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LC 0803 LAW OF EVIDENCE

Dr. Pandhare Balasaheb Dashrath

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LC 0803 Law of Evidence

Dr. Pandhare Balasaheb Dashrath
Asstistant Proffesor,
New Law College, Ahmednagar
LL. M, Ph.D

This study material is prepared for the students of **LL.B.- II [2017 Pattern]** as per syllabus prescribed by the Savitribai Phule Pune University for **Paper no. LC 0803 Law of Evidence,** It covers **Module 01 to Module 08 and seek**s to equips the students with knowledge of: (a) the fundamental principles of evidence law, (b) the strict application of it in judicial proceedings, (c) the role of evidence law in civil and criminal proceedings, (d) the connection of the course with substantive and other procedural laws, and (e) the relevance of the course in non-litigation practice. The student will also be exposed to the concerned provisions of the Information Technology Act, 2000. Further it will enable the student to prepare for the University Examination.

MODULE 01

INTRODUCTION OF THE ACT (SECTIONS 1-5)

1. IMPORTANCE OF LAW OF EVIDENCE
2. ROLE IN CIVIL AND CRIMINAL PROCEEDINGS
3. APPLICATION OF THE ACT
4. INTERPRETATION CLAUSE UNDER THE ACT
5. PRESUMPTIONS: MAY PRESUME, SHALL PRESUME AND CONCLUSIVE PROOF
6. RELEVANT DEFINITIONS UNDER THE INFORMATION TECHNOLOGY ACT, 2000
7. EVIDENCE OF FACTS IN ISSUE AND RELEVANT FACTS ONLY
8. RELEVANCY AND ADMISSIBILITY

MODULE 02

RELEVANCY OF FACTS I

1. WHAT FACTS ARE RELEVANT (SECTIONS 6-16)
2. RELEVANCY OF ADMISSIONS (SECTIONS 17-23 AND 31)
3. RELEVANCY OF CONFESSIONS (SECTIONS 24-30)

MODULE 03

RELEVANCY OF FACTS II

1. STATEMENT BY PERSONS WHO CAN-NOT BE FOUND (SECTIONS 32-33)
2. STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES (SECTIONS 34-39)
3. JUDGMENTS (SECTIONS 40-44)

MODULE 04

RELEVANCY OF FACTS III

1. RELEVANCY OF OPINIONS (SECTIONS 45-51)
2. RELEVANCY OF CHARACTER (SECTIONS 52-55)
3. FACTS WHICH NEED NOT BE PROVED (SECTIONS 56-58)

MODULE 05

ORAL AND DOCUMENTARY EVIDENCE I

1. ORAL EVIDENCE (SECTIONS 59-60)
2. DOCUMENTARY EVIDENCE (SECTIONS 61-78)

MODULE 06

ORAL AND DOCUMENTARY EVIDENCE II

1. PRESUMPTIONS AS TO DOCUMENTS AND ELECTRONIC RECORDS (SECTIONS 79-90A)
2. EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE (SECTIONS 91-100)

MODULE 07

BURDEN OF PROOF

1. BURDEN OF PROOF (SECTIONS 101-111)
2. PRESUMPTIONS (SECTIONS 111A-114 A)
3. DOCTRINE OF ESTOPPEL (SECTIONS115-117)

MODULE 08

WITNESSES AND EXAMINATIONS OF WITNESSES

1. WITNESSES (SECTIONS 118-134)
2. EXAMINATIONS OF WITNESSES (SECTIONS 135-166)
3. IMPROPER ADMISSION OR REJECTION OF EVIDENCE (SECTIONS 167)

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MODULE 01

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1. IMPORTANCE OF LAW OF EVIDENCE

The Law of Evidence is a significant part of any branch of the judicial system irrespective of any nation, which means the role of evidence is very important statute in every country. But talking specifically about India the enactment of Indian Evidence Act has changed our judicial system completely as there were no codified laws relating to evidence which enriched our judicial system by providing rules and regulations for ascertaining the shreds of evidence. Although the India Evidence Act is based on English law still it is not fully comprehensive and also it is a 'Lex Fori' law which means law of the land where court proceedings are taken. The term 'evidence' is derived from Latin word i.e., 'Evident' or 'Evidere' which means 'to show clearly, or to discover, or to ascertain or to prove.'

The Evidence act came into force from 1st September 1872 applies to all over India except the state of Jammu and Kashmir. The limitation of this act does not end here, as it is not applicable to army & naval law, disciplinary acts and all the affidavits. It is well known that the Law of evidence is Procedural Law and it only applies to court proceedings but it also has a feature in its some part which makes it as Substantial Law like Doctrine of Estoppel.

The primary objective of any Judicial System irrespective of any state is to administer justice and protect the rights of the citizens. For administering justice, every judicial system has to consider the facts of the cases and has to extract the correct facts for complete justice; and there the importance of procedural law comes into existence which laws different rules in checking the value of the facts produced by the law offender and by the victim. The complete 'corpus juris' i.e, a body of laws, is divided into two categories:

- Substantive laws- Which mean a set of rules and regulations that govern the society.
- Adjective laws- These are the set of rules and regulations which deals with the law governing procedural aspects such as evidencing, pleading etc.

But the law of evidence neither comes under substantive law nor under procedural law, rather it's a subject matter of 'adjective law', which defines the pleading, evidencing and procedure with respect to substantive laws. The general meaning of 'Evidence' is 'a body of facts and information indicating or adjudicating the values of any facts or evidence'.

Evidence is the only possible way by which the court can make inferences to render a decision. The definition of evidence explains that evidence is the proof of any fact in issues so without evidence there will be no possibilities to prove any fact in issues or even to establish any facts in the cases. It is very obvious that it is not much difficult task to obtain trust through violating the basic structure of law but in the course of protecting those rights Evidence, Law comes into the picture. Evidence Law tells the basic principles and rules regarding collection. So the process of evidencing any facts or proof should be governed by a well-established law in order to achieve speedy and fair justice. The law of evidence is not just a fundamental principle governing the process of proof rather it also has a multidimensional purpose of governing the rules relating to the process of proof in court proceedings. While it's moral dimension is a special asset in criminal trials as it endeavors in protecting the innocent and highlighting the guilty person to administer complete and fair justice. On the other hand,

the evidence rules also have the capability to hide and prevent the truth to be disclosed in the public domain to protect the mass public interest.

2. ROLE IN CIVIL AND CRIMINAL PROCEEDINGS

The rules of evidence are in general the same in civil and criminal proceedings, and bind alike State and citizen, prosecutor and accused, plaintiff and defendant, counsel and client. There are, however, some exceptions, e.g. the doctrine of estoppel applies to civil proceedings only; the provisions relating to confessions (ss. 24-30), character of persons appearing before Courts (ss. 53, 54), and incompetence of parties as witnesses (s.120) are peculiar to criminal proceedings.

In a civil case, a Judge of fact must find for the party in whose favour there is a preponderance of proof, through the evidence is not entirely free from doubt. In a criminal case no weight of preponderant evidence is sufficient, short of that which excludes all reasonable doubt. Unbiased moral conviction is no sufficient foundation for a verdict of guilty unless it is based on substantial facts leading to no other reasonable conclusion than that of guilt. Circumstantial evidence not furnishing conclusive evidence against an accused, though forming a ground for grave suspicion against him, cannot sustain a conviction. The onus of proof in criminal cases never shifts to the accused, and they are under no obligation to prove their innocence or adduce evidence in their defence or make any statement. In a civil case, it is the duty of the parties to place their case before the Court as they think best, whereas in a criminal case it is the duty of the Court to bring all relevant evidence on the record and to see that justice is done.

3. APPLICATION OF THE ACT

In British India, the administration courts by ideals of the Royal Charter build up in Bombay, Madras and Calcutta were adhering to English standards of the law of evidence. In Mofussil courts, outside the administration towns, there were no clear standards identifying with the Law of Evidence. The Courts delighted in liberated freedom in the matter of affirmation of proof. The whole organization of equity in the

Mofussil courts, without any positive principles in regards to the Law of Evidence, was in all-out mayhem. There was a desperate need for the codification of the principles of law. In 1835, the main endeavour was made to arrange the principles of evidence by passing the Act, 1835. Somewhere in the range of 1835 and 1853 around eleven enactments were passed managing the Law of Evidence. In any case, every one of these enactments was discovered insufficient.

In the year 1868, a Commission was set up under the chairmanship of Sir Henry Mayne. He presented the draft, which was later discovered inadmissible to Indian conditions. Later in the year 1870, this task of codification of the standards of the Law of Evidence was dependent on Sir James Fitzjames Stephen. Stephen presented his draft and it was alluded to the select council and furthermore to High Courts and individuals from Bar to evoke the conclusion, and, in the wake of social occasion feeling, the draft was put before the governing body and it was instituted. Finally, “The Evidence Act ” came in to force on first September 1872.

Before Independence, there were upwards of 600 princely states in India, which were not inside the locale of the British arrangement of equity. Every one of these states had its own principles of the Law of Evidence. Be that as it may, all things considered, followed the Indian Evidence Act, 1872. After independence, there was a merger of princely states into the Indian Union. Both the substantive as well as procedural laws have been made consistently relevant to all States, regardless of whether the British region or native States. The Law of Evidence is presently material to all States establishing the Union of India.

Territorial Extent as per The Indian Evidence Act, 1872

Part 1, Chapter 1 and Section 1 of the Indian Evidence Act, 1872 state about the extent of the Indian Evidence Act. It plainly expresses the way that the Indian Evidence Act, 1872 reaches out to the whole of India aside from the territory of Jammu and Kashmir. It additionally applies to all the legal procedures in or under the watchful eye of the any Court including the Court-martial, other than the Court-martial convened under the Army Act, Naval Discipline Act or the Indian Navy (Discipline) Act 1934, or the Air

Force Act yet not to affidavits produced to any Court nor to procedures before a judge.

Applicability of The Indian Evidence Act

As already stated in Section 3 of the Indian Evidence Act, 1872 that it also deals with its applicability. Evidence is the law of those matters which are completely governed by the law of the country in which the proceeding takes place irrespective of the fact whether a witness is competent or not, whether certain evidence proves certain fact of not. Therefore, the lex fori determines all the questions which are related to the admission or rejection of evidence.

Relevant Cases based on the Application

Section 3 of the Indian Evidence Act 1972, also defines what a Court is. As the above-mentioned Section, the Court incorporates all the appointed authorities or judges and Magistrates, and every other individual, with the exception of arbitrators who are lawfully authorized to take evidence. Likewise, an enquiry is judicial if the object of which is to be resolved has a jural connection or relation between one individual and another or a group of people; or between him or the community generally. It had been held on account of Queen v. Tulja (1887) 12 Bom. 36, 42 that an enquiry where evidence is lawfully taken can be remembered for the term of the judicial proceeding.

In any case, an enquiry about issues of reality wherein no discretion is practiced or no judgment is to be framed, however, some are being done as a specific method for an obligation or duty, then at that point, it forms administrative enquiry rather than a judicial enquiry. Similarly, in the case of, Queen-Empress v. Bharma (1886) 11 Bom. 702 FB, it had been held that procedure before a Magistrate who isn't authorized to direct an enquiry is not a judicial proceeding in any case. It had been held in the case of Munna Lal v. State of U.P AIR 1991, All 189, 1991 Cr LJ 1893, that a Family Court also falls inside the ambit of the significance and articulation of Court.

The statutory provisions additionally don't have any significant bearing before an arbitrator. Consequently, an arbitrator will undoubtedly comply with the standards of natural justice. They are not limited to the specialized technique of the rule of evidence.

The Indian Evidence Act additionally doesn't also apply to the affidavit.

Different Views And Decisions As To The Applicability: Important Findings

Prior to Independence, the Act was applied to what was known as the "British India" and "British Burma". However, the definition of "British India" was amended under Section 3(5) of the General Clauses Act, 10 of 1897. In this way, 26 January 1950, India pronounced itself as a Sovereign, Democratic, Republic and immediately Burma was likewise announced as the Independent Republic from 23rd March 1956.

Judicial proceeding

The term Judicial Proceeding is defined under this Act. However, it had been held by Justice Spankie in the case of R v. Gholam (1875) ILR 1 All that judicial proceeding can be expressed as any procedure over the course of which evidence is or might be taken, or in which any judgment, sentence or final order is passed on recorded evidence. The Court has to perform administrative or executive and legal obligations all together so that in a judicial proceeding, the adjudicator or the magistrate must act in a judicial capacity.

Evidence Act if applicable to the arbitration procedure

The Act in clear terms doesn't have any significant bearing to the arbitral method. As a result of which arbitrator isn't limited by the specialized standards of evidence except, if the fundamental principles of fairness and well-established principles of evidence are not disregarded.

Thus, it had been held in the case of Haralal v. State Industrial Court A 1967 B 174, that the rules of Act don't apply to the procedures before an arbitrator. The very object of submission to an arbitrator is to have an expeditious dispute solving without getting into the tedious and elaborate procedure of a regular trial or technicalities.

Even if the Indian Evidence Act doesn't apply to the arbitration procedure still it had been held in the case of Jatan Builders v. Army Welfare Housing Organization, 2009 AIHC 2475 (2485) (Del.) that arbitrator can evolve a procedure, which complies with the

principle of natural justice for conduct of the proceeding. However, even if the provisions of the Evidence Act are not taken into consideration, still the parties and the arbitrators cannot override or ignore the contractual terms and act contrary to it.

It is not a valid objection to the award that the arbitrators had not acted in strict conformity with the rule of evidence. This had been held in the case of Ganga v. Lekhraj (1887) ILR 9 All 253, that arbitrators are bound to conform to the rules of natural justice. Even in the case of Hoogly River Bridge Commissioners v. Bhagirathi Bridge Construction Co.(1995) 1 Cal LJ 489; AIR 1995 Cal 274, it had been held that the Court is absolutely not worried about the merit of the case. However, the principle of natural justice and reasonable or fair play in real life requires some basic evidence either oral or documentary before the arbitrators which would empower them to arrive at a just and reasonable conclusion.

Affidavits

The definition of evidence is excluded from the meaning of evidence under Section 3 of the Indian Evidence Act and is also explicitly avoided under Section 1 of the said Act. In this manner, affidavit is a personal oath or affirmation which is based on a person's own knowledge. Affidavits per se don't become evidence in suits, however, it can become evidence just by the assent of the parties or where it is exceptionally approved by any provisions of law. However, in the case of Shamsunder v. Bharat Oil Mills AIR 1964 Bom 38, it had been held that affidavits can be used as evidence if, for sufficient reasons, the Court passes an order under Order 19, rule 1,2 of the Code Of Civil Procedure 1908. It, therefore, stated that an affidavit cannot be treated as evidence unless an order has been passed under Order 19 of the Code of Civil Procedure.

In the case of Radhakrishnan v. Navoraton Mal Jain A 1990 Raj 127, 130, it had been held that when there was no order of the court under Order 19 rule 1, affidavits filed by the parties without giving them the opportunity of cross-examining the deponents, cannot be treated as evidence.

Affidavits filed suo moto

An affidavit that is recorded suo moto by a party without having any direction from the Court can't be named as false evidence. But it had been held in the case of Delhi Lotteries v. Rajesh Agarwal AIR 1998 Del 332, that no action under the Indian Penal Code can be taken against the deponent.

Affidavits in Interlocutory application

Where the Court is explicitly allowed to choose the interlocutory issues on affidavit, it draws the provision of Order 19 Rule 1 and 2 of the Code of Civil Procedure which can't be squeezed into service. It, hence, brings the terms and impediments endorsed by request 19 rules 1 and 2 will be connected just if the Court practices the general authority or power which is vested in it. The scrutiny of wordings of rule 1 of Order 39 unmistakably shows that interlocutory application for interim injunctions, the Court had been explicitly allowed by the legislature itself to choose such applications on affidavit.

On account of B.N. Munibasappa v. G.D. Swamigal AIR 1959 Mys. 139, the Mysore High Court held that while it would not be right to state that evidence can't be viewed as evidence despite the fact that its property delivered under rule 1, and 2 of Order 19 of the Code of Civil Procedure, therefore plainly an affidavit can never replace an evidence recorded in a common manner except, if the case is one to which the arrangement of the provisions apply or the evidence identifies with an issue like an application for a connection or an order as to which the code itself had made express opinion.

