the Act or the headings that the sections, parts or chapters carry. It is true that we are trying to pursue an elusive thing like an opinion but we have of necessity to hold on to something more tactile like the external manifestation of that opinion in the shape of conduct of the holder of the opinion. The relevancy of a fact is not destroyed by taking it to pieces because each piece would by itself become a relevant fact and when taken in connection with other pieces would help us to reconstruct the relevant fact. Each piece, therefore, becomes 'relevant' or a 'fact in issue' as defined in section 3. Each ingredient of section 50 being a part of a transaction would by itself be relevant in view of these definitions read with the provisions of section 6. Each ingredient being a link in the chain of cause and effect will be relevant in view of section 7. Each ingredient in connection with other ingredients makes the existence of the disputed relationship highly probable and becomes relevant under the second part of section 11. Taken alone or in connection with other facts, each ingredient becomes relevant or a fact in issue and no Court can decline to accept evidence of any of these ingredients which are relevant or facts in issue. The truth of what I have said above would be self-evident to any one who takes the trouble of looking up the above mentioned definitions in section 3 or the provisions of sections 5, 6, 7, 11(2). The various sections in chapter II carrying the heading "Of the relevancy of facts" enumerate the hundred and one ways in which one fact could be relevant to another. Section 50 which falls under this chapter may or may not open any new doors for the admission of a particular type of evidence but it does not in any case close the doors that have been opened for the admission of evidence by the other provisions or sections of the Act. The relevant fact defined in section 50 is a mixture of the three ingredients mentioned therein and all the three ingredients have to co-exist to give us that relevant fact. Confusion would be created if we are inclined to think that any one or the other ingredient taken alone can be the relevant fact and not the other ingredients.

(32) It has been observed in some of the rulings that the defective languages of section 50 creates a wrong impression on which Shri

Sibal's argument may appear to be based. One of these rulings was in the case of *Natbar Paricha and others* v. *Nimai Charan and others* (10). It was this division Bench ruling of the Orissa High Court that had been affirmed on appeal by the Supreme Court in *Dolgobinda Paricha's case* (1) (supra) Ray C.J. was pleased to observe that section 50 was ambiguously worded and may tend to mean and refer to the opinion of the witness in the box. There is nothing to justify the substitution of the word 'witness' for the word 'person' anywhere in section 50 because in that context it could be argued that some conduct or other by which the witness had expressed his opinion had to be proved so that the opinion of the witness could be let in as admissible media of proof for the purpose of formation of Court's own opinion as to the relationship. Ray C. J. had no hesitation in observing that such a reading of the section was not permissible. One thing was plain and clear to my Lord the Chief Justice that the conduct to be proved was of any person who as a member of the family or otherwise had special means of knowledge on the subject. Pedigree is nothing but a simultaneous statement of a number of births, deaths and marriages. A birth, death or marriage like any other fact is capable of being proved by direct evidence of any one who has seen the acts constituting the births, deaths and marriages.

(33) It was then observed by Ray C. J. that questions of pedigree or relationship by blood, marriage, adoption etc. often arose for proof in judicial proceedings many years after the facts had occurred. The strict enforcement of the ordinary rule of evidence that the evidence should in all cases be direct would, therefore, lead to grave failures of justice. Law was, therefore, found to have devised an exception to the rule excluding hearsay evidence. Under this exception, the parties were allowed to have recourse to hearsay evidence within certain limits. This hearsay evidence has at places been called as traditional evidence meaning thereby the evidence in the shape of traditions about pedigree and family relationships handed down from one generation to the other. This traditional evidence has also been sometimes called evidence of habit and repute in the shape of the behaviour or conduct of the public at large towards the parties to the disputed relationship. If hearsay evidence is admitted in such cases, it is only because it carries the guarantees prescribed by law that it is true but it is hearsay evidence none the less. When the Supreme Court ruling says while

(10) A.I.R. 1952 Orissa 75.