In the case of Kailash Nath Agarwal v. Amar Nath Agarwal AIR 1969 All 82, it had been held that by importing legal fiction, the affidavits on record of the proceeding may also be placed by the Civil Court as affidavit under Order 19 of the Civil Procedure Code and may also be filed or read in evidence and cross-examination may also be permitted.

Domestic enquiry

In the case of State of Haryana v. Rattan Singh AIR 1977 SC 1512, it had been held that the rule of evidence under the Evidence Act may not apply to the domestic

enquiry. Similarly in the case of K.L. Shinda v. State of Mysore AIR 1976 SC 1080, the rule of evidence doesn't apply to departmental proceeding as well. However, again there is a contradictory view in the case of Balkrishna Mesra v. Presiding Officer, Orissa (1977) 35 Fac LR 11 (SC), that there is no bar on the part of the competent authority to rely on evidence in disciplinary proceedings.

Applicability of the Act to Tribunal

It is an established fact that domestic tribunals are not bound by the specialized principles of methodology as are contained in the Evidence Act. On account of B.Bhimrajee v. Union AIR 1971 Cal 336, it had been held that the rule of evidence has no application in the departmental proceeding and the examination witnesses need not be in the request set somewhere around the said Act. Specialized standards of the Evidence Act don't make a difference to the residential enquiry yet substantive rules which structure the part of the principle of natural justice, such that it can't be disregarded in Domestic Tribunals. This had been held on account of Central Bank v. P.C.Jain AIR 1969 SC 983.

The Act has no application to enquiries directed by the Courts despite the fact that they might be legal in character. It had been held in the case of Union of India v. T. R. Verma AIR 1957 SC 882, that it is the requirement of law that such Tribunals ought to watch rules of natural justice in the conduct of enquiry.

Application of the Act to the Commissioner

The Evidence Act doesn't strictly apply to enquiries conducted by domestic Tribunals. This had been held in the case of Ahmed v. Chief Commissioner AIR 1966 Mani 18. However, a Commission appointed by Code Of Civil Procedure and Code of Criminal Procedure has the power to summon the witness and evidence, and the rules of evidence apply to the proceedings before him.

Applicability of the Act to Labour Courts

All the technicalities of the Evidence Act are not strictly applicable to Labour Courts and Tribunals, except in so far as Section 11 of the Industrial Disputes Act 1947

and the rules therein are permitted. This had been held in the case of Bareilly Electricity v. Workmen AIR 1972 SC 330. However, it had also been held in the case of Leonard Biermans v. Second Industrial Tribunal AIR 1962 Cal 375 that a proceeding before an Industrial Tribunal is merely a quasi-judicial proceeding and the evidence is not applicable to such proceedings.

Even in some cases, there has been contradictory views. In the case of Raghu v. Burrakur Coal Co. Ltd AIR 1966 Cal 504, it had been held that it is a Court under Section 3 of the Indian Evidence Act, and therefore it must observe the rules of evidence and natural justice.

Applicability to Income tax authorities

Income tax authorities are strictly not bound by the rules of evidence. This view had also been laid down in the case of Commissioner of Income-tax v. East Coast AIR 1967 SC 768.

Proceedings under the Contempt of Courts Act

The provisions of the Evidence Act also do not apply to the reception of materials against the contemnor in a contempt proceeding. This had been established in the case of Basanta Chandra Ghosh, in the matter of AIR 1960 Pat 430.

The Indian Evidence Act, 1872 is so vast and its implications and interpretations are wide. The application of the above Act though mostly depends upon the statutory provisions but depending upon the circumstances, nature of the case along with the underlying principles of natural justice the application also varies hugely. However, the very objective of the Evidence Act is meted out that is the Court has to find out the truth on the basis of the facts brought before the Court by the parties to meet the ends of justice as expeditiously as possible. Thus, the Rule of Evidence is not to put limitations and restrictions on the parties rather it acts as a guiding factor for the Courts to take evidence.

4. INTERPRETATION CLAUSE UNDER THE ACT

Sec.3	
Court	• "Court" includes all **Judges** and **Magistrates** and all **persons**, **except arbitrators,** legally **authorized to take evidence**.
Fact	• "Fact" means and includes –– (*1*) **anything, state of things**, or **relation of things**, capable of being **perceived** by the **senses**; • (*2*) Any **mental condition** of which any person is **conscious**.
	• That a man said certain word is a fact [**Illustration (c)]**. Similarly the words written by a person also constitute a fact. The words so written or spoken are capable of being perceived. And as such these words being a statement constitute a fact.
Relevant	• One fact is said to be **relevant to another** when the one is **connected** with the other in any of the **ways referred** to in the provisions of **this Act relating to** the **relevancy of facts**. • Relevancy can be **logical as well as legal**. • **Relevancy under the Act** is not a question of pure logic **but of law,** as no fact, however logically relevant, is receivable in evidence **unless it is declared** by the Act to be **relevant**. • Whatever is legally relevant is logically relevant but **not vice-versa.** • **Pulukuri Kotayya . v. Emoeror. A.I.R. 1947 P.C. 47** • the statement of the accused : **"I have kept in the field the knife with which I killed A**' is logically relevant to prove the guilt of the accused, • but **section 27** of the Act provides that only **so much part of the information** as relates distinctly to the fact thereby **discovered**

	may be proved, • i.e., is relevant and hence the **latter portion** of accused's statement, viz., **"with which I killed A"** though logically relevant is **not legally relevant**
DISTINGUISH BETWEEN RELEVANCY, ADMISSIBILITY AND EVIDENTIARY VALUE	
	• A fact may be legally relevant, yet its **reception may be prohibited** on the grounds of public policy, e.g., communications during marriage. • Every relevant fact is therefore **not necessarily admissible**. Similarly, every admissible fact is **not necessarily relevant** within sections 6 to 55 of the Act. • Even if a **confession** is relevant and admitted by the court, it is in the wisdom of the judge as to **what weight shall be attached to it.** • So determination of **evidentiary value** is a question to be decided by the **judge** according to **facts and circumstances** of each case. • **Sahoo v. State of U.P. [A.I.R. 1966 S.C. 40]** • The Supreme Court has observed that there is a clear **distinction** between relevancy, admissibility and weight to be attached to a piece of evidence
Facts in issue	• The expression "facts in issue" means and includes ––any **fact** from which, either by **itself** or in **connection** with other facts, the **existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied** in any suit or proceeding, necessarily follows. • *Explanation*. ––Whenever, under the provisions of the law for the time being in force relating to **Civil Procedure**, any Court records

	an issue of fact, the **fact to be asserted or denied in the answer to such issue** is a fact in issue.[**Order XIV Code of Civil Procedure, 1908**] • Facts in issue are facts out of which the **disputed legal right**, **liability** or **disability** are derived for determination. • To put it in otherwise the facts **asserted by one party** and **denied by the other**, essentially constitute the facts in issue. • In other words the **allegations pertain to an offence**, which is **defined in a given statute** • An **offence** is constituted of certain **ingredients**. And the prosecution has to **prove** these **ingredients** by evidence
Document	• means any **matter** expressed or described upon any **substance** by means of **letters, figures** or **marks**, or by more than one of those means, **intended to be used**, or which may be **used**, for the purpose of **recording that matter** [Indian Penal Code, s. 29 and the General Clauses Act, 1897 s. 3 (18)] **P. Gopalkrishnan @ Dileep V. State of Kerala and Anr**. CRIMINAL APPEAL NO.1794 OF 2019 SUPREME COURT OF INDIA **November 29, 2019** • The **contents of the memory card/pen drive** being electronic record must be regarded as a **document**. • If the prosecution is relying on the same, ordinarily, the **accused must be given a cloned copy thereof** to enable him/her to present an **effective defense** during the trial. • However, in **cases involving issues such as of privacy** of the complainant/witness or his/her identity, the **Court** may be

	justified in providing **only inspection thereof** to the **accused** and his/her **lawyer or expert** for presenting effective defence during the trial. • The **court** may issue **suitable directions** to **balance** the interests of **both sides**.
Evidence	• "Evidence" means and includes –– (*1*) all **statements** which the **Court permits or requires** to be made before it by **witnesses**, in relation to matters of **fact under inquiry**; such statements are called **oral evidence**; (*2*) 4[all **documents** including **electronic records** produced for the **inspection of the Court**;] such documents are called **documentary evidence**.[Subs. by Act 21 of 2000 w.e.f. 17-10-2000]
Proved	• A fact is said to be **proved** when, after **considering** the **matters** before it, the **Court**; **either** believes it to **exist**, or considers its **existence** so **probable** that a **prudent man** ought, under the **circumstances of the particular case**, to act upon the supposition that it **exists.**
Disproved	• A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.
Not proved	• A fact is said not to be proved when it is neither proved nor disproved.
India	• "India" means the territory of India excluding the State of Jammu and Kashmir.

5. PRESUMPTIONS: MAY PRESUME, SHALL PRESUME AND CONCLUSIVE PROOF

Presumption- Presumption generally means a process of ascertaining few facts on the basis of possibility or it is the consequence of some acts in general which strengthen the possibility and when such possibility has great substantiate value then generally facts can be ascertained. A presumption in law means inferences which are concluded by the court with respect to the existence of certain facts. The inferences can either be affirmative or negative drawn from circumstance by using a process of best probable reasoning of such circumstances.

The basic rule of presumption is when one fact of the case or circumstances are considered as primary facts and if they are proving the other facts related to it, then the facts can be presumed as if they are proved until disproved. Section 114 of Indian Evidence Act specifically deals with the concept that 'the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of (a) natural events, (b) human conduct, and (c) public and private business, in their relation to the facts of the particular case'.

May presume- It is a condition when the court enjoys its discretion power to presume any/ certain/ few facts and recognize it either proved or may ask for corroborative evidence to confirm or reconfirm the presumption set by the court in its discretion. Section 4 of the Indian Evidence Act provides that a fact or a group of facts may be regarded as proved, until and unless they are disapproved. The concept is defined under Section 4 of this Act that 'May Presume' deals with rebuttable presumption and is not a branch of jurisprudence.

Shall presume- It denotes a strong assertion or intention to determine any fact. Section 4 of Indian evidence Act explains the principle of 'Shall Presume' that the court does not have any discretionary power in the course of presumption of 'Shall Presume', rather the court has presumed facts or groups of facts and regard them as if they are proved until they are disproved by the other party. Section 4 of the Indian Evidence Act explains that the concept of 'Shall Presume' may also be called 'Presumption of Law' or 'Artificial Presumption' or 'Obligatory Presumption' or 'Rebuttable Presumption of Law' and tells

that it is a branch of jurisprudence.

Conclusive Presumptions/ Proofs- It can be considered as one of the strongest presumptions a court may assume but at the same time the presumptions are not completely based on logic rather court believes that such presumptions are for the welfare or upbringing of the society. With regards to Conclusive proofs, the law has absolute power and shall not allow any proofs contrary to the presumption which means if the facts presumed under conclusive proofs cannot be challenged even if the presumption is challenged on the basis of probative evidence. This is the strongest kind of all the existing presumptions whereas Section 41, 112 and 113 of the Evidence Act and S. 82 of the Indian Penal Code are one of the most important provisions related to the irrebuttable form of presumptions or Conclusive Presumption.

The general definition of Conclusive Proof is a condition when one fact is established, then the other facts or conditions become conclusive proof of another as declared by this Act. The Court in its consideration shall regard all other facts to be proved, only if one fact of the case is proven without any reasonable doubt. And if the other facts are proved on the basis of proving of one fact that the court shall not allow any evidence contrary to other facts which are presumed as conclusive proofs

Illustration- A and B married on June 1 and the husband left home to his work for 6 months later he discovered that her wife is pregnant he divorced the wife and challenges that he is not liable for paying damages either to his wife or to his illegitimate son. And also explains that he never consumed his marriage as just after one day of marriage he left his home for his work. But in this case, the court will conclusively presumed that the son born out of his wife is legitimate because he was with his wife for at least 1 day and shall not allow any proof contrary to the conclusive proof even if he provides probative evidence.

6. RELEVANT DEFINITIONS UNDER THE INFORMATION TECHNOLOGY ACT, 2000

1. Certifying Authority

Sec. 2 (*g*) —Certifying Authority means a person who has been granted a licence to issue a electronic signature Certificate under section 24;

2. **Electronic signature**

Sec. 2 (*ta*) —electronic signature‖ means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature;

3. **Electronic Signature Certificate**

Sec. 2 (*tb*) —Electronic Signature Certificate‖ means an Electronic Signature Certificate issued under section 35 and includes Digital Signature Certificate;]

4. **Electronic form**

Sec. 2 (*r*) —electronic form‖ with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

5. **Electronic records**

Sec. 2 (*t*) —electronic record‖ means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

6. **Information**

Sec. 2 (*v*) —information‖ includes 2[data, message, text,] images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche;

7. **Secure electronic record**

Sec.14 —Where any security procedure has been applied to an electronic record at a specific point of time, then such record shall he deemed to be a secure electronic record from such point of time to the time of verification

8. **Secure electronic signature**

Sec.14 —An electronic signature shall be deemed to be a secure electronic

signature if—

(*i*) the signature creation data, at the time of affixing signature, was under the exclusive control of signatory and no other person; and

(*ii*) the signature creation data was stored and affixed in such exclusive manner as may be prescribed.

Explanation.–In case of digital signature, the —signature creation data‖ means the private key of the subscriber.

9. **Subscriber**

Sec. 2 (*zg*) —subscriber‖ means a person in whose name the 1[electronic signature] Certificate is issued

7. EVIDENCE OF FACTS IN ISSUE AND RELEVANT FACTS ONLY [SECTION 5]

Evidence may be given of facts in issue and relevant facts. –– 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 hereinafter declared to be **relevant**, and of **no others**.

Explanation. –– This section shall **not enable** any person to give evidence of a fact which he is **disentitled to prove** by any provision of the law for the time being in force relating to **Civil Procedure**

Illustrations

(*a*) A is tried for the **murder of B by beating** him with a **club** with the **intention** of causing his death.

At A's trial the following facts are in issue: ––

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

(*b*) A suitor **does not** bring with him, and have in **readiness** for production at the **first hearing** of the case, a bond on which he **relies**. This section **does not** enable him to **produce the bond** or prove its contents at a **subsequent** stage of the proceedings, **otherwise** than in accordance with the conditions prescribed by the **Code of Civil Procedure**.

The Explanation is obviously referable to Order 7, Rules 14, 18 and Order 13, Rule 1, Order 41, Rule 27 of the Code of Civil Procedure, 1908.

Section 5 of Indian evidence act provides that evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and relevant fact. Fact in issue means any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows. Relevant fact means one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

8. RELEVANCY AND ADMISSIBILITY

Sections 6 to 55 of the Act deal with the relevancy of facts. The word 'relevant' is defined in section 3 of the Act as "one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of the Act relating to relevancy of facts." Relevancy can be logical as well as legal. A fact is said to be logically relevant to another -when it bears such casual relation with the other as to render probable the existence or non-existence of the latter. All facts logically relevant are not, however, legally relevant.

The Act exhaustively enumerates the kinds of casual connections which make a fact legally relevant to another. Hence relevancy under the Act is not a question of pure logic but of law, as no fact, however logically relevant, is receivable in evidence unless it is declared by the Act to be relevant. Whatever is legally relevant is logically relevant but not vice versa, e.g.[1] the statement of the accused : "I have kept in the field the knife with which I killed A' is logically relevant to prove the guilt of the accused, but section 27 of the Act provides that only so much part of the information as relates distinctly to the fact thereby discovered may be proved, i.e., is relevant and hence the latter portion of accused's statement, viz., "with which I killed A" though logically relevant is not legally relevant.[2]

Before going into relevancy, of confession, let us distinguish between relevancy,

[1] Monir, M . , Princioles and Dicrest of Law of Evidence. 35 (1975).

[2] Pulukuri Kotayya . v. Emoeror. A.I.R. 1947 P.C. 47.

admissibility and evidentiary value. Relevancy and admissibility are not interchangeable terms. A fact may be legally relevant, yet its reception may be prohibited on the grounds of public policy, e.g., communications during marriage.

Every relevant fact is therefore not necessarily admissible. Similarly, every admissible fact is not necessarily relevant within sections 6 to 55 of the Act. Even if a confession is relevant and admitted by the court, it is in the wisdom of the judge as to what weight shall be attached to it. So determination of evidentiary value is a question to be decided by the judge according to facts and circumstances of each case.