affirming the Division Bench ruling of the Orissa High Court in *Natbar Paricha's case* (10) that retailing of gossip as an extreme form of hearsay is to be avoided, it obviously does not mean that hearsay evidence within the admissible limits had also to be ruled out. In fact, Ray C. J. was inclined to have a very cautious approach while judging the acceptability of the evidence of two of the three witnesses examined in the case even after he had laid down very broad propositions of law after reference to some English cases. Sushila Misrain was the youngest of the three witnesses examined in the case and her testimony as such could be described as the weakest of all. Even though Ray C. J. was inclined to entertain some doubts as to the admissibility of Sushila Misrain's evidence, the Hon'ble Judges of the Supreme Court observed in para 8 of their judgment (as reported in the All-India Reporter) that her evidence would also be admissible on the same criteria as the evidence of the other two witnesses Janardhan Misra and Dharnidhar Misra. I shall be referring in detail to the evidence of Sushila Misrain further on in this judgment because paragraph 8 of the Supreme Court ruling has failed to make the desired impact in some quarters because of its sweet brevity even though it was so pregnant with meaning. If the Supreme Court found it unnecessary to discuss Sushila Misrain's evidence, it was only because the evidence of the other two witnesses who were older in age and whose evidence as such could be described as direct evidence was found to have already tilted the balance in favour of the party for whom Sushila Misrain had appeared as a witness. The Hon'ble Judges of the Supreme Court seemed to have taken it for granted that after the lucid exposition of the facts and law in the first seven paragraphs of the judgment, nobody could possibly have doubts in applying the test indicated to the testimony of any of the witnesses.

(34) The Indian law of evidence is based on the English Common Law and if section 50 is ambiguously worded, we can for our guidance fall back upon rulings of the Courts in England. This was exactly what had been done by Ray C. J. in *Natbar Paricha's case* (10). The exception made in pedigree cases to the general rule that hearsay evidence is to be avoided has found statutory recognition in section 32(5). The exception to the rule justifies the admission of proof of declarations as to relationships handed down from man to man, that is hearsay upon hearsay. The exception to the general rule is justified as a rule of necessity because of the difficulty of obtaining any other traditional evidence in matters of family history. On the basis of the

observations of Lord L. C. Erskine in *Vowls* v. *Young*, (11) it was laid down that Courts of law are obliged in cases of this kind to depart from the ordinary rules of evidence as it would be impossible to establish descents according to the strict rules of evidence. In cases of pedigree, therefore, recourse is to be had to a secondary sort of evidence, the best that the nature of the subject will admit. On the basis of the observation of Peckham J. in *Esenlorted* v. *Clum*, (12) that in many cases traditional declarations may be the only evidence which is available and, therefore, becomes the best evidence. This rule of necessity is not without its guarantee of trustworthiness. One of the particular significance is the circumstantial probability, "the circumstances may be such that sincere and accurate statement would naturally be uttered and no plan of falsification be formed." Hence the rule limiting the admissibility to statements made *ante litum mortem* or the conditions may be such that the statements are made under such publicity that error if it had occurred would probably have been detected and corrected. These safeguards justify the uniform acceptance by eminent judges of the circumstantial probability as a test of the trustworthiness of such hearsay evidence. After discussing a large number of English rulings, Ray C. J. was pleased to observe that the necessity rule of admitting traditional evidence as media of proof of ancient pedigrees will apply to opinions expressed by conduct and that this rule had been enacted as section 50. The section makes opinion expressed in conduct admissible. The evidence of the eldest witness Dharnidhar Misra who was 96 years of age and who gave the various relationships that make up the family free from his own knowledge was accepted as true testimony of a reliable witness. As regards the other two younger witnesses, knowledge of relevant facts as to relationship could not be attributed to them. Their evidence though true and otherwise acceptable was not shown to have been based upon their having heard the declarations of such members of the family as were their contemporaries or upon traditions or reputations as family descent handed down from generation to generation and recognised and adopted by the family generally. Judged from their respective ages, these two witnesses could not be considered to have direct knowledge of the matters in issue and doubt was, therefore, entertained as regards the acceptability of the evidence of these two witnesses. On appeal, the Supreme Court felt that Ray C.J.'s approach was unnecessarily much too cautious and that the evidence

(11) (1806) 13 Ves. 140.
(12) 126 N.Y. 552 S.E. 1024.

of all the three witnesses was admissible. This was also the view of Narasimhan J. of the Orissa High Court who was a member of the Division Bench that had given the ruling under appeal in the Supreme Court.