The Supreme Court has also observed in **Sahoo v. State of U.P.**[3] that there is a clear distinction between relevancy, admissibility and weight to be attached to a piece of evidence.

MODULE 02

RELEVANCY OF FACTS I

1. WHAT FACTS ARE RELEVANT (SECTIONS 6-16)

2. RELEVANCY OF ADMISSIONS (SECTIONS 17-23 AND 31)

[3] A.I.R. 1966 S.C. 40

3. RELEVANCY OF CONFESSIONS (SECTIONS 24-30)

1. WHAT FACTS ARE RELEVANT (SECTIONS 6-16)

Doctrine of Res- gestae: The doctrine of Res gestae is expressed under section 6 of the Indian Evidence Act, 1872 in the following words- "Facts which though not in issue are so connected with the facts in issue so as to form a part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places"

Res gestae was originally used by the Romans which means to 'acts done or actus'. The most important principle of this doctrine is that all the facts must be described in the same transaction. Whereas transaction means a group of facts which are so connected to each other that they can be considered as a single fact. In Layman's language, a transaction may be considered as a series of certain acts and when all the actions are carried in the same situations at the same point of time then such situation or condition be called as the act of the same transaction. Circumstantial or indirect facts are also considered under the doctrine of res gestae as they are also forming a part of the same transaction.

Essentials of Doctrine of Res Gestae-

- The statement made should not be an opinion and must be a statement.
- The statements should be made by the participants of the transaction.
- The statements should have enough information to explain or brief about the incident.
- The statements made by the person or act of the person should be spontaneous and simultaneous to the main transaction.

Illustrations-

- If a person is dying of poison and before dying, he tells the name of the accused.
- If a person is about to die as the accused is in front of him holding a gun and he asks for help.
- If an injured person is crying for help.

In, **Ratten V. Queen**[4] the victim (wife) called the police for help as her husband was holding the gun and was about to kill her but before the operator could get connected to the call and report the statements of the victim, the call disconnected. Later the police found her dead body in her house from where she called the police for help. Later the police found that the time of the call and time of death was almost the same so the call by the victim comes under the principle of res gestae. Hence the court found the husband guilty of murder and quashed his reasoning that he shot accidentally without any intention.

In, **Sukhar V. State of UP**[5] the victim tried to alarm that the accused will shoot him in a few minutes. On hearing the alarm the witness almost reached the place of incident. However, the victim survived and the accused was charged under section 307 of IPC (Punishment for Attempt to Murder). Despite the circumstances, in this case, being hearsay evidence, but still, the court recognised the act in the same part of the transaction and explained it to be a case of section 6 of the Indian Evidence Act. Therefore the statements of the witnesses were admissible as it formed a part of the same transaction.

In **Uttam Singh vs. State of Madhya Pradesh**[6] the child and the victim were sleeping together at the time of the incident and he suddenly awakened due to the voice of axe and screamed for help by taking the name of the accused. Just after the call for help his mother, sister and other witness come there. The court found this evidence to

[4] [1972] A.C. 378,

[5] (1999) 9 SCC 507

[6] 2002 INDLAW MP 79

be admissible as the act of the child and the accused was of the same part of the single transaction.

Motive Preparation and Conduct

Section 8 of the Indian Evidence Act talks about the importance and of motive, preparation, conduct (previous & subsequent) in various cases. And it is a well-known fact that Motive & Preparation are among the first act before any conduct. Therefore Section 8 explains the importance of motive, preparation and conduct where there are no direct evidence and the facts are proven on the basis of circumstantial.

Motive

The general meaning of 'Motive' a purpose, or objective to obtain something. The Supreme Court of India defined motive is something which induces or activates a person to make an intention and knowledge, with respect to awareness of consequences of the act.

The relevance of Motive under the Act: As in the above discussion we have already seen that Motive is the main inducing force which induces a person to do some act. It is expressed that if the offence has been commenced voluntarily then could be no possibility of the absence of motive. Although it is very difficult to obtain the evidence of motive still evidence of motive becomes very important in the case of circumstantial evidence. The Supreme Court in the reference of motive said that 'if the witnesses of any case are trustworthy and have enough credibility then the motive of any act done by the offender has no such importance'.

Although motive and intention are the same there is a thin line of difference between them that intention is the pre-calculation or knowledge of ascertained consequences in the mind of the offender. In some cases, it is observed that sometimes motive behind the execution of a crime may be good but the intention is always bad or guilt-oriented.

In, **Kundula Bala Vs State of A.P**[7] The son-in-law before his marriage demanded a piece of land from the deceased. But after the marriage, the deceased refused to transfer the ownership of the property and expressed that he would give this property to his daughter. Such inferences of the father in law induced the accused in committing a crime and after some time the crime commenced. The court observed that there is a strong motive with the accused of committing the crime as the father in law refused to transfer the property in the accused name.

In, **Gurmej Singh Vs State of Punjab**[8] The deceased has won the election against the accused. It is also seen that they don't have good relations between and they have always had a quarrel with each other. The reason behind frequent quarrels was that the accused diverted dirty water stream towards the house of the deceased. The court observed that there were pending litigation between them and dirty water stream induced the frustration between them. After the death of the deceased, the Court concluded that dispute related to the passage of dirty water could be the motive of the murder.

In, **Rajendra Kumar Vs State of Punjab**[9] The Court held that the accused can only be convicted if the prosecution completely proves the motive and provide the supporting evidence to establish the commission of the offence by the accused.

Preparation

The Supreme Court of India interpreted 'preparation' as a word which denotes the action or preparation of any act and also those components which are prepared. Preparation includes arranging the essentials objects for the commission of a crime/offence.

Evidence tending to show that the accused had prepared for the crime is always

[7] 1993 Cr LJ 1635 SC

[8] AIR 1992 SC 214

[9] AIR 1966 SC 1322

admissible. Preparation does not express the whole scenario of the case rather preparation is only subjected to the arrangements made in respect of committing any act. Further, there is no mandate that preparation is always carried out but it is more or less likely to be carried out. It is very difficult to prove preparation as there is no mandate that preparation is always carried out for the purpose of committing any crime. It is mostly observed that the Court draw inference with certain facts in establishing or ascertaining the preparation of crime committed.

In, **Mohan Lal Vs Emperor**[10] The accused was charged for cheating as he was importing goods in Karachi port from Okha port without paying the proper custom duty as he made some arrangements with the customs department. The prosecution showed enough evidence to prove the preparation by the accused in avoiding the import duties. The Court held that the act by the accused was completely wrongful and are prohibited by the law hence the accused is liable for preparation.

In, **Appu Vs State**[11] The four accused arranged a meeting to make essentials arrangements for commencing crime. Certain facts related to the objective of the scheduled meeting were admitted which showed preparation on their part. The preparation was administered clearly that it is an intention to commit burglary and the accused were waiting for the right time to get the best opportunity to execute their preparation.

Conduct

Section 8 of The Indian Evidence Act also defines 'conduct', conduct here means an external behaviour of a person. To check if the conduct of a person is relevant to the incident then the court must establish a link between the conduct of a person who committed the crime and the conduct of incident. The most important role of this part is that the relevant conduct must bring the court to a conclusion of the dispute. If the Court came to a conclusion then the conduct was previous or subsequent, it shall be checked properly by the Court. It is very clear that conduct is one of the very important

[10] AIR 1937 Sind 293

[11] AIR 1971 Mad 194

evidence explained under Section 8 and such importance is only considered when this conduct is in direct form, otherwise, if the conduct is recognised indirectly then it will lose its importance.

In, **Bhamara Vs State of M.P**[12] a person X was farming on his land, on seeing another person standing near to his place he called the person for some conversation. After a few moments, the conversation turned into arguments and ended up into a fight. On seeing such activity other people came to the place of incident to stop the fight but subsequently, the offender tried escaping. But the offender was caught by some other person. The Court found that the conduct of escaping of the offender was relevant subsequent conduct.

In, **Nagesha V. State of Bihar**[13], it was held by the Court if the first information is given by the accused himself, the fact of his giving information is admissible against him as evidence of his conduct.

Conspiracy- Conspiracy means few people come together to do an act with common intention. So in the same context, a criminal conspiracy is the act of at least two or more persons to do an act which is not authorised by the law i.e., an illegal act, or to do a legal act by illegal means. Criminal Conspiracy is a kind of partnership in crime, and every member of such partnership must join the partnership by mutual agreement for executing a common plan.

There are two relevant provisions which deal with the criminal conspiracy i.e., Section 120(A) of the Indian Penal Code and Section 10 of the Indian Evidence Act talks about the things said or done by a conspirator.

Essentials of Criminal Conspiracy u/s 10 of the Indian Evidence Laws:

- There should be reasonable grounds to establish a conspiracy.

[12] AIR 1953 Bhopal 1

[13] AIR, 1996 SC119

- There should be at least two or more persons to form a conspiracy.
- There should be a common intention of all the conspirators.
- Acts or Statement of the conspirators.
- The acts or statements of the conspirators must be in reference to common intention.

In, **State of Tamil Nadu v. Nalini**[14] the court held that once any of the participants of conspiracy execute the conspiracy then his statements made by him cannot be used against other conspirators according to Section 10 of the Indian Evidence Act.

In **Subramaniam Swamy v. A Raja**,[15] the court in its judgments showed that anything which is doubtful cannot be considered as legal proof and such proofs are insufficient to prove any criminal conspiracy.

Alibi

The word 'Alibi' is derived from the Latin word, which means 'elsewhere'. Section 11 of the Indian Evidence Acts explains the concept of 'Facts not otherwise relevant become relevant' and makes the provision as a defending ground for the accused. The simplest meaning of this section is a condition when the incident took place and the accused is charged for the incident then he may make defend him on explaining that at the time of the incident he was not present at the location. Although previously it was not relevant for the court to know that where he was as the investigation showed that he committed the crime but his explanation that he was not at the place of incident make the irrelevant facts a relevant fact. The important part of Section 11 of the Evidence Act is that this rule is only accepted in the course of admission of the evidence and no other statute provides such rule.

The plea of alibi has to be taken on the very first stage of the trial and must be proved without any reasonable doubt as the burden of proof is on the person who is

[14] AIR 1999 SC 2640

[15] (2012) 9 SCC 257

taking advantage of Section 10 i.e., Plea of Alibi.

Essentials of Plea of Alibi

- There must be an offence punishable by the law.
- The person taking the defence of Section 10 should be accused of that particular offence punishable by the law.
- The defence must be satisfactory and beyond any reasonable doubt.
- The defence must be backed by evidence.

In, **Lakhan Singh @ Pappu vs The State of NCT of Delhi**[16] A plea of alibi cannot be compared with a plea of self-defence although both the plea is to be taken on the very first instance of the court proceedings.

In, **Sahabuddin & Anr vs the State of Assam**[17] Once the court is in doubt with respect to plea of alibi and the accused does not give any substantive explanation to support his statement under Section 313 CrPC, then the Court is authorised to conclude a negative or not a positive inference against the accused.

In, **Jitender Kumar v State of Haryana**[18] the Court not believing the plea of alibi as the accused did not provide the sufficient supportive evidence for establishing the defence. And the Court supported the case from the prosecution side.

2. RELEVANCY OF ADMISSIONS (SECTIONS 17-23 AND 31)

INTRODUCTION

Admissions and confessions are exceptions to the hearsay rule. The evidence Act places them in the category of relevant evidence in Part I "Relevancy of Facts ", presumably on the ground that as they are declarations against the interest of the person making them, they are probably true. Sections 17 to 23 and 31 deal with

[16] Delhi HC Crl Appeal No. 166/1999

[17] Criminal Appeal No. 629 of 2010

[18] (2012) 6 SSC 2014

admissions and Sections 24 to 30 of the Evidence Act with confessions.

MEANING OF ADMISSION

An admission is a statement, [oral or documentary or contained in electronic form], by party to the proceeding or his agent or person claiming under party which suggests any inference as to any fact in issue or relevant fact. Sections 18 to 23 lay down the circumstances which render admissions valid.

An admission has following characteristics:

(1) An admission is a 'statement' which suggests any 'inference' as to any fact in issue or relevant fact;

(2) It must be made by any of the 'persons' prescribed by the Act'

(3) It must also be made under the 'circumstances' prescribed by the Act;

(4) An admission may be oral or documentary.

PERSONS WHO CAN MAKE ADMISSIONS

Section 18 postulates that statements made by a party to the proceedings, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions. Similarly, statement made by a person who has any proprietary or pecuniary interest in the subject matter of the proceedings or persons having derivative interest make statements during the continuance of the interest are also admissions.

As per Section 19 persons whose position or liability is necessary to prove as against any party to the suit, if statements are made during the continuance of such position or liability, and such as would be relevant as against such persons in relation or liability in a suit brought by against them. As per Section 20, person to whom a party to the suit has expressly referred for information in reference to a matter in dispute. Section 21 does not say that admissions may not be used against persons other than the maker, and is evidently not intended to be exhaustive.

Statements which are admissions within Sections 19 and 20 are relevant and may clearly be proved against persons other than the makers of them, and similarly it

appears that admissions by persons who have a proprietary interest in a certain property may be used against other persons interested in the same property although the latter are not representatives in interest of the persons by whom the admissions were made.

SEC 22 & 22A: The contents of a document which is capable of being produced must be proved by the instrument itself and not by oral evidence. Oral evidence has to contain of documents are excluded under this section. However, they are admissible when the party is entitled to give secondary evidence of the contents of the document under section 65 and 66. This section also disallows the evidence of oral admission as to the contents of an electronic record.

SEC 23: This section lays down that in civil cases an admission is not relevant when it is made 1) upon an express condition that evidence of it is not to be given, or 2) under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

SEC 31: Admissions are not conclusive proof of the matters admitted but they may operate as estoppal under the provisions herein after contained.

Section58: Provided court may invite evidence to prove even admitted fact. A thing admitted need not be proved. **Shreedhar Govind Kamerkar v. Yesahwant Govind Kamerkar and Anr. 2006 (14) SCALE174**

Section70: Admission of execution by party to attested document shall be sufficient proof even without examination of attesting witness although document is such which requires attestation by law. (**Bharpur Singh Vs. Shamser Singh (2009) 3 SCC 687**) The examination of an attesting witness will not be necessary for the purpose of proving the execution of the document required by law to be attested if the executor admits the execution.

ADMISSION IN CIVIL CASES

In a case of ***Ram Kajaraia..vs.. Sheoprakash Kajaria, Mh.L.J. 2016(3) 172,*** it is held by Hon'ble Supreme Court that “Admission in pleading cannot be withdrawn by way of Amendment.” Though the admission is the best piece of evidence, it is equally wellsettled that the admissions are not conclusive as contemplated under Section 31 of

the Act as the maker of it is at liberty to prove that the admissions were mistaken or untrue. If admissions made in written statement were found incorrect or were made due to mistake either in law or fact, or as a result of any fraud or manipulations, the defendant can be permitted to amend his written statement as the admissions are not conclusive proof of matters admitted but they may operate as estoppal and the maker of admissions is at liberty to prove that the admissions are mistaken or untrue. Where the admission made by the plaintiff in his pleadings as well as in his statement on oath was that the suit premises was let out to the defendant for the commercial purposes, hence he (defendant) would be estopped to take a different stand as the admission may operate as an estoppal against him.

EVIDENTIARY VALUE OF ADMISSION

1) An admission constitutes a substantive piece of evidence in the case and for that reason can be relied upon for proving the truth of the facts incorporated therein.
2) An admission has the effect of shifting the onus of proving to the contrary on the party, against whom it is produced with the result that it casts an imperative duty on such party to explain it. In the absence of satisfactory explanation, it is presumed to be true.
3) An admission, in order to be competent and to have the value and effect referred to above should be clear, certain and definite and not ambiguous, vague or confused. It is true that admissions are not conclusive proof of the facts admitted and be explained or shown to be wrong, but they do raise an estoppal and shift the burden of proof to the person making them or his representative ininterest. Unless shown or explained to be wrong, they are efficacious proof of the facts admitted. The evidentiary value of admissions, therefore, depends upon the circumstances under which they are made.

3. RELEVANCY OF CONFESSIONS (SECTIONS 24-30)
“ CONFESSION”

The word “confession” appears for the first time in Section 24 of the Indian

Evidence Act. This section comes under the heading of Admission so it is clear that the confessions are merely one species of admission. Confession is not defined in the Act. Mr. Justice Stephen in his Digest of the law of Evidence defines confession as "confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime." The acid test which distinguishes a confession from an admission is that when conviction can be based on a statement alone, it is a "Confession and where some supplementary evidence is required to authorize a conviction, then it is admission". (**Ram Singh v. State, All. L.J. 660 1958. All. C.R. 462.)**

In **Pakala Narayan Swami v Emperor AIR 1939 P.C. 47** Lord Atkin observed " A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not in itself a confession".

In the case of **Palvinder Kaur v State of Punjab AIR 1952 SC 354** the Supreme Court approved the Privy Council decision in Pakala Narayan Swami case over two scores. Firstly, that the definition if confession is that it must either admit the guilt in terms or admit substantially all the facts which constitute the offence. Secondly, that a mixed up statement which even though contains some confessional statement will still lead to acquittal, is no confession. Thus, a statement that contains self-exculpatory matter which if true would negate the matter or offence, cannot amount to confession.

However, in the case **Nishi Kant Jha v State of Bihar 1959 SCR 1033** the Supreme Court pointed out that there was nothing wrong or relying on a part of the confessional statement and rejecting the rest, and for this purpose, the Court drew support from English authorities. When there is enough evidence to reject the exculpatory part of the accused person's statements, the Court may rely on the inculpatory part. "Confession" is species of "Admission", it is dealt within sections 24 to 30. These sections suggest the circumstances when a confession made by a person can be used against him or against some other person or just cannot be used at all.

TYPES OF CONFESSION*:* –

Confessions are of two types. Judicial and Extra Judicial. Judicial confession is a confession made in the immediate presence of a magistrate. All other confessions are

extra judicial confessions. An Extrajudicial confession may be a confession made to a police officer/investigation officer or to any other person. An extrajudicial confession made to anybody except investigation officer or a police officer needs corroboration. Such a confession

is looked with doubt as the one made to police officer.

DIFFERENCE BETWEEN JUDICIAL AND EXTRAJUDICIAL CONFESSION – JUDICIAL CONFESSION

Judicial Confession	**Extrajudicial**
1. Judicial confessions are those which are made to a judicial magistrate under section 164 of Cr.PC or before the court during committal proceeding or during trial.	1. Extrajudicial confession are those which are made to any person other than those authorized by law to take confession. It may be made to any person or to police during investigation of an offence.
2. To prove judicial confession the person to whom judicial confession is made need not be called as witness.	2. Extrajudicial confession are proved by calling the person as witness before whom the extrajudicial confession is made.
3. Judicial confession can be relied as Proof of guilt against the accused person if it appears to the court to be voluntary and true.	3. Extrajudicial confession alone cannot be relied it needs support of other supporting evidence.
4. A conviction may be based on judicial confession.	4. It is unsafe to base conviction on extrajudicial confession.

WHEN CONFESSION NOT RELEVANT AND IN ADMISSIBLE IN LAW

Section 24 enacts the general rule of inadmissibility of involuntary confessions, recognized all over the world and guaranteed under Article 20(3) of the Constitution of India. A confession made under circumstances which would make it appear to the Court

that such confession was caused by any inducement, threat or promise from a person in authority is irrelevant in a criminal proceeding. Offering such inducement, threat or promise by police officers is prohibited under the S. 163 Code of Criminal Procedure. Section 25 and 26 go far beyond the constitutional protection and debar confession made by an accused person to a police officer or whilst in police custody to anyone except in the immediate presence of a Magistrate from being given in evidence.

Section 24 Confession caused by inducement, threat, or promise from a person in authority To attract the provisions of Sec 24, the following facts must be established:

(a) The confession must have been made by an accused person in authority.

(b) It must appear to the court that the confession has been caused by any reason of inducement, threat or promise proceeding from a person in authority

(c) The inducement, threat or promise must have reference to the charge against the accused person

(d) The inducement, etc. must be such that it would appear to the Court that the accused, in making the confession, believed that he would by making it, gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It is necessary that all the conditions must exist cumulatively.

Further, this section merely requires that if it "appears to the court" that the confession was improperly obtained, it becomes inadmissible i.e. if the circumstances create a probability in the mind of the court that the confession is improperly obtained, it may hold it inadmissible.

CUSTODIAL CONFESSION

The rule of total exclusion of custodial confession from evidence, as enacted under Section 25 and 26 of the Evidence Act on the face of it, shows a serious concern of legislature for protection against police brutality, of the right of an accused person not to be compelled incriminate himself. The rule carries the privilege against compelled self-incrimination quite for adding to it the concept of deemed in voluntariness due to the custody of the police.

In the process, however, an important agency of the state entrusted interalia with the job of maintaining law and order and of prevention and detection of crimes the jobs

essentially requiring public confidence and faith, gets stigmatized as 'untrustworthy'. A confession made by an accused to any third person before he is apprehended by police is admissible in evidence and can be used to convict the accused even if it is share link between him and the circumstantial evidence, but not if it is made to a police officer or to anybody, whilst he is in custody of the police except to the extent provided for in section 27 the prohibition is absolute.

Any confessional statement given by accused before police is inadmissible in evidence and cannot be brought on record by the prosecution and is insufficient to convict the accused; **Ram Singh v.State of Maharashtra, 1999 Cr LJ 3763 (Bom).**

If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by section 25; **Aghnu Nagesia v. State of Bihar, AIR 1966 SC 119.**

Reasons for exclusion of confession to police another variety of confessions that are under the evidence act regarded as involuntary are those made to a personnel. Section 25 expressly declares that such confessions shall not be proved. If confessions to police were allowed to be proved in evidence, the police would torture the accused and thus force him to confess to a crime which he might not have a committed. A confession so obtained would naturally be unreliable. It would not be voluntary. Such a confession will be irrelevant whatever may be its form, direct, express, implied or inferred from conduct. The reasons for which this policy was adopted when the act was passed in 1872 are probably still valid.

In **Dagdu v. State of Maharashtra , A.I.R. 1977 S.C. 1579,** Hon'ble Supreme Court noted: The archaic attempt to secure confessions by hook or by crook seems to be the be all and endall of the police investigation. The police should remember that confession may not always be a shortcut to solution. Instead of trying to "start" from a confession they should strive to "arrive" at it. Else, when they are busy on their short route to success, good evidence may disappear due to inattention to real clues. Once a confession is obtained, there is often flagging of zeal for a full and through investigation with a view to establish the case de hors the confession, later, being inadmissible for one reason or other, the case fundles in the court.

EFFECT OF POLICE PRESENCE

The mere presence of the policeman should not have this effect. Where the confession is being given to someone else and the policeman is only casually present and overhears it that will not destroy the voluntary nature of the confession. But where that person is a secret agent of the police deputed for the very purpose of receiving a confession, it will suffer from blemish of being a confession to police. In a rather unusual case, the accused left a letter recording his confession near the dead body of his victim with the avowed object that it should be discovered by the police, the supreme court held the confession to be relevant. There was not even the shadow of a policeman when the letter was being written, and planted.

The object of section 26 of the Evidence Act is to prevent the abuse of their powers by the police, and hence confessions made by accused persons while in custody of police cannot be proved against them unless made in presence of a magistrate. The custody of a police officer provides easy opportunity of coercion for extorting confession obtained from accused persons through any undue influence being received in evidence against him.

CONFESSIONS WHEN RELEVANT -

The following three types of confession are relevant and admissible Following conditions are necessary for the application of section 27 :

1. The fact must have been discovered in the consequence of the information received from the accused.
2. The person giving the information must be accused of an offence.
3. He must be in custody of a police officer.
4. That portion only of the information which relates distinctly to the fact discovered can be proved. The rest is inadmissible.
5. Before the statement is proved, somebody must depose that articles were discovered in consequence of the information received from the accused.

Before the statement of the accused could be proved, somebody, such a sub inspector, must depose that in consequence of the given information given by the accused, some facts were discovered. 6. The fact discovered must be a relevant fact, that is, to say it

must relate to the commission of the crime in question.

In **Pandu Rang Kallu Patil v. State of Maharashtra** , S.C . it was held by Supreme Court that section 27 of evidence act was enacted as proviso to. The provisions of sections of Section 25 and 26, which imposed a complete ban on admissibility of any confession made by accused either to police or at any one while in police custody. Nonetheless, the ban would be lifted if the statement is distinctly related to discovery of facts. The object of making provision in section 27 was to permit a certain portion of statement made by an accused to Police Officer admissible in evidence whether or not such statement is confessional or non confessional.

Section 28 provides that if there is inducement, threat or promise given to the accused in order to obtain confession of guilt from him but the confession is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court been fully removed, the confession will be relevant becomes free and voluntary.

Section 29 lays down that if a confession is relevant, that is, if it is not excluded from being proved by any other provision on Indian Evidence Act, it cannot be relevant if it was taken from the accused by:

1.Giving him promise of secrecy, or

2. By deceiving him, or

3. When he was drunk, or

4. Because it was made clear in answer to question which he need not have answered, or because no warning was given that he was not bound to say anything and that whatever he will state will be used against him.

Section 30 consideration of proved confession affecting person making it and others jointly under trial for the Same offence

Section 30 of the Act is an unusual provision by which something which is not in the nature of evidence may be used against the accused person at the trial. The scope of its application is very limited. The confession by a co accused is not to be treated as evidence against another accused in the sense that conviction of the co accused may not be supported. If can only be taken into consideration and used as corroboration if other materials brought in support of the charge exist. It has to be seen whether

confession of the co accused is of such nature that the person making such confession would be convicted on the confession for the offence with which he and his co accused are charged. Where evidence against a coaccused
is sufficient to base a conviction, confessional statement of the accused may be treated as a
corroboration for believing that evidence.

In **Kashmira Singh v. State of MP** , accused Kashmira who was an Assistant Food Procurement Inspector, his services along with the another food inspector were terminated on a report of the food officer when they were getting the rice polished in a rice mill. Kashmira was heard twice saying that he would teach a lesson to the food officer. After a few months the son of the food officer was found missing and his body was found in a well. Kashmira, Gurudayal brother of Kashmira, Prithipal son of Gurudayal and one Gurubachan, a rickshaw puller in this case were tried of conspiracy and killing the child. The prosecution story was that Prirthipal led the child, when he was playing near the Gurudwara, for some distance and then the child was taken on the cycle by Kashmira to a house where he was murdered.

According to the judgment of the SC Guruibachan was not a rickshaw puller by profession and the rickshaw was hired only for that night for the disposal of the body of the deceased. Hence, before the confession of one accused may be taken into consideration against others, it has to be shown that:

1) The person confessing and the others are being tried jointly.
2) They are being tried for the same offence.
3) The confession is affecting the concessioner and the others.

PROOF OF JUDICIAL CONFESSION

Under section 80 of Evidence Act a confession recorded by the magistrate according to law shall be presumed to be genuine. It is enough if the recorded judicial confession is filed before the court. It is not necessary to examine the magistrate who recorded it to prove the confession. But the identity of the accused has to be proved.

PROOF OF EXTRAJUDICIAL CONFESSION

Extrajudicial confession may be in writing or oral. In the case of a written confession the writing itself will be the best evidence but if it is not available or is lost

the person before whom the confession was made be produced to depose that the accused made the statement before him. When the confession has not been recorded, person or persons before whom the accused made the statement should be produced before the court and they should prove the statement made by the accused.

EVIDENTIARY VALUE OF CONFESSION

A confession is substantive evidence against its maker, so that it has been duly recorded and suffers from no legal infirmity, it would suffice to convict the accused who made the confession, though as a matter of prudence, the Court expects some corroboration before acting upon it. Even then slight corroboration would suffice. But before acting upon a confession, the Court must be satisfied that it is voluntary and true.

In ***Aghnoo Nagesia Vs. State of Bihar*** **, AIR 1966 SC 119** , it has been held that, "A statement contained in the FIR furnished by one of the accused in the case cannot, in any manner, be used against another accused.

Even as against the accused who made it, the statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it is as an admission under Sec.21 of the Evidence Act against its maker alone unless the admission does not amount to confession."

In the case of ***Jagta Vs. State*** **, AIR 1974 SC 1545** , it has been held that evidence of Extrajudicial confession in the very nature of things is a weak piece of evidence. However, it is not open to any court to start with a presumption that extrajudicial confession is weak type of evidence. Admissibility of the confession is a question for the Judge. Upon a consideration of the evidence and circumstances, the Judge preliminary decides on the voluntariness or otherwise of the confession. If his answer is in negative, the confession is excluded as a matter of law. If his answer is affirmative, the confession is admissible. The Judge to determine admissibility of the confession whether confession is true and of how much weight and value. If he is satisfied from the evidence that it is true then to act upon it.

Confession made before the police leading to discovery of the facts is admissible, as per Sec.27 of the Evidence Act. When accused retract from confession it is called retracted confession. Such confession can be legal base of the conviction, if

the court is satisfied that it was true and so voluntarily made. But ordinarily corroboration is required.

The law in regard to extrajudicial confessions may be stated thus: An extrajudicial confession, if voluntary, can be relied upon by the Court along with other evidence in convicting the accused. In examining the value of an extrajudicial confession one factor is whether the accused was a free man while making his confession. The second factor is that the value of the confession as an evidence on veracity of the witness to whom it was made. A conviction can be founded on a extrajudicial confession. It should be clear, specific and unambiguous. But it should not be expected that the witness, in order to establish his credibility, should be able to reproduce the statement in its word for word original version. As a matter of law corroboration is not necessary at all as a general rule a retracted confession requires corroboration of some kind; but the amount of corroboration which the Court will look for depends on the circumstances of each case. It has been held about a judicial confession that though it is retracted by the maker, it was not a ground to presume that it was tainted.

The rules regarding a confession, which is subsequently retracted, are;

(1) that a confession is not to be regarded as involuntary merely because it is retracted,

(2) as against the maker of the confession, the retracted confession may form the basis of a conviction if it is believed to be true and voluntarily made,

(3) as against the co accused, both prudence and caution require the Court not to rely on a retracted confession without independent corroborative evidence and

(4) retraction should not be ambiguous, vague or imaginary.

DIFFERENCE BETWEEN ADMISSION AND CONFESSION

The distinction between a confession, and an admission, as applied in criminal law, is not a technical refinement but based upon substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgement of guilt, on the part of the accused

and by the very force of the definition excludes an admission which of itself as applied

in criminal law, is a statement by the accused direct or implied of facts pertinent to the issue and tending in connection with proof of other facts or prove his guilt but of itself is insufficient to authorize a conviction.

The acid test which distinguishes a confession from an admission is that where conviction can be based on the statement alone, it is a confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission. Another test is that if the prosecution relies on the statement as being true it is confession and if the statement is relied on because of its falsity it is admission.

Confession	**Admission**
1. Confession is a statement made by an accused person which is sought to be proved against him in criminal proceeding to establish the commission of an offence by him.	1. Admission usually relates to civil transaction and comprises all statements amounting to admission defined under section 17 and made by person mentioned under section 18, 19 and 20.
2. Confession if deliberately and voluntarily made and may be accepted as conclusive of the matters confessed.	2. Admissions are not conclusive as to the matters admitted and it may operate as an estoppel.
3. Confessions always go against the person making it.	3. Admissions may be used on behalf of the person making it under the exception of section 21 of Evidence Act.
4. Confessions made by one or two or more accused jointly tried for the same offence can be taken into consideration against the co accused (section 30)	4. Admission by one of the several defendants in a suit is no evidence against other defendants.
5. Confession is statement written or oral	5. Admission is a statement oral or written

which is direct admission of guilt.	which gives inference about the liability of person making admission.

CONCLUSION

To sum up A confession is a statement made by an accused person which is sought to be proved against him in criminal proceeding establish the commission of offence by him. Whereas, an admission usually relates to civil transaction and comprises all statements amounting to admission defined under Section 17 and made by person mentioned under Sections 18,19 and 20. Confessions, if deliberately and voluntarily made, may be accepted as conclusive of the matters confessed whereas; admissions are never conclusive to the matters admitted, though it may act as an estoppel. Confessions always go against the person making it whereas, admissions may be used on behalf of the person making it under the exceptions provided in Section 21 of Evidence Act. Confessions made by one or two or more accused jointly tried for the same offence can be taken into consideration against the co accused also as mentioned in Section 30. On the other hand, admission by one of several defendants in a suit is no evidence against others. Confession is statement written or oral which is a direct admission of suit and Admission is a statement, oral or written, which gives inference about the liability of person making admission.