(35) As the laying down of the theory in the abstract has not created the desired impression in some quarters, we could refer at some length to the testimony of Sushila Misrain, the youngest witness in the case cited. The relationship to be proved in that case was whether the mothers of the plaintiffs namely Malabati and Ahilya were the daughters of Lok Nath or the co-sanguine sisters of Lok Nath's son Satya Nand born from Lok Nath's second marriage, Lok Nath had died in 1895 while Satya Nand had died in 1902-03. The youngest witness Sushila Misrain who belonged to another family remotedly connected by ties of marriage had been born in 1903. It is obvious that Sushila Misrain was either born after the deaths of Satya Nand and Lok Nath or she may have been such a babe in arms when Satya Nand died that she could not possibly have behaved or conducted herself personally towards one of the parties to the disputed father-daughter or brother-sister relationships. She could not, therefore, have had any personal opinions about the existence or non-existence of these relationships. She could not, therefore, have behaved or conducted herself in any particular manner towards these parties to the disputed relationships *inter se* and she could not have been deposing to her own conduct towards the persons whose relationship was in dispute and on the basis of which she had formed the opinion about that relationship. In spite of all this, her testimony was found to be admissible not only by the Division Bench of the Orissa High Court but also by the Supreme Court. Her testimony had obviously related to the traditions that had been handed down to her by the ancestors or on the basis of the conduct of the other two witnesses towards Malabati and Ahilya that she had been seeing for herself. She was apparently not talking about her own conduct towards the parties to the disputed relationship *inter se*. Her evidence included an element of hearsay which was none the less found to be admissible on such questions of pedigree or relationship.

(36) There is some confusion as to whether a witness appearing in Court has to satisfy all the three conditions mentioned in section 50. This confusion occurs when one is inclined to substitute the word 'witness' for the word 'person' in that section. All the three

ingredients must be shown to exist in one person whether dead or alive, before the Court woud have before it the relevant fact defined in section 50. It is, however, not laid down anywhere that all these ingredients have to be proved in Court by one and the same witness. Different witnesses may, therefore, bring to Court piece-meal evidence about the relevant fact. It is not necessary that one and the same witness should bring all the evidence in a lump which may help us to reconstruct the fact defined in section 50. There could be an unintended collaboration of efforts on the part of these witnesses without any planned or well thought out co-ordination or consensus of minds in bringing to Court the component parts from which the relevant fact defined in section 50 can be reconstructed. As soon as the Court finds on the basis of the evidence produced by one and the same witness or by different witnesses that all the three ingredients mentioned in section 50 have been proved to exist in one person, whether dead or alive or whether appearing in Court or not, the Court would have before it the relevant fact defined in section 50. It is not necessary that the person whose opinion as expressed by conduct has been proved should himself come into the witness-box. In some cases this person may be the opposite party interested in denying the existence of the disputed relationship.

(37) An extract from "*Queen Empress* v. *Subbarayan,* (6)" has then been reproduced and discussed in paragraph 7 of the Supreme Court ruling. Hutchins J. was found to be imposing an uncalled for limitation on the interpretation of section 50 when he said that another person's conduct as a manifestation of other person's opinion could be proved by a witness only after that other person had died. The conclusion is obvious that a witness could prove another person's conduct as manifesting that other person's opinion, not only after that other person's death but also during his lifetime. If there is any difficulty in construing this clearly expressed passage, one has only to turn to paragraph 8 of the Supreme Court judgment where it may appear to have been taken for granted that after the lucid exposition of the law in the earlier paragraphs, no one could possibly dispute that the evidence of the youngest witness Sushila Misrain would also be admissible on the same criteria. This youngest witness in the case was apparently talking about some family traditions or the conduct of the other two elder witnesses that she had been observing. These two witnesses were still alive to be deposing about their own conduct and that was why Sushila Misrain's evidence could be described to be relatively weaker or of secondary character as compared to the

evidence of the two elder witnesses. She was talking about the conduct and behaviour of the other two witnesses during their lifetime and not after their death. Both the superior and the inferior evidence given by all the three witnesses was, however, declared to be admissible. Section 60 does not in any way lay down any hard and fast principle that only the best evidence has to be accepted in all cases and that where weaker evidence exists side by side with better evidence, it has to be rejected for all purposes. The weaker evidence has to be assessed for all that it may be worth. There could be two opinions in some cases as to which is the superior and which is the inferior evidence. The admissibility of a piece of evidence is a proposition of law of universal application while the credibility of that piece of evidence would be a question of fact to be determined on the peculiar circumstances of each case.

(38) There appears to be some confusion as to when a person sworn into the witness-box is talking about his own opinion or conduct and when he is talking about the opinion and conduct of others. As no amount of abstract theorising has cleared up the matter, I may be permitted to speak in parables.