MODULE 03

RELEVANCY OF FACTS II

1. STATEMENT BY PERSONS WHO CAN-NOT BE FOUND (SECTIONS 32-33)

2. STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES (SECTIONS 34-39)

3. JUDGMENTS (SECTIONS 40-44)

1. STATEMENT BY PERSONS WHO CAN-NOT BE FOUND (SECTIONS 32-33)

Introduction

Persons who cannot be called as a witness

Section 32 of the Indian Evidence Act, 1872 is an exception to the general rule

and under this section the hearsay evidence is admissible. Under this section, indirect evidence is relevant as held in the case of **Mst. Biro v. Atma Ram.** According to section 32, any written or verbal statement containing relevant facts which is made by a person who is either dead or cannot be found or has been given by a person who has become incapable of giving evidence or the attendance of such person can require delay or expense which seems unreasonable to the court, are relevant in the following cases:

When the statement is related to causing of death

According to section 32(1), when the question comes to the death of a person and that person gives a statement regarding the cause of his death or about any of the circumstances which led to his death then it is considered to be relevant. The statements made are considered relevant even if that person making a statement was there or not at the time when the statement was made during the expectation of death.

Illustration:

When the question arises that whether B murdered A or not.

A dead due to the injury caused by B and suit against B is carried on by legal heir of A.

The statement of A regarding his death referring to the murder and other actionable wrongs are relevant facts.

A statement made in the ordinary course of business

A statement which has been made by such person during the ordinary course of business and such statement consists of any statement or entry of memorandum or any book maintained by him in the ordinary course of business. It may be considered of any acknowledgement which has been written and signed for him of any document which is used for commerce which has been written and signed by him according to sub-clause (2) of section 32.

ILLUSTRATION: When the question in dispute is regarding the question that whether the ship sailed from Kolkata harbour on a particular date then, a letter written by a member of merchant's firm to the correspondent stating that the cargo has been

shipped on the particular date is a relevant fact.

The statement made against the interest of the maker

When a statement made by a person is against his pecuniary or proprietary interest and it will expose him if it is true to criminal prosecution or to the suit of damages then it considered being relevant under section 32(3).

Illustration:

A has made any statement which is against his interest and such statement can expose him, then such statement is relevant.

The statement which gives an opinion as to public right or custom

When a statement is made which gives an opinion regarding the existence of any public rights, customs, or a matter related to the general public interest which it existed, he would have been aware of and when such statement has been made there was no controversy of such rights, customs or matter under section 32(4).

Illustration

If a question arises whether the road is a public way. The statement by X who is a deceased headman of that village is relevant.

The statement as to the existence of a relationship

Under section 32(5), when a statement is given which is related to the existence of a relationship by blood, marriage or adoption by the party making the statement has a special means of knowledge about the existence of such relationship about marriage, blood relation or adoption and such statement is required to be made before the dispute was raised.

Illustration:

If the question of the dispute arises that whether or not A and B are legally married, then

the statement of a deceased clergyman that they were married by him under certain circumstances will be relevant.

A statement made in a will or deed in family affairs

When the statement made is related to the existence of a relationship by blood, adoption or marriage between the deceased persons in any deed or will and such will or deed is related to the family affairs of such deceased person then it is considered to be relevant under section 32(6). Such a statement is required to be made before the question in dispute was raised.

ILLUSTRATION: If the question arises that A who is a deceased person, whether the father of B. The statement of A in his will considering B as his son is relevant.

Statement in a document relating to transaction creating a Right or custom

According to section 32(7), when a statement is stated in any will, deed or any other document which is related to the question of the existence of a right or custom under section 13(a) of the Evidence Act,1872. Such a statement should be regarding the existence of a certain right or custom by which such right or custom which is in question was created, coined, recognised or denied.

Illustration:

When an issue arises about a custom or right in a particular area, the statement of X who was present when such right or custom was created is relevant.

A statement made by several persons expressing feelings relevant to the matter in question

When the statement has been made by several numbers of persons who have expressed their feelings on their part, then such statement is relevant under section 32(8).

EXAMPLE: Public opinion about a matter in dispute.

Who can make the above statements

The person who is dead

The statement made under section 32 must be made by a person who is dead before admitting the statement before this section. The statement of a dead person has been given importance under this section as there can be no better evidence can be laid than the statement made by the dying person himself about his death.

If the person who has made the dying declaration survives then such statement is not admitted under section 32 but under the provision of confession.

The person who cannot be found

When a person disappears and never heard of and his presence as a witness cannot be compelled and such a person makes a statement and the party to the proceeding is able to prove that such person has disappeared but his statement can be proved then such statement can be admitted.

Before such a statement is admitted it is required to be proved that the person who is seeking for admission of such a statement has made an examination of that person with an honest effort.

By the person who is incapable of giving evidence

When a person making a certain statement later become physically unfit and incapable to depose, in such a situation, if the statements made are related to the sub-clauses of section 32 of the Act, then it is admitted and may be proved during the proceedings. This section includes any person who becomes physically incapable of giving a statement on a later stage.

Unreasonable delay or expenses

When there can be unreasonable delay or expenses in the procedure of appearance of a witness, then if his previous statement is relevant, it is admissible.

But, the mere fact that a person is living far away from the place of trial, is not a

valid ground of the admission of a statement under section 32. For the admission of a statement under section 32, it must be proved that in the attendance of the person, unreasonable delay and expense will take place.

DYING DECLARATION

The term "dying declaration" is not defined under the Evidence Act but it can be interpreted according to sub-section (1) of section 32.

As held in the case of **Ram Bihari Yadav v. the State of Bihar**, "A dying declaration can be defined as a statement made by a person who is dead regarding the reason for the cause of his death and regarding any transaction which resulted in his death. Also when the question of death comes into question then such statements are relevant under section 32 of the Indian Evidence Act. The person making such a statement was under the expectation of death or not at the time when such statement was made comes into question".

Evidentiary Value of Dying Declaration

When a dying declaration is made orally and the person gives the name of assailants and it is written by any of them, then it is a valid dying declaration. The people present can dispose of orally that the names of assailants were given by the deceased as held in the case of **Nanhu Ram v. the State of M.P**.

The oral dying declaration is considered admissible and they are an exception to the general rule of evidence that considers hearsay evidence as invalid evidence in the eyes of law.

In the case of **Bable v. State of Chattisgarh**, it was held that the oral dying declaration is an exception of the Hearsay evidence.

Even when a dying declaration has been made by the deceased before his wife, father-in-law or any relative in a conscious state and the doctor conducting his post mortem examination has not made a cross-examination about the mental state of the

deceased, then also the dying declaration considered absolutely valid and conviction can be made on the basis of such declaration as held in this case of **Prabin Ali v. State of Assam.**

In the case of **Vijay Pal v. State (Government of NCT) Delhi**, it was held by the court that it is clear by the law that when a dying declaration is credible and there is nothing in the record that the condition of deceased was not so that he could have made the statement to a witness. Like in this case when the witness rushed to the house of the deceased, she told him that her husband has poured kerosene on her.

In the case where the death of the deceased by burning by the husband, in such cases, the dying declaration made by the deceased is considered to be totally true and no evidence is present that can prove the contrary. Even the absence of kerosene oil in the deceased hairs cannot render the dying declaration as doubtful as held in the case of **Tanua Rabidas v. State of Assam.**

The dying declaration cannot be used for conviction of accused if it is the sole evidence. The conviction cannot be made solely on the basis of dying declaration unless it is corroborated and each case is decided on an individual basis of the case. The circumstances of the case affect the value of the dying declaration. sole evidence

Reason for admissibility of dying declaration in evidence

A dying declaration is admissible in the evidence based on the principle of: **'Nemo moriturns proesumitur mentiri'**

This principle means that a man does not lie at the time of his death and he will not meet God with a lie in his mouth". A dying declaration is considered to be correct as long as confidence is inspired by it in the mind of the Court. A dying declaration is required to be judged according to its circumstances as held in the case of **Umakant v. State of Chattisgarh**.

As held by the Supreme Court in the case of **Uka Ram v. State of Rajasthan,** the sense of death leads to the same feeling which a virtuous man get under oath and the principle of admissibility of dying declaration is based upon this principle. The

admission of dying declaration is made on the consideration that the declaration has been made by the deceased under extremity. When a person is near death and his hope is gone for this world then it is powerful consideration that he will be speaking the truth. Indian law is based on the principle that "a dying man seldom lies. There are two types of statements which are made admissible by section 32(1):

- A statement stating the cause of death
- Statement related to any circumstances which resulted in death.

Conditions for dying declaration

The statement is considered as a dying declaration when the statement is made under the following circumstances and conditions:

Cause of death

When a person makes a statement regarding his cause of death or about any circumstances or transaction that resulted in his death then such statement will be considered as a dying declaration and it is considered relevant.

Illustration:

A dies due to assault. Before his death, A makes a statement than B stabbed him with a knife. Such a statement is admissible before the court as a dying declaration and the fact the deceased survived for few days even after a fatal injury does not deprive such statement of being of a character of dying declaration.

- The statement related to the cause of death of the deponent is admissible and the time gap between the statement of deceased and the death is considered immaterial.
- The statement of the deceased made but the cause of death is something else or some disease, then such statement is not considered as a dying declaration.

When declarant dies of injury that is yet to be proved

For the statement to be considered as a dying declaration it is required to be proved that the cause of his death is due to the injury he received in the incident for which the accused is to be prosecuted. As in the case of Chandra Bhan Singh v. State where the deceased narrated the incident of murder before the police about the attack on him for murder but later it was found that the death of deceased was because he developed cancer. So, the statement of the deceased could not be considered as a dying declaration.

Circumstances which resulted in his death

The expression "any circumstances of transaction that resulted in death" has a wider scope than the expression cause of death. Even if a statement is not considered as a cause of death but it might be admissible under the circumstances which resulted in death.

In the case of **Patel Hiralal Joita Ram v. the State of Gujrat**, it was held by the court that statement of circumstances that resulted in death is itself enough to expand the scope of admissibility of the declaration. Any statement related to death directly or indirectly, proximately or remotely are considered under this and it expands the ambit of dying declaration.

Intention to use such a statement as dying declaration is not compulsory

In the case **Bhagirath v. the State of Haryana** it was held by the Supreme Court that it is not compulsory that while recording the dying declaration that statement is to be used at dying declaration. The intention to use the statement at a dying declaration is not mandatory.

In this case, also the deceased who has suffered the gunshot made his statement but later he died. The statement recorded was considered as the dying declaration.

The person making a statement when not dead

When the person who has made the statement as dying declaration survives and does not die, then such statement is not considered as a dying declaration. It will be considered as confession statement but not as a dying declaration.

Expectation of death

A statement recorded as dying declaration is considered relevant when the person making the statement was or was not having an expectation of death.

The expectation of death does not affect the validity of dying declaration but it affects the weight attached to it. When a person who is making the statement has knowledge that he is going to die and he does not have any hope of recovery left, then the chances of statements to be true increases as held in the case **State v. Kanchan [AIR 1954 All 153]**.

The Supreme Court is also of the view that there is no doubt that when a person is expecting death soon then the chances of falsehood decreases but the value of the statement is not lost if the person is alive for a longer time than expected.

Proximate cause

The statement made as dying declaration must have a proximate relationship with the actual occurrence and not remote as observed by the privy council in the case of Narain Swami v. Emperor. The statement of a person should be regarding the cause of death or circumstances leading to the death of the person and it should be made by the deceased person.

Difference between Indian Law and English Law regarding the dying declaration

The rules regarding the dying declaration are different under English law than the Indian Law as follows:

- The dying declaration is not admissible in the civil cases under the English Law but under Indian law, the dying declaration can be admissible even in civil cases into question.
- In the criminal cases under the English Law, the dying declaration is considered only in single instances of homicide such as murder or manslaughter where the circumstances of the death are subject to dying declaration while under the Indian Legal System, the statement made as dying declaration act as evidence whatever the nature of charges may be.
- As per the English law, for dying declaration certain conditions are required to exist during the time of declaration such as:
    - It is important that the declarant should be in actual danger of death and the statement should be made receiving the injury.
    - The declarant should be aware of his danger and he should have left every hope of recovery.
    - The death should be caused.
- Under the Indian Legal system, the third condition of death is necessary as the dying declaration is considered admissible only when the declarant dies but the first two conditions are not mandatory under Indian Law for a declaration to be admissible as dying declaration.
- Under section 32 of the Evidence Act, the statement of the deponent is considered as a dying declaration even when he was not in actual danger or he has no actual knowledge of the danger
- Under English law, admissibility of the dying declaration depends on the principle that sense of death is produced in a man's mind some feeling of that is same as a virtuous person giving a statement under oath. When a person is at the verge of death and he has no hope left for life, then the feelings of falsehood disappears and a person's mind only speaks the truth.

- Under Indian Law, for consideration of statements as dying declaration and testing its credibility, a weight is given to the facts and circumstances of the case.

Dying declaration recorded by the police

A dying declaration recorded by a police during his course of investigation is considered admissible under section 32 of the Indian Evidence Act but it is better to leave such declaration out of consideration unless the prosecution is able to satisfy the court that why it was not declaration recorded by a magistrate or a doctor as held by the Supreme Court in the case **Dileep Singh v. the State of Punjab [1979 CrLJ 700]**.

Conclusion

There are certain classes of people who cannot be called as a witness but their statement when recorded under certain circumstances, it is considered as relevant. Such as when the statement is made by a person who is dead or a person who cannot be found or the attendance of whom requires unreasonable delay or expenses then the statement made by them regarding his death, or ordinary course of business and certain other conditions as mentioned under section 32 are considered relevant. One the major statement is the dying declaration. The dying declaration is considered admissible under the Indian Legal system and holds important evidentiary value under law. The dying declaration solely does not lead conviction but under few circumstances of the case, even the sole dying declaration can lead to the conviction of accused.

The consideration of the dying declaration also depends upon the facts and circumstances of the case. There is a major difference between the concept of dying declaration between the English Law and under the Indian Legal System. The dying declaration and the weight attached to also depends upon the knowledge of the deceased about the expectation of death as there is the concept in the legal system that when a person knows he is going to die, then the statement given by him are not false and it also improves the credibility of dying declaration.

2. STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES (SECTIONS 34-39)

Entries in account books regularly kept in the course of business are admissible though they by themselves cannot create any liability.

Ishwar Das v. Sohan Law, 2000

Unbound sheets of paper are not books of account and cannot be relied upon.

Dharam Chand Joshi v. Satya Narayan Bazaz, 1993

Books of account being only corroborative evidence must be supported by other evidence.

Dharam Chand Joshi v. Satya Narayan Bazaz, 1993

35. Relevancy of entry in public [record or an electronic record] made in performance of duty.

An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact.

Documents made ante litem motam-

Documents made ante litem motam can be relied upon safely, when such documents are admissible under section 35.

Murugam versus State of Tamil Nadu, 2011

Relevancy of Baptism certificate-

It has been held regarding proof about legitimacy of child that the British certificate proceeding on the basis of baptism certificate, containing fact that baptism record was read and checked before the godparents and signed by person along with godparents, such certificate is valid. Thus British certificate proceeding on basis of

baptism certificate legally recognised legitimacy.

Luis Caetano Viegan v. Esterline Mariana R.M.A. Da'Costa, 2003

36. Relevancy of statements in maps, charts and plans.

Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts, or plans are themselves facts.

37. Relevancy of statement as to fact of public nature, contained in certain Acts or notifications.

When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament of the United Kingdom, or in any Central Act, Provincial Act, or a State Act, or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony or possession of His Majesty is a relevant fact.

38. Relevancy of statements as to any law contained in law books.

When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

39. What evidence to be given when statement forms part of a conversation, document, electronic record, book or series of letters or papers.

When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or is contained in part of electronic record or of a connected series of letters or papers, evidence shall be given of so much and no more of the

statement, conversation, document, electronic record, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

3. JUDGMENTS (SECTIONS 40-44)

Let us first understand the actual meaning of judgement under the code of civil procedure, 1908. The section 2(9) of CPC defines it as a decision which is given by the judges in a court regarding the rights, duties and liabilities of an individual. The basic theory of law is whether the previous judgements or the following judgements are not relevant, as every case is decided by its own facts. The judgement depends upon the facts of the case of particular parties and not by the references to the judgement of other cases.

Judgment is of two types

- Judgement in rem
- Judgement in personam

Judgement in rem: – When a judgment is given on a particular subject matter, it will not only remain between the two parties but also be applicable to the entire world.

Judgement in personam: – When a judgment is given on a subject matter, it will remain between the parties. It means the judgment will be against an individual.

''Relevancy of judgement,'' it means that every judgement is based upon the facts of each particular case. If we understand it in a simple way, it says that each and every case has its own importance. The judgement of each case is based upon the subject matter and it is not necessary that the judgment of one case is interrelated with another case.

A civil judgement is not relevant to a criminal trial though arising out of the same fact. A judgement in a civil case for defamation is not relevant to criminal prosecution. The previous judgment is not relevant to the subsequent case. More importance is

given to the facts of the cases and on the basis of which judgement is given.

The Indian Evidence Act, 1872

The law may be divided into 2 parts i.e. substantive law and procedural laws. Substantive laws are those laws which define the right, duties, punishments and offences for the same, for e.g. I.P.C., and procedural laws are those by which the procedure of substantive law is regulated, for e.g. C.R.P.C. So the procedural law includes the Evidence Act. The existence of proof or evidence is necessary in procedural law. The Indian Evidence Act was originally passed by the Imperial Legislative Council in 1872 in India, during the British Rule. It contains a set of rules and provides, inter alia, how a fact is to be proved.

It includes sections regarding the judgment of court of justice when relevant from Section 40 to Section 44 which talks for the same.

- Section 40– The existing judgment will be relevant even in a second suit trial.
- Section 41– The certain judgments in probate, matrimonial, admilarity, and insolvency jurisdiction are relevant.
- Section 42– The effect of judgement, order, or decree is relevant, other than those which are given in section 41.
- Section 43– Judgment, order or decree are irrelevant, other than those mentioned in section 40-42.
- Section 44– If the previous judgment may proved fraud, collusion or incompetency of a court then such judgment does not have the effect of res judicata.

Section 40- Previous judgments relevant to bar a second suit or trail

Under the Indian Evidence Act, 1872, Section 40 defines that, the existence of any judgment, will be relevant even in a second trial. Here the rule of ‘res judicata’ applies. It simply means that if any judgement which prevents the court from giving attention to

such a suit or petition then it will be a relevant fact.

What is "res judicata"

Many of you may have heard about this word. "Res" means "subject matter" and "judicate" means "already decided". So, it says that the matter is already decided. It is defined under Section 11 of Cr.P.C.

For Example: – 'A' and 'B' are two parties, 'A' sues 'B' for matters related to property. But the court dismissed the suit and then again 'A' filed a suit against 'B'. So it was said that once the judgement was given by a court over a particular subject matter then that court does not have the jurisdiction and the formulae of res judicata applies.

Similarly, the Criminal Procedure Code bars a second trial of a person once tried or convicted. Thus, the judgment by which he was convicted will be relevant to every case or proceeding in which he is charged with the same offence.

Shrinivas Krishnarao Kango v. Narayan Devji Kango And Others (1954)

This case belongs to a member of a joint undivided family. Both Siddopant and Krishnarao were members of the Kulkarni family. Krishnarao died in 1897 and left behind a widow (Rukminibai) who was the sixth defendant. Siddopant died in 1899 leaving his son Gundo. Gundo died in 1901 leaving behind his widow (Lakshmibai) who was the fifth defendant. Lakshmibai adopted a son Devji, who died in 1935 leaving his three sons. The three sons and a widow (Akkubai) who was the fourth defendant. In 1944, Rukmanibai adopted the plaintiff and now that adopted son was the Petitioner in this case and the Respondent was Devji. So, the Plaintiff was claiming for the half share from the family property. But the Defendant denied the truth and validity of the plaintiff's adoption. They further said that the only ancestral property belongs to the family of Watan's Land. In this case, the court held that the adoption of the plaintiff was valid or true and also said that this question was no longer in dispute. The trial court held that the plaintiff was entitled to the share.

Section 41- Relevancy of certain judgment in probate, etc, jurisdiction

The Indian Evidence Act, 1872 says that a final judgment, order, decree or ruling of a court exercising probate (relating to will), matrimonial (marriage, divorce), admiralty (war claims) or insolvency jurisdiction is relevant.

This section consist of two parts:

- It deals with judgement in rem i.e. a kind of declaration about the status of a person and is effective to the entire world whether he was a party or not.
- A judgement in personam is when a judgment is given to the parties (e.g. a tort or a contract action) which binds only the parties and is not relevant in any subsequent case.

Such judgment is conclusive proof. It refers to a presumption of a particular set of facts which cannot be overruled or changed by additional evidence or argument.

Syed Askari Hadi Ali Augustine v. State (Delhi Administration) & Anr (2009)

In this case, Shamim Amna Imam was a Testatrix (a person who made a will or gave a legacy). She was the owner of the properties in question. She executed a will in favour of the appellant i.e Syed Askari Hadi Ali on 3.5.1998 and after that, she died on 23.5.1998. Syed Askari Hadi Ali filed an application regarding the will. He also applies for a grant of mutation in respect of the property but the request for mutation could not be accepted due to certain reasons:-

- The appellant could not produce the original copy of the will.
- The property which was in question was under possession.
- And the Title Suit which was filed by the Testatrix against the appellant was pending in the civil court.

So, after this many appeals were made and due to lack of proof which was essential in this case; finally the court said that it is not a fit case where we should exercise our discretionary power or jurisdiction under Article 136 of the Indian Constitution have regard to the facts of the case and the circumstances regarding the

same.

Kinds of jurisdiction

Probate jurisdiction

It exercises the power of probate, surrogate, or orphan's court. It includes the establishment of wills; settlement of a decedent's estate; supervision of guardianship of infants.

Goutam Shantilal Shah vs State of West Bengal on 9 May, 1996

In this case, a question arose, whether district delegates under section 276 of Indian succession act 1925 can entertain an application for grant of probate of a will in respect of immovable property. But in the end, it was held that if any application is made for grant of probate of the will, such application shall be decided in accordance with the law.

Matrimonial jurisdiction

It exercises the power of marriage, divorce, et thoro, the nullity suit.

Santhini vs Vijaya Venketesh on 9 October, 2017

This case deals with section13 of Hindu marriage act, in this case, it was held that video conferencing is not allowed in matrimonial matters. In the circumstances, issue notice on the review petition.

Admiralty jurisdiction

It exercises the power of law over cases concerning ships or the sea and other navigable waters.

Gobind Ram vs Gian Chand on 27 September, 2000

This case deals with the matter in admiralty court. The respondent who was alleged to have committed breach of contract in London, the admiralty court's jurisdiction was invoked in England.

Insolvency jurisdiction

It exercises the power of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings.

Krishnaswami Iyer and … vs T.V. Swaminatha Iyer on 26 August, 1924

This case deals whether vakils have a right of audience in the insolvency of the court at the Presidency Town of Madras. G. Krishnaswami Iyer was the appellant and T.V. Swaminatha Iyer was the respondent. After all the discussion it was decided that vakils had no right of audience in the insolvency court.

Section 42- Relevancy and effect of judgments, orders, decrees, other than those mentioned in Section 41 of the Indian Evidence Act

The effect of judgment or order will be relevant, except those which are mentioned in section 42. Judgements are relevant if they are related to matters of public nature. But such judgment, order or proclamation is not conclusive proof of which they state.

Illustration: – X sues Y for the murder of his brother i.e. Z. Y alleges the existence of a public right of a licensed gun which he used for his protection against Z. The existence of an order in favour of the defendant. Similarly in a suit by B against A for the murder of C in which A alleged the existence of the same right of way, is relevant but it is not conclusive proof that the right way of existence.

Vishnu Dutt Sharma v. Daya Sapra on 5 May, 2009

In this case, the Respondent who was Daya Sapra had borrowed a sum of rupees 1.5 lakhs from the Appellant Vishnu Dutt Sharma on 10-August,1999. After reminder by appellant to respondent, the respondent issued a cheque on 20-October,1999, but the

cheque received by the appellant with remark of insufficient funds. Then he filed a petition against the respondent. Earlier it was said that it was the matter of 'Res Judicata' but the final judgement was given that it was not the matter of 'Res Judicata'. So the appeal is allowed however the facts, issues and circumstances of this case, there shall be no order as to costs.

Section 43- Judgment, order etc, other than those mentioned in Section 40 to 42, when relevant

Judgment, order or decree are irrelevant other than those mentioned in section 40, 41 and 42. In this, the previous judgments are not relevant with concern with the subsequent proceeding.

Let us understand with an illustration. 'X' prosecutes 'Y' for stealing his horse from him. 'Y' is convicted. Afterwards 'X' sues to 'Z' for the horse which 'Y' had sold to 'Z' before his conviction. As between 'X' and 'Z', the judgment which was against 'Y' is irrelevant.

In the case of The Duchess of Kingston's Case, it was held that the Dowager Duchess of Kingston, Countess of Bristol, was tried and found guilty of the charge of bigamy by her peers, the members of the House of Lords.

Admissibility of judgments in civil and criminal matters

Admissibility of judgments means that the quality of being acceptable or valid, especially as evidence in a court of law. So here is some admissibility of judgment in civil and criminal matters: –

The principle of 'Res Judicata' may apply between the parties in civil suits.

If the proceedings of civil and criminal cases are for the same cause or reason, then the judgment of the civil court would be relevant if the conditions of any sections regarding 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in section 41. In a criminal case, section 300 of C.r.P.C, it is said that once a person is convicted, he may not be examined again for the same offence if the conditions which are mentioned there are satisfied.

Emperor vs Bhagwandas Tulsidas on 20 August, 1945

In this case, it was held that the accused murdered Dharamsey and Mr. Haji, and he says that the matter will come under Section 42 of the Indian Evidence Act under matters related to public policy. But it was held that the matter related to such an unnatural death will not come under public concern. Hence, the examination of certain facts is not relevant under any provision related to the Indian Evidence Act and therefore unacceptable in evidence.

Section 44- Fraud or collusion in obtaining judgment, or incompetency of court, may be proved

Section 44 of Indian Evidence Act says that if the previous judgment is proved fraud, collusion (secret or illegal cooperation) or incompetency of court then such judgement does not have the effect of res judicata.

- There are at least 2 parties to a suit or proceeding.
- If any party may show a judgment, order, or decree which is relevant under section 40, 41, or 42.

The act only provides that the value of a judgment may be ineffective if these three things are present in that case that are: –

- Incompetency of the court
- If there is fraud
- If there is collusion

Asharfi Lal vs Smt. Koili (Dead) By L.Rs. (1995)

This case is related to the land reform dispute and Zamindari abolition as in this case, Raja Ram was the brother of Smt. Koili and husband of Smt. Nanki. And here the Asharfi Lal who was an appellant and he said that he was the only heir of Raja Ram and said for the possession of agricultural land of Raja Ram but the Smt. Koili denied that

the Asharfi lal was the son of Raja Ram. Earlier the judgment was in the favour of Smt. lal but afterwards the evidence of record which were produced in the consolidation proceedings the Deputy Director has found that Ashrafi lal was the son of Raja Ram and the only heir.

Conclusion

According to me, judgment should totally be on the basis of the facts and the issues raised in the court. The court is also required to determine what principles of law should control the case. But there is also a criticism regarding this that there is always a scope for improvement. The judges said that the system which is developed and applicable in one jurisdiction is not necessary to be applicable in the jurisdiction of other countries. After all, no system is fool-proof. Once it is said by Justice Sikri, that we all learn from our experiences and mistakes.

MODULE 04

RELEVANCY OF FACTS III

1. RELEVANCY OF OPINIONS (SECTIONS 45-51)

2. RELEVANCY OF CHARACTER (SECTIONS 52-55)

3. FACTS WHICH NEED NOT BE PROVED (SECTIONS 56-58)

1. RELEVANCY OF OPINIONS (SECTIONS 45-51)

Introduction

Generally, when a person is summoned to court for giving testimony as a witness, he is expected to state only facts and not to give any opinion. It is the job of the court to form an opinion in the case. Moreover, if a person is asked to give his testimony then it is expected that the person must be factually related to the case not merely a third party. But there is an exception to this rule. The experts are considered as witnesses although they are not actually related to the case. The court requires these experts to give an opinion regarding the case to help the court in having a wider perspective to give justice. The rationale behind the same is that it is not practical to expect the Judges to have adequate knowledge of medical issues. The statutes regarding the experts' opinion are discussed in The Indian Evidence Act, 1872.

Who is an expert

The court cannot form a correct judgement without the help of a person with special skills or experience in a particular subject. When the court needs an opinion in a subject which requires special assistance, the court calls an expert, a specially skilled person. The opinion given by a third person is considered as relevant facts if the person

testifying is an expert.

For example, the court was confused that a letter has been written by person 'X' or not. The court calls a handwriting expert to find out the same. This person will be known as an expert and the opinion which he gives in the case is relevant.

Expert is defined under section 45 of The Indian Evidence Act, 1872. The court needs an expert to form an opinion upon:

- Foreign law
- Science & Art
- Identity of Handwriting
- Identity of finger impression
- Electronic evidence

Only in the expertise in the above-said fields, a person's opinion is considered to be an expert opinion. If a field not mentioned above requires an opinion, it is not considered as an expert opinion. There have been cases such as:

- The disposition or temper of animals
- Colour, weight or scale of similar facts
- Age of a person
- If a man or women were intimate
- If a person was intoxicated or not

If an expert is giving an opinion, it is considered as a relevant fact for the case. An expert has devoted his time in learning a special branch of expertise and thus is specially skilled in the subject. It can include:

- Superior knowledge, and
- Practical experience

The court of law, before admitting any of the opinion made by an expert, needs to ensure that the person is an expert under the law. If it is found that the person is not an expert, his opinion is discarded by the court. For checking that the witness is an expert, he must be examined and cross-examined. A person becomes an expert by:

- Practice,
- Observation, or
- Experience

In the case of Ramesh Chandra **Agrawal vs Regency Hospital Ltd. & Ors** the court stated that the first and foremost requirement for expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the layman. People who can be termed as an expert are explained in detail below.

Handwriting expert's opinion (Section 47)

When the court has an opinion that who has written or signed a document the court will consider the opinion of a person who is acquainted with the handwriting. That person will give an opinion that particular handwriting is written or not written by that particular person or not.

The handwriting of a person may be proved in the following ways:

1. A person who is an expert in this field
2. A person who has actually seen someone writing, or
3. A person who has received any document which is written by the person whose handwriting is in question or under the authority of such person and is addressed to that person

4. A person who regularly receives letters or papers which are written by that person
5. A person who is acquainted with the signatures or writing of that person
6. A certifying authority who has issued a digital signature certificate when the court has formed an opinion as to the digital signature of a person. This is mentioned under section 47-A of the act.
7. The evidence of the writer himself. This is mentioned in section 60 of the act.
8. If another person admits that the documents were written by him. This is mentioned in section 21 of the act.
9. A person who has seen the person writing or signing. This is mentioned under section 6o of the act.
10. When the court himself compares the document in question with any other document which is proved genuine in the court. This is mentioned in section 73.
11. The court may ask the person to write something for the court to compare it with the document in question.

For example, Ms. Pinky claims in the court that she has not signed any document for sale of her property. To match her signatures with the one on papers, the court calls Mr. Raju who is the personal assistant of Ms. Pinky. Mr. Raju's job is to get all the official documents of the company to be signed by Ms. Pinky. Mr. Raju gives a testimony that the papers were signed by Ms. Pinky only. Here, Mr. Raju will be termed as an expert under the meaning of s. 47 as he has seen Ms. Pinky signing the documents and regularly receives such papers.

However, there have been several instances where the courts have been discouraged to decide cases of matching of signatures without evidence and merely on inspection. The court needs to work with the utmost care and caution in determining the authenticity of the documents.

Opinion for Electronic evidence (Section 45A):

When a piece of information is transmitted or stored in a computer system and the court needs assistance or opinion for the same in any case; they refer an examiner of electronic evidence. This examiner of electronic evidence is known as the expert in such cases. For this section, electronic evidence includes any information transmitted or stored in any computer resource or any other electronic or digital form for which the opinion of electronic evidence examiner is required as per section 79A of the Information Technology Act, 2000.