(39) Let us suppose that the marriage of a Hindu girl named 'D' is taking place in a particular year. There are a number of guests present but it could be said that they had been invited there because of their social, business, natural or blood connections with the family of the bride or the groom. These witnesses would have personal opinions and special means of knowledge and when they appear in the witness-box some decades later to prove the marriage that they had witnessed, there could be some mixing up of the question whether these guests appearing as witnesses were talking about their own conduct or opinion towards the parties to the disputed relationship or whether they were talking of the conduct and opinion of the parties to the disputed relationship *inter se*. I would, therefore, in order to emphasise my point take the extreme case of a witness who is complete stranger to the community that has gathered at the marriage. Let us suppose that the musical band engaged on the occasion is headed by an Anglo-Indian who is there only for mercenary reasons connected with his avocation in life. He has no personal opinions or special means of knowledge about the disputed relationship. The significance of the ceremonies is lost on him as he does not belong to the social community of the parties and does not understand their language. He, however, has strong powers of observation and a good

memory. He sees a person named "F" performing the *kanyadan* ceremony. Amongst some sections of the community, part of the ceremony consists of pouring out of some pop or puffed rice (*phullian*) into the hands of the groom jointly by the bride and her father. This signifies that the care and protection of the girl have henceforth been entrusted to the bridegroom. The bandmaster sees another person named "MU" taking out some red and white ivory bangles and putting them on in "D's" fore-arms (*churra charrana*). He also sees "MU" making a present of a few silk suits and gold ornaments to "D" (*Chhak*). The significance of the ceremonies is completely lost on the bandmaster even though he stands mentally alert but socially isolated from the rest of the community. The objective aspects of the ceremonies leave an indelible imprint on his memory. He hears the words 'Mama' being used when 'MU' makes the present of the ivory bangles and other valuable articles and wonders in his mind why the family members are using the word, in respect of a maiden girl, which in his language means a mother, Like the Anglo-Indian that he is, he disdainfully gives no further thought to the talk of these natives. He is so ignorant of the language of the community or the significance of their ceremonies that he may strike up the most inopportune tune of *'ghar ghar me dewali hai, mere ghar me andhera'* in a house bedecked all over with illuminations in the midst of the dark neighbourhood. It is not without any purpose that I am raising these racial, social or lingual walls around the bandmaster to put him in a state of complete mental isolation from the rest of the community. The blissful ignorance of the bandmaster is going to help us in meeting some pedentic thinking that exists on the subject. The idea is to make it clear that the bandmaster has no personal opinion about the disputed relationship of "F" or "MU" with "D" and that his own conduct towards these persons is, therefore, not shaped by any such opinions. It cannot be said that the bandmaster's outward or external behaviour was of a tenor which was consistent with the existence of the disputed relationship of "F" or "MU" with "D".

(40) Let us suppose that some decades later it becomes necessary in a case to prove the relationship of "F" or "MU" with D. The bandmaster is called into the witness-box to depose to what he had seen or heard about the ceremonies performed at the time of "D's" marriage. He gives a very accurate objective description of the ceremonies in the Court. He is deposing to some thing that he had seen or heard with his own eyes and ears. He had seen the conduct of "F" and "MU" towards "D" without realising what their behaviour

or conduct *inter se* had meant. He had no special means of knowledge about the existence or non-existence of the disputed relationship and he held no personal opinions about this relationship. Still he is describing the conduct of "F" and "MU" towards "D" and this conduct or behaviour is a part of a relevant fact. As such, this part is by itself 'relevant' or the 'fact in issue' in accordance with the definitions of these words in section 3. I do not see how any Court can refuse to accept the evidence of the bandmaster in view of the provisions of sections 5, 6, 7 and 11(2) and other provisions in the chapter. The bandmaster's testimony is direct perception evidence and is being offered in the modes prescribed by one or more of the first three clauses of section 60.