Opinion for foreign law (Section 38 r/w Section 45)

When there is a law of prevailing in any foreign country which needs to be considered for giving judgement in any case, the court needs an expert who is well versed with that law.

Otherwise, the court can take opinion from a law-book which contains the answer regarding any foreign law. These books must be printed or published under the authority of the government of that country. Other reports of the ruling of the courts can also be taken as relevant which are given in such books of foreign law. Foreign law in India is always considered as a question of fact. There have been cases where the court has interpreted personal laws as Indian laws and thus are the laws of the land. Therefore, the court does not require a person to interpret the law as the courts can do that task on their own.

Opinion for fingerprint

Generally, finger impression expert's opinion is given more value because

- The fingerprints of any person remain the same from their birth till death, and
- No two individuals' are ever found to have the same finger impressions

Footprint studies are gaining importance nowadays but the courts have been

reluctant to accept that as a piece of evidence. A person, who is a fingerprint expert, is called to match two or more fingerprints, than the opinion of such an expert is relevant and admissible in the court.

Opinion for Science or Art

The words 'Science and Art' are to be broadly constructed. The term 'science' is not limited to higher sciences and the term 'art' is not limited to fine arts, but having its original senses of handicraft, trade, profession and skill in work. To construe that if any expertise comes under the head of 'art' or 'science'; the following tests can be applied

- Is the subject matter of the injury such that inexperienced people are not capable of forming a correct judgement without the assistance of experts?
- Is the character of a science or art as such that it requires a course or a study to obtain a competent knowledge or skill.

Science and Art signify the activities which include the fields which require special knowledge or expertise form an opinion. Before designating that a person is an expert, it needs to be checked that the field or the matter on which we are seeking the opinion should not be something which can be easily understood by layman or court without any special knowledge or skill. The scientific question involved is assumed to be not within the court's knowledge. Thus cases, where the science involved, is highly specialized and perhaps even esoteric, the central role of an expert cannot be disputed.

Every science has its own technical terms, which are so much Greek or Hebrew to the average juryman. What would the Ordinary man make of this answer to a question whether a certain dose of a prescription containing chloral would have been dangerous. There can be various categories which can be treated under art and science. Some of them are discussed below for better understanding.

Opinion of Medical Expert

In many cases, the opinion of medical experts is required. Especially in criminal

cases, the medical examination of accused and victim is necessary. When in a case, the court requires some opinion which involves medical technicalities, they ask medical officers.

Opinions of a medical officer can be used to prove

- The Physical condition of the person,
- Age of a person
- Cause of death of a person
- Nature and effect of the disease or injuries on body or mind
- Manner or instrument by which such injuries were caused
- Time at which the injury or wounds have been caused.
- Whether the injury or wounds are fatal in nature
- Cause, symptoms and peculiarities of the disease and whether it is likely to cause death
- Probable future consequences of an injury etc.

Say in a rape case, the medical report of the victim and accused are of great importance. If the medical officer says that he thinks that act was not consensual referring to the injuries on the body of the victim and the nail scratches on the body of the accused, this opinion carries a lot of importance. But the problem with these experts is that they are always called by one party only who has evidenced in their favour. This is the reason that the court is reluctant to rely completely upon the views and opinions of the expert though they consider the same while imparting their judgement. In other cases, if the court finds that the expert's opinion is in contradiction with the opinion of an eye-witness then for obvious reasons, the normal witness's opinion is given preference over the expert's opinion. This is because the expert's statement is just opinionative whereas the other witness's statement is based upon the facts of the case.

Opinion of Ballistic Expert

Ballistic experts, also known as firearms expert are people who are experts in the study of projectiles and firearms. Their help is taken is cases say where guns are involved. A ballistics expert may trace a bullet or cartridge to a particular weapon from which it was discharged. Forensic ballistics may also furnish opinion about the distance from which a shot was fired and the time when the weapon was last used. It must be noted that the opinion of the ballistics expert can be taken into consideration only when he himself has given the report. In the case where the expert gives opinion only by looking at the picture of the wound, the court denied relying upon such opinion.

Evidence of Tracking Dog

Trained dogs are used for the detection of crime. The trainer of tracking dogs can give evidence about the behaviour of the dog. The evidence of the tracker dog is also relevant u/s 45.

Moreover, Sec.293 Cr.P.C. provides a list of some Govt. Scientific Experts as following:-

- Any Chemical Examiner / Asstt. Chemical examiner to the Govt.
- The Chief Controller of explosives
- The Director of the Fingerprint Bureau
- The Director of Haffkein Institute, Bombay
- The Director, Dy. Director or Asstt. Director of the Central and State Forensic Science Laboratory.
- The Serologist to the Govt.
- Any other Govt. Scientific Experts specified by notification of the Central Govt.

What is the Evidentiary Value of an Expert Opinion

The data given by the expert are relevant and admissible. If any oral evidence

contradicts the data/ report; it will not make the data evidence obsolete. But, as per section 46, in case any fact is in contradiction to the opinion of the expert, that fact becomes relevant. If the opinion of the expert is relevant, the contradictory fact becomes relevant even though it was not relevant as such. The value of expert opinion depends upon the facts on which he is based and the competency of such expert in forming a reliable opinion.

However, the personal appearance of the expert in the court can be excused unless the court expressly asks him to appear in person. In such a case, where the expert is excused, he can send any responsible officer who is well versed with the facts of the case and the report and can address the court with the same. If a judge relies upon the opinion of the expert only and not on the facts and the testimony of ordinary witnesses to give judgement then is the weakness of the case. This is because even if a person is an expert in his field, he cannot be termed as a direct witness and cannot give a statement on the facts of the case. He is just giving an opinion as per the evidences given to him and cannot draw a conclusion regarding the guilt of the accused in all the cases.

The evidence given by the expert is just an opinion and is not a fact-based testimony and thus are given slight value. This is the reason that eye-witnesses or other factual witnesses are given a priority over the expert's opinion. This is because opinion evidence cannot supersede substantive evidence. No expert can claim that he could be absolutely sure that his opinion was correct, expert depends to a great extent upon the materials put before him and the nature of the question put to him.

However, the evidentiary value of an expert's opinion depends upon the facts and circumstances. For example, if there is a dispute as to who is the biological parent of a child, the DNA report of the Medical expert is of great importance. If the expert says that the DNA of the child or parents matches, than it is a relevant fact in deciding the case. But in case if a handwriting expert says that the signatures matches or not matches with the person; this fact does not hold much value because there can be a possibility that the person has practiced a lot to copy the signature. But on the other hand, DNA cannot be copied or changed. Privy council once observed that 'there cannot be any

more unsatisfactory evidence than that of an expert." In the case of **Emperor v. Kudrat**, the court held that when the expert is giving an opinion upon the age by observing only the height, weight and tooth; it cannot be relied upon.

The court must be satisfied that the accused is guilty. The court cannot hold him guilty mere because an expert has said that in his opinion, the person is guilty. The court needs to look into the evidence along with the opinion of the expert before giving any judgement or order.

Difference between the testimony of an expert and an ordinary witness

Basis of Distinction	**Expert Witness**	**Ordinary Witness**
Reasoning of Statement	The statement of the expert witness is not confined to what has taken place. He can additionally give his personal opinion with respect to the case. For example, a doctor may not have attended the victim but he can still give his opinion as to the cause of death of the victim and the after-effects of certain poison.	The statement of an ordinary witness is based upon facts. He is not allowed to give any opinion, inferences or conclusions regarding the case because it is the job of the court.
Reference to past experiences	An expert can refer to and rely upon the experiments conducted by him in absence of the other party	An ordinary witness has no such right where he can refer to any past experience to support his statement
Refreshing the memory	An expert can refer to well-known books, can quote passages from the same as a reference for refreshing his	An ordinary witness cannot has a reliance upon any such books because his statement is based upon facts and not

	memory	technical knowledge
Stating facts other than the case	The experts can state facts of other cases which are similar to the present case in order to support their opinion	The layman is giving statement based upon facts and thus cannot rely upon other judgements as the court deals with different cases differently depending upon the facts and circumstances of the case
Qualification to be a witness	A person is known to be a witness by its knowledge, experience, skill, training and education. The following points can be noted to find an expert: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the	An ordinary witness does not require any specialized skill or knowledge to give the statement. A person can be testified as an ordinary witness in the following cases: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge

	case.	
Personal Knowledge	Experts may use their knowledge or skill to draw conclusions	Lay witnesses can only base their opinions on information they personally observed.
When can a witness testify	Expert witnesses can give testimony even when there is no sufficient evidence to support a finding. The Immoral Traffic (Suppression) Act was passed in 1956	Lay witnesses are constrained by relying on information they have gained through personal knowledge and rationally based perception. It is thus required that a witness may only testify if the evidence is sufficient to support a finding that the witness has personal knowledge of the matter.
Personal Observations	Expert witnesses are not required to be at the crime scene or witness the crime. They are not even expected to have knowledge about the facts of the case	Lay witnesses may testify to their perception of the incident if obtained through earlier personal observations. Lay witnesses can offer opinions relating to degrees of light, sound, weight and distance as well as a person's appearance, identity, or manner of conduct.

Hypothetical Situations	Expert witnesses are expected to answer hypothetical situations and can also refer to past cases or medical situations to answer the questions.	Ordinary witnesses are not expected to give answers to hypothetical situations. They are just supposed to give the facts they already know.
Disclosure Rules	Expert witnesses must disclose to the opposing party a report previewing the expert's proposed testimony. The report must be sufficiently detailed and contain "all opinions the witness will express and the basis and reasons for them"	There is no such obligation upon the ordinary witnesses.
Judicial Scrutiny	Expert's opinion goes through high-end judicial scrutiny and is less reliable since they are based upon opinion and not facts. They are just the perspective of the expert and he needs to establish the reliability of his testimony.	The statement of an ordinary witness is considered more reliable as compared to that of an expert. This is because the testimony of a layman is based upon facts. If in any case, his statement contradicts with the opinion of the expert; his statement will be given an upper hand than the expert.

Conclusion

Unlike an ordinary witness, expert witnesses have a separate standing as a witness in a court. It is interesting to note that an expert's report cannot be questioned in the court. The report is questioned when the ability and knowledge of the expert to make that report is in question. The experts are judged with a different eye by the court since they are just giving an opinion and are not aware of the facts of the case. But still, an expert's opinion matters as the court has no knowledge of that particular field of expertise and they will not be able to impart justice without seeing the other side of the coin.

2. RELEVANCY OF CHARACTER (SECTIONS 52-55)

Introduction

We often term the habit of judging people based on their character as normal human nature. Judges are also human beings and the question that arises is, doesn't to know about the character of an individual influence their decision? The next set of questions that arise are, does the character have relevance, especially under the Indian Evidence Act? What is the scope of relevance of character? Answers to all these questions are the takeaway from this article.

The word 'Character'

The term 'character' has not been described in Indian law. The Cambridge dictionary defines conduct as a particular combination of qualities that make a person different from others. Honesty, good-natured, modest, violent temper, etc. are all traits of character.

Section 55 of the Indian Evidence Act provides that the term 'conduct' includes both reputation and disposition. It is normally established that reputation is the general opinion about an individual in the eyes of the others whereas disposition is how that person is in real and what are his inherent qualities.

Evidence of character is irrelevant in civil cases

Section 52

Section 52 of the Indian Evidence Act provides that in civil cases, a fact pertaining to the character of an individual is not relevant. It lays the principle that the character of a party as a piece of evidence can't be used to manifest that conduct attributed to him is probable or improbable.

Illustration-

'A', a businessman is charged with fraud.

In this case, no evidence of the fact can be treated as relevant which states that he is an honest man i.e. the character is such that he can never commit fraud.

Neither can the opposite party present evidence of the fact that A's character had been so trickery that he must have committed the fraud.

The reasons behind the irrelevance are that a case has to be decided based on the facts of the case and not the character of the parties. Evidence of conduct doesn't just delay the proceedings but also hampers and impairs the mind of the judge. In civil cases, previous convictions of the accused person are irrelevant.

There are a few exceptions to Section 52-

Section 55 of the Evidence Act provides that in civil cases, evidence of the good or bad character of the person that is to receive the amount of damages is relevant. The character of the original plaintiff is relevant.

For example- In a case of the action of damages for rape or seduction, the character of the plaintiff is relevant as it is likely to affect the damages that the plaintiff ought to receive.

When the character of the party is itself a fact in issue then the evidence pertaining to the character of that party is relevant.

For example- if divorce is sought on the ground of cruelty of husband, in such case evidence pertaining to the character of the husband will be relevant as the cruel character is itself a fact in issue.

In the case of **Scott v. Sampson,** the court held that the term 'character' should mean a man's reputation and nothing more than "general evidence of reputation".

Evidence of previous good character is relevant in criminal cases

Section 53

Unlike civil cases where the character is irrelevant, in criminal cases it is relevant. Section 53 of The Indian Evidence Act provides that in criminal cases, the good character of the accused person is relevant. The reason behind this is the basic human psychology that a person of good character will not generally resort to a criminal act. If

goodness is proved it helps in a presumption of non-commission of the offence by that individual.

Evidence of good character is always admissible. In a doubtful case, it may be used to tilt the balance in favour of the accused but in a case where there is positive evidence of guilt of the accused then the good character cannot outweigh the positive evidence. It depends on the discretion of the court that how much weight the evidence of the good character has to be given while deciding the case.

In the case of **Habeeb Mohammad v. State of Hyderabad**, the Supreme Court held that in criminal proceedings, the character of the accused can help in determining the innocence or guilt of the accused. It can help in either making him suspicious or free from all the suspicions. Accused is allowed to prove general good character in the question of punishment.

Evidence of character or previous sexual experience not relevant in certain cases

Section 53A

Section 53A of the Indian Evidence Act was inserted by Act 13 of 2013. This section provides that in cases where the offence is committed under the following sections of Indian Penal Code-

- Section 354 (Assault or criminal force to woman with intent to outrage her modesty),
- Section 354A (Sexual harassment and punishment for sexual harassment),
- Section 354 B (Assault or use of criminal force to woman with intent to disrobe),
- Section 354 C (Voyeurism),
- Section 354 D (Stalking),
- Section 376 (Rape),
- Section 376 A (Intercourse by a man with his wife during separation),

- Section 376 B (Intercourse by public servant with woman in his custody),
- Section 376 C (Intercourse by superintendent of jail, remand home, etc.),
- Section 376 D (Gang Rape),
- Section 376 E (Punishment for repeat offenders) and, an attempt to commit such offences and

the consent or quality of consent is in question, then neither the character of the accused nor the victim is relevant. Evidence pertaining to previous sexual acts of the victim is also irrelevant.

Previous bad character not relevant, except in Reply

Section 54

According to Section 54 of the Indian Evidence Act, evidence pertaining to the fact that the accused has a bad character is not relevant in criminal cases. In other words, the prosecution cannot present evidence of the accused's bad character as a part of the main case.

There are certain exceptions to this section-

When the accused has submitted any evidence of his good character, in such a case to rebut, the prosecution can present evidence pertaining to the bad character of the accused.

Explanation 1 to Section 54 provides that when the character is itself a fact in issue then evidence of bad character can be submitted.

Illustration: In a defamation case, the character of the plaintiff becomes a fact in issue. Section 110 of the Code of Criminal Procedure provides that if a person is by habit a robber, a housebreaker, etc. then he is to be bound down.

In the case of **B. Vasanthi v. Bakthavatchalu**, the characters of both the plaintiff and the defendant were facts in issue and the court considered evidence of the

character of both to decide in the best interest, the custody of the children.

Bad character isn't defined in Indian law but it amounts to the general meaning as interpreted by the society. Explanation 2 of section 54 provides that evidence showing any previous conviction is also relevant as evidence of bad character in criminal cases. According to Section 71 of the Indian Penal Code, any person who is already a previous convict should be sentenced a longer term of imprisonment than that is awarded ordinarily.

Character as affecting Damages: Section 55

Section 55 of the Indian Evidence Act states that in cases of civil nature, the character of the person who is ought to receive the amount of damages is relevant. This section is an exception to Section 52 mentioned above. The evidence pertaining to the good or bad character of the accused is irrelevant whereas evidence of the good or bad character of the victim is relevant.