(41) In order to reconstruct the relevant fact defined in section 50, it is however necessary to prove that the conduct or behaviour of "F" or "MU" towards "D" was motivated by a particular opinion about the existence of the relationship. For this purpose, one could call into the witness-box an all-knowing priest who has for many years been the *prohit* of a number of families in this community. He need not be the priest who had conducted the marriage ceremony of "D". The priest has special means of knowledge with regard to social customs, usages, traditions and tenets of the community of "F", "MU" and "D'. He comes out with his opinion that from the conduct of "F" and "MU" towards "D" as described by the bandmaster. the conclusion is inescapable that "F's" conduct was consistent only with his holding the opinion that he was the father of "D". The priest also offers his own opinion that ,'MU's" conduct as described by the bandmaster could be consistent only with "MU" holding the opinion that he was the maternal uncle of "D". This evidence of the all-knowing priest is a relevant fact in view of section 49. The holder of the opinion is appearing personally in Court and has qualified himself as a witnes in view of the fourth clause of section 60. I again do not see how the Courts can decline to accept the all-knowing priest's evidence even though he was not present at the marriage ceremony and was not talking about his own conduct towards the parties to the disputed relationship.

(42) We have yet to prove that "F" and "MU" had special means of knowledge with regard to the existence of the disputed relationship before the Court would have before it the relevant fact defined in section 50. For this purpose, one could call into the witness-box

the mid-wife who had delivered "Mrs. F" of the female child "D". The mid-wife need not have been present at "D's" wedding. The mid-wife could prove how she had provided "F" and "MU" with the special means of knowledge about "D" being the daughter of "F" even though "F" and "MU" had not seen with their own eyes the child being born. She can prove that "F" and "MU" had been meeting all expenses and running errands at the time of "D's" delivery like the calling of the doctors, bringing medicines from the bazar and making presents which are usual at the time of such births. The nurse could also prove that she had helped "F" and "MU" to form an opinion that "D" was the daughter of "F". The opinion of "F" and "MU" thus formed about their relationship with "D" is a part of the relevant fact defined in section 50 but the proof of the three different parts of the relevant fact defined in section 50 has been brought to Court by three different witnesses.

(43) Let us now analyse all this evidence a little more carefully. The bandmaster has been talking of two distinct types of conduct. So far as his own conduct in witnessing the wedding and coming forward to depose about it in Court is concerned, the conduct of the witness was not motivated by any opinions about the existence or non-existence of the relationship and the bandmaster had no special means of knowledge on these points. He was all the same a competent direct witness of what he had seen or heard. His evidence was perception evidence which was being offered in one or the other modes laid down by the first three clauses of section 60. After the bandmaster had qualified himself in the eyes of the Court as a competent direct witness, he had proceeded to describe the conduct of "F" and "MU" towards "D" without in any manner knowing that this conduct had been motivated by any particular opinions of "F" and "MU" about their relationship with "D". The bandmaster is, therefore, talking about two types of conduct. His own conduct is not the conduct contemplated by section 50, but his testimoney is admissible and relevant to the fact in issue.

(44) The all-knowing priest is similarly talking about two types of opinion. First is his own opinion or conclusion drawn from the description given by the bandmaster of "F" and "MU's" behaviour towards "D" at the time of the latter's wedding. This opinion is relevant under section 49 but in order to prove this opinion, the holder has to appear in the witness-box in view of the fourth clause in section

60. This opinion of the all-knowing priest based on his own knowledge and experience is, however, not the opinion that is contemplated by section 50. The Priest is, however, trying to prove another type of opinion as manifested by the conduct of "F" and "MU" towards "D". The priest elaborates that the conduct is the outer shell that has taken share from the opinion that it contains inside and having taken its shape from that opinion the outer shell gives us an idea of the shape of that opinion. What can be presented in Court as evidence of the motivating force or opinion behind the conduct is the outer shell or mould. The priest has given his own opinion as to what opinions "F" and "MU" could have held about their respective relationships with "D". Conduct is the crystallised form of the opinion which is held in a pan described as special means of knowledge. The crystal has formed itself out of a colourless solution and the priest can, on the basis of his specialised knowledge and experience explain to us the process of crystallisation and the fact that a crystal of this shape and form can occur only in a solution of a particular composition. From his specialised knowledge and long experience as a priest of the community, he can easily form the opinion from the bandmaster's description of "F" and "MU's" behaviour towards "D" that "F" and "MU" must have held the opinion that they were the father and maternal uncle respectively of "D". Now the priests testimony in Court deals with two types of opinion. The first is his own personal opinion formed by the process of inferences or deductions made possible by his specialised knowledge. This opinion is relevant under section 49 and must be proved by the holder appearing in Court as a witness in view of the fourth clause of section 60. The priest's reading about what opinion "F" and "MU" must have held when they were conducting themselves in a particular manner at "D's" wedding would not necessitate the personal appearance in the witness box of "F" or "MU". This opinion has already been proved by the objective description of the part that "F" and "MU" played in the wedding ceremonies narrated by the bandmaster. With his expert handling, the priest is in a position to chip of small parts of the calcified shell of conduct to reveal that the calcified shell of conduct to reveal that the colourless solution contained inside has the same shape and form as the outer shell. It has been left to the priest to reveal to us the thing that we have been looking for even though the bandmaster was the unwitting carrier into Court of the outer shell or crystal without being conscious of the fact that he had smuggled into Court the very thing that everybody has been after.

(45) In ordinary everyday life it would be unnecessary to call such unattached mercenary or professional witnesses because anyone or more of the scores, if not hundreds, of guests or family members present at the wedding could have been examined as competent witnesses. In my parables I have kept them away from the witness-box so that there may be no mixing up of the opinions, knowledge or conduct of these witnesses with the opinions, knowledge of conduct of the persons whose relationship *inter se* was in dispute.

(46) I, therefore, conclude that in such matters of pedigree or relationship, the witness need not in all cases confine his testimony to his own conduct as expressive of his own opinion and that he can retail hearsay within the admissible limits as long as it carries the prescribed guarantees of truth. The pithy two-line illustration (b) to section 50 had to be dilated over all these pages to demonstrate to the unbelieving the flexibility of the subject in hand.

(47) My answer to the first part of the questions, as formulated in the order of reference, is therefore, in the affirmative while the answer to the latter part has necessarily to be in the negative.

D. K. Mahajan, J.

(48) There is a controversy between my learned brethren as to what the Full Bench was required to settle. In the referring order, my learned brother Suri J. has stated the question that had to be dealt with by the Full Bench thus :—

> "Whether, in cases where it becomes necessary to prove the relationship of one person to another, a witness appearing in Court can make a statement to prove the conduct of another having special means of knowledge about the disputed relationship when that conduct expresses the opinion of that person about the relationship. Is it necessary that the statement of the witness is to be confined only to his own conduct as expressive of his own opinion with regard to the existence of the disputed relationship?"

(49) My learned brother Sodhi J. has split up the question referred by Suri, J., into two parts, namely :—

> "(1) Is it necessary that the statement of witness is to be confined only to his own conduct as expressive of his own

opinion with regard to the existence of the disputed relationship ?

(2) Whether in cases where it becomes necessary to prove the relationship of one person to another, a witness appearing in Court can make a statement to prove the conduct of another having special means of knowledge about the disputed relationship when that conduct expresses the opinion of that person about the relationship ?"

(50) As I look at the matter, it seems to me that the answer to the question posed by my learned brethern is to be found in the clear enunciation of law by the Supreme Court in *Dolgobinda Paricha* v. *Nimai Charan Misra and others* (1). In view of the clear pronouncement in this judgment, the question referred by Suri J., which itself is again in two parts, has to be answered thus; the answer to the first part has to be in the affirmative and the second part in the negative.

(51) In order to substantiate what I have said I merely would reproduce the relevant passages from the decision in *Dolgobinda's case* (1). Before I do so, I must stress that the Supreme Court has clearly held that what is relevant under section 50 of the Evidence Act and can be proved, is conduct or outward behaviour of a person who has special means of knowledge. The opinion which that person holds is merely the outflow of his conduct. Thus, the material evidence is of conduct, which can be of the witness himself or of another person regarding whose conduct the witness is deposing. It is from the conduct as established on evidence that the Court has to form an opinion as to relationship. It is not necessary that the person whose conduct leads to the opinion relevant under section 50 of the Evidence Act must appear as a witness or he must be dead before some one else can prove that conduct in terms of section 60 of the Evidence Act. What I have said directly flows from the decision in *Dolgobinda's case* (1). I have underlined (*in italics in this report*) the parts in this decision which bear out what I have said.

(52) The following passages from *Dolgobinda's case* (1) are relevant and are set out below :

"The Evidence Act states that the expression 'fact in issue' means and includes any fact from which either by itself

or in connection with other facts the existence, non-existent, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follow; 'evidence' means and includes (1) all statements which the Courts permits or requires to be made before it by witnesses in relation to matters of fact under enquiry; and (2) all documents produced for the inspection of the Court. It further states that one fact is said to be relevant to another when the one is connected with the other in any one of the ways referred to in the provisions of the Evidence Act relating to the relevancy of facts. Section 5 of the Evidence Act lays down that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are declared to be relevant and of no others. It is in the context of these provisions of the Evidence Act that we have to consider section 50 which occurs in Chapter II, headed 'Of the Relevancy of Facts'. Section 50, in so far as it is relevant for our purpose, is in these terms :

'Section 50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact.'

On a plain reading of the section it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring out the true scope and effect of the section. It appears to us that the essential requirements of the section are — (1) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as

a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfil the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant in his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief that is, a belief or a conviction resulting, from what one thinks on a particular question. Now, the 'belief' or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant and may, therefore, be proved. We are of the view that the true scope and effect of section 50 of the Evidence Act has been correctly and succinctly put in the following observations made in *Chandu Lal Agarwala* v. *Khalidar Rahman*, (7).

'It is only 'opinion as expressed by conduct' which is made relevant. This is how the conduct comes in. *The offered item of evidence is 'the conduct', but what is made admissible in evidence is 'the opinion'*, the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision : its immediate effect is only to move the Court to see if this conduct establishes any 'opinion' of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer 'the opinion', the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the 'opinion'.

When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, 'the opinion of a person'. It still remains for the Court to weigh such evidence and come to its own opinion as to the 'factum probandum'—as to the relationship in question.'

We also accept as correct the view that section 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship ; '*Lakshmi Reddi* v. *Venkata Reddy*, (8).

It is necessary to state here that how the conduct or external behaviour which expresses the opinion of a person coming within the meaning of section 50 is to be proved is not stated in the section. The section merely says that such opinion is a relevant fact on the subject of relationship of one person to another in a case where the court has to form an opinion as to that relationship. Part II of the Evidence Act is headed 'On Proof'. Chapter III thereof contains a fascicule of sections relating to facts which need not be proved. Then there is Chapter IV dealing with oral evidence and in it occurs section 60 which says inter alia :

'Section 60. Oral evidence must, in all cases whatever, be direct; that is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says be saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it ;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness, who says he perceived it by that sense or in that manner ;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds'.

If we remember that the offered item of evidence under section 50 is conduct in the sense explained above, then there is no difficulty in holding that such conduct or outward behaviour must be proved in the manner laid down in section 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it; and so on. *The conduct must be of the person who fulfils the essential conditions of section 50, and it must be proved in the manner laid down in the provisions relating to proof. It appears to us that that portion of section 60 which provides that the person who*

holds an opinion must be called to prove his opinion does not necessarily delimit the scope of section 50 *in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under section* 50 *or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts which constitute conduct and is given by persons personally acquainted with such facts, the testimony is in each case direct within the meaning of section* 60. This, in our opinion, is the true inter-relation between section 50 and section 60 of the Evidence Act. In *Queen Empress* v. *Subbarayan,* (6), Hutchins J., said :

'That proof of the opinion, as expressed by conduct, may be given, seems to imply that the person himself is not to be called to state his own opinion, but that, when he is dead or cannot be called, his conduct may be proved by others. The section appears to us to afford an exceptional way of proving a relationship, but by no means to prevent any person from stating a fact of which he or she has special means of knowledge.'

While we agree that section 50 affords an exceptional way of proving a relationship and by no means prevents any person from stating a fact of which he or she has special means of knowledge, we do not agree with Hutchine, J., when he says that the section seems to imply that the person whose opinion is a relevant fact cannot be called to state his own opinion as expressed by his conduct and that his conduct may be proved by others only when he is dead or cannot be called. We do not think that section 50 puts any such limitation."

(53) I, therefore, agree with Suri J. that the answer to the question posed by him, which is in two parts, and by my learned brother Sodhi J., which is also in two parts, has to be, so far as the first part is concerned in the affirmative. So far as the second part is concerned I agree with my learned brother Suri, J., that the answer has to be in the negative. Necessarily I do not, with utmost respect to

my learned brother Sodhi J., agree to the answer proposed by him to the first question formulated by him. The case will now go back to the learned Single Judge for final disposal.

ORDER OF THE FULL BENCH.

(54) In accordance with the unanimous decision, the second question, as framed by Sodhi J., and the first part of the question, as framed by Suri J., are answered in the affirmative. In accordance with the opinion of the majority, the answer to the first question, as framed by Sodhi J., and the second part of the question as framed by Suri J., are answered in the negative.

K. S. K.

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