For instance, in cases of seduction or rape or defamation, the evidence of the good or bad character of the original plaintiff is relevant to decide the amount of damages that the plaintiff is ought to receive. This is generally used to reduce the amount of damages.

Explanation of this section states that the term character which is used in sections 52, 53, 54 and 55 includes both reputation and disposition.

Disposition is often referred to as what a person is in a person's reality. A person's inherent qualities which he had obtained through education, upbringing or any material condition in life is called disposition. A bad reputed person may have a good disposition. Reputation is often referred to as the general estimation of a person. It is what other people think about that individual. It is to be noted the evidence of those who do not know the individual but have heard of his reputation is not admissible in court.

Illustration: In the show 'Suits', the character Harvey Specter had a reputation of an arrogant and selfish individual whereas he had a disposition of a highly confident, self-motivated, practical thinker and focused individual. Both of these things combinedly

defined the character of Harvey Specter.

Distinction Between Relevancy of character in Criminal and Civil Cases

In order to differentiate the first thing to note is that the Indian Evidence Act talks about two types of characters- good and bad character.

In cases of civil nature, the evidence pertaining to character is irrelevant as per Section 52 of the Evidence Act. There are two exceptions to this rule: first, when the character of the party is a fact in issue then evidence of character is relevant and second, the character of the person who ought to receive the amount of damage is relevant(Section 55).

Whereas in cases of criminal nature, the previous good character of the accused person is relevant(section 53) but the previous bad character is not relevant(section 54). Evidence of the bad character of the accused is relevant in two cases: first, to rebut the evidence of good character presented by the prosecution and second, when the character of the party is itself a fact in issue.

Bharpur Singh v. Parshotam Dass on 2 November 2015

In this case, the Court described the scope of sections 52 and 54 of the Indian Evidence Act. This case was filed to resist an action for recovery brought on a promissory note. While deciding the scope of Section 52, the Court observed that this section refers to a situation where evidence of character is relevant in a civil case. Normally any evidence of character cannot render the probability or improbability of any conduct and is irrelevant in civil cases. If the character is a fact in issue then evidence of character is relevant.

Section 54 observed that previous bad character can be relevant only in case of rebuttal to good character evidence or when the character is a fact in issue.

Sardar Sardul Singh Caveeshar v. State Of Maharashtra on 18 March 1963

This case is also referred to as the Empire Conspiracy Case. The Court answered the question of what is the evidentiary value of the character of an accused in a criminal case. It observed that Section 53 mentions that the good character of the accused is relevant in cases of criminal nature.

Section 55 of the Act makes it clear that general reputation and general disposition in criminal cases are relevant. The Court also explained the difference between reputation and disposition. It stated that disposition is 'inherent qualities of a person' whereas reputation is 'general credit of the person amongst the public'. A man may have a good reputation but in reality, may have a bad disposition. The value of evidence depends on the cleverness of the person to hide his real traits, and the witness's opportunity to observe the accused.

The court quoted Wigmore's proposition which stated that evidence can be used in a doubtful case to tilt in favour of the accused but it can't outweigh a piece of evidence which shows the guilt of the accused. Evidence of good character is a weak evidence but can be used in criminal cases.

Conclusion

It is concluded that according to the Indian Evidence Act, in civil cases, the evidence pertaining to character isn't relevant subject to certain exceptions. In criminal cases, the evidence pertaining to good character is relevant but evidence depicting the bad character isn't relevant subject to certain exceptions. Various countries like the USA, UK and many more also deal with the relevance of character as evidence.

3. FACTS WHICH NEED NOT BE PROVED (SECTIONS 56-58)

Introduction

As a general rule of law, the party to a suit is required to establish his cause before the Court by adducing either oral or documentary evidence which includes electronic evidence. However, under certain scenarios, provided under the Indian Evidence Act, 1872, where the parties to a suit are not required to provide evidence in favor of their assertions. Section 56 to Section 58 of the Indian Evidence Act contains the provisions related to non-imperativeness of admission of evidence by the parties to the suit before the Court to endorse the credulity of their statements.

Facts which are judicially noticeable need not be proven

According to Section 56 of the Indian Evidence Act, 1872, the facts of which the Court will take judicial notice need not be proved.

Simply put, any judicially noticeable fact does not require to be proven before the Court. Now for comprehending this statement, first understanding the meaning of the clause “taking judicial notice” is necessary. This expression means recognizing something without proof of being existing or truthful. Judicial notice is the acknowledgement by the Court on certain matters which are so infamous or

transparently established that their existential evidence is deemed inessential. The clear reason behind this is that such facts are expected to be within the ambit of knowledge of the Judge and therefore any attempt of proving them would indirectly undermine the judicial competency.

According to Lord Stephen, certain facts are so notorious by nature or have such authentic assertion and accessible publications that they do not require any proof. The Court, if it is unknown to such facts, can inform itself about them, in prior to taking evidence. These facts are deemed to be judicially noticed. This Section has to be understood in unison with Section 57, reckoning the instances when the Court shall take judicial notice such that adducing any evidence would be unnecessary.

Facts of which the Court must take judicial notice

According to Section 57 of the Indian Evidence Act, 1872, the Court shall judicially notice the following facts:

- All existing laws within the territory of India;
- All previously enacted legislations or future legislations made by the UK Parliament, and all local and personal legislations made under its direction;
- Articles of war for the Indian Army, or Navy, or Airforce;

  This refers to the Articles contained in the Army Act (XLVI of 1950), for soldiers, officers, etc.

- The Parliamentary proceedings of the United Kingdom, the Indian Constituent Assembly, and any other provincial or State Legislature;

  This refers to all legislative and other proceedings by the Parliament of the United Kingdom. Indian Constituent Assembly referred to the Central Legislature of the British India, however, subsequent to Independence it refers to the

legislative and other proceedings held in the Upper House and the Lower House of the Parliament. The provincial or the State Legislatures refer to the Legislative Assemblies located in all the States constituting the Union of India. For Eg: the State of West Bengal, Andhra Pradesh, Maharashtra, etc.

- The accession and the sign manual of the existing Sovereign of the United Kingdom and Ireland;

  Accession refers to the attainment or acquisition of a position of rank or power; and Sign Manual is the signature of the Sovereign, by affixation of which it expresses its pleasure either by order, or commission, or warrant. Here the Sovereign refers to the King or Queen of the United Kingdom.

- The Seals of all the Indian Courts, the seals of all the Courts outside India established under the jurisdiction of the Central Government or the Representative of the Crown, the Seals of the Admiralty Courts and of Public Notaries, and all other seals which any person is authorized of using under the Constitution or a Parliamentary Act of the U.K. or an Act or Regulation having a legal operation in India;

- The accession to office, names, titles, functions, and signatures of the persons occupying any public office, in any state, if the fact of their appointment has been declared by notification in the Official Gazette;

- The recognition of the existence, title, and national flag of every State or Sovereign by the Government of India;

- The time divisions, the geographical divisions of the world, public festivals, facts and holidays which are promulgated by notification in the Official Gazette;

- The territories which are located under the paramountcy of the Government of India;

- Any “notification” related to commencement, continuance, and termination of animosity between any other State or body of persons and the Government of

India;

In simpler words, any declaration by the Government of India in relation to the beginning of hostility, continuation of hostility, and end of such hostility. For Eg: Declaration of War, continuation of war, and end of war.

- The identity of the judicial officers and members, including their deputies, subordinate officers, assistants, including all the officers acting towards executing the judicial process. Also of all the advocates, the attorneys, the proctors, the vakils, the pleaders and other persons legally authorized to appear or act before the Court;
- The rule of the road, either at land or at sea.

  In case of road, the horses and all other forms of vehicle should keep to the left side of the road. At sea, it is the rule that ships and steamboats, on coming across, shold port their helms for passing on the port or left side of each other; steam boats should stay away from the route of sailing ships; and every vessel, while overtaking another vessel should stay away from its way.

In all these cases, including all matters related to public history, literature, science or art, the Court may refer to appropriate books or documents. On being called upon to take judicial cognizance by any person, the Court may refuse to do so unless and until that person produces any such book or document which it may consider necessary to enable it to do so.

Facts admitted need not be proved

According to Section 58, no fact requires to be proved in any suit which the parties to the suit, or their agents agree of admission at the hearing, or which they agree to admit in writing, prior to the hearing or which they under any existing rule of pleading are deemed to have been admitted through their pleadings. However, the Court by

exercising its discretionary potency may require the admission of such facts in some other way for submission.

Thus, this Section contains three circumstances:

- Facts which the parties to the suit or their agents agree to admit at the hearing.
- Facts which the parties to the suit or their agents agree to admit, prior to the hearing, in writing.
- Facts deemed to be already admitted by the parties to the suit through pleadings.

Onkar Nath and Ors v. the Delhi Administration

In this case, the appellants were Union Leaders of the Northern Railwaymen's Union. They were accused of instigating other workmen towards striking and were booked under Rules 118 & 119 of the Defence Of India Rules, 1971. They were sentenced with 6 months of rigorous imprisonment by the Metropolitan Magistrate of Delhi. The conviction order was upheld in a Revision Appeal by the Additional Sessions Judge of the Delhi High Court.

However, the previous judicial decisions were set aside by the Supreme Court, which observed that mere summary instead of the exact words cannot be deemed as the ground for conviction. The statement of the only witness may although be truthful cannot be relied upon, in absence of the exact words which were delivered at the meeting by the accused. The list of facts of which the Court shall take Judicial notice under Section 56 to be read with Section 57 is non-exhaustive, and shall, therefore, depend upon the discretion of the Court and vary from case to case.

S. Nagarajan v. Vasantha Kumar & Anr.

Here, in this case, the respondents were husband and wife by relation and had 2 shops located at Trivandrum. Their residences were also located in the vicinity of those shops. The petitioners, i.e. the Officers of the Customs Preventive and Intelligence Unit, on obtaining information that foreign goods were being sold in those shops and also stored in the houses of the respondents, searched the shops and also the house

premises and seized them. A trial was held under the Customs Act, 1962 with the prosecution asserting that the respondents were guilty of committing an offense under Section 135(1) of the said Act.

However, the respondents contended that the seized and confiscated goods were not for sale and also the notifications by the Central Government are not laws for consideration under Section 57(1) of the Indian Evidence Act, 1872, thereby pleading not guilty. The Trial Court maintained the contention and ordered in favor of the respondents to which the petitioners appealed before the High Court of Kerala.

The High Court of Kerala after making due observations and considerations, overruled the trial Court's decision and held that Central Government's notifications are indeed laws within the ambit of Section 57(1) and therefore the respondents were held guilty.

Subhash Maruti Avasare vs State Of Maharashtra

In this case, the appellant along with the accomplices of four others were found guilty of murdering one Babdya and were convicted under Section 323 of the Indian Penal Code by the Trial Court. The appellant was a friend of the main accused Subhash Maruti Avasare and was also acquainted with the family of the deceased. The appellant had gone to inquire of the whereabouts of the deceased at his house and was informed by his mother of the deceased's absence at that time. The deceased after returning had been informed about it and then he allegedly disclosed to her mother that the accused no. 3 (Rakesh Tukaram Pawar) had asked for a bottle of beer from him and on his refusal had slapped him. He further disclosed that an attempt of assault with a knife was also made on him but he had managed to escape.

On 30.10.1996 at about 6:30 PM, i.e the day of the incident, the deceased had gone to a clinic of a doctor with his wife for medical check-up of their ailing son. After some time, the victim's wife runningly returned home and informed the witness no.1 (the deceased's mother) that some people had picked up a quarrel with her husband in front of the hospital of Dr. Babar.

The prime witness went to the spot with her daughter-in-law and witnessed her son being mortally stabbed by the appellants. By this time the victim's father and his son had also arrived at the spot, and the accused-appellants escaped in the meantime. The deceased was first taken to a local hospital and then transferred to the Sassoon hospital, where he died due to his injuries. A post mortem was conducted and the cause of death was deemed to result from 7 succumbed external injuries and 5 internal injuries. The Trial Court after observing the reports and testimonies of the accused persons and witnesses of the cases convicted the accused persons. The decision of the Trial Court was maintained both by the High Court of Maharashtra and the Supreme Court.

Conclusion

In the light of the above provisions from the Indian Evidence Act and the judicial decisions, it can be concluded that facts judicially noticeable by the Courts, such as laws operating in India; articles of war; governmental seals; facts related to legislative, executive and judicial proceedings in India or any other Sovereign or State recognized by the government of India; the rule of the road, at the land or at sea, etc; need not be proved by the parties to a Suit. It is imperative for providing evidence under Section 57 that exact words and not the gist of the assertion is necessary for the purpose of conviction as mere gist is insufficient. Also, every notification or order made by the Central Government under the empowerment of any legislation is deemed as an operating law under Section 57. Also, the facts admitted by the parties to a suit either prior to or at the hearing by themselves or their agents need not be endorsed with evidence. Such admission includes written admission.

MODULE 05

ORAL AND DOCUMENTARY EVIDENCE

1. ORAL EVIDENCE (SECTIONS 59-60)

2. DOCUMENTARY EVIDENCE (SECTIONS 61-78)

1. ORAL EVIDENCE (SECTIONS 59-60)

Introduction

All of us know what importance evidence holds under any court proceedings. Evidence is a certain reliable and relevant set of facts which proves or abstains from proving any matter; there is a prescribed manner on which the cycle of evidence works which has been divided into two main heads- Oral and Documentary evidence by the Evidence Act 1872. In this article we will be dealing with oral evidence, how is it made and everything which will make us understand Oral Evidence.

Oral Evidence is dealt with under Section 59 and 60 of the Evidence Act, 1872. Oral evidence is defined under section 3 (under evidence head) which explains that "All statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called as oral evidence." The word 'Oral' itself describes its meaning as something spoken or expressed by mouth; so anything which is accepted in the court in relation to the inquiry and expressed by any witnesses who are called in the trial is termed as oral evidence. Oral Evidence also includes the statements made by people in signs and writing forms (inclusive of people who cannot speak).

Importance of Oral Evidence

Every evidence plays an important role in the trials, oral evidence has been growing in regards to usage; as earlier it was not considered to be as precise and blunt as documentary but its need and importance has been constantly subjected to rapid growth. Oral evidence is also equally important as it stimulates a person and extracts

what a person has seen or what he wants to say in regards to the trial. Oral evidence is comparatively easier to refer. The importance has been explained by the Bombay High Court in one of the cases that if the oral evidence is proved beyond reasonable doubt it can also be enough for passing conviction.

Section 59 – Proof of facts by Oral Evidence

All the facts and circumstances may be proved by oral evidence by expressing or speaking except the contents of documents and electronic records. The contents of documents and electronic records cannot be proved by oral evidence. It is held that if any person has to be called for proving their documents then that document becomes oral and documentary evidence loses its significance.

It was held in **Bhima Tima Dhotre v. The pioneer chemical co**. that "Documentary evidence becomes meaningless if the writer has to be called in every case to give oral evidence of its contents. If that were the position, it would mean that, in the ultimate analysis, all evidence must be oral and that oral evidence would virtually be the only kind of evidence recognised by law. This provision would clearly indicate that to prove the contents of a document by means of oral evidence would be a violation of that section."

Section 60 – Oral Evidence must be Direct

This is the cardinal principle of any evidence to be admissible in the court. If any oral evidence needs to be admissible, all the conditions under Section 60 of the Indian Evidence Act must be fulfilled. If anyone of the following conditions is not fulfilled, then the evidence will fail to be pictured as an Oral Evidence. Oral evidence and section 60 is a proportional equation. For acting out one, the other needs to be fulfilled. The base principle on which section 60 is placed is that the evidence which is taken into regards must be direct. The word Direct does not include any category of hearsay as its main element is vested in the word "must". Every statement under oral evidence must be direct. Now let's focus on some conditions which need to be fulfilled to make oral evidence admissible;

Direct oral evidence

Oral Evidence must be direct in all cases. Indirect ways or hearsay is not considered a part of direct oral evidence. The word “Direct” in all matters must mean that it is administered by any person on their own i.e through their personal knowledge and is not passed by any other person (hearsay) which on the other hand will be inadmissible. This involves certain cases in which the word “direct” is involved :-

- It refers to a fact which could be seen, it must be the evidence of a witness who says he saw it. It refers to evidence which has been given by the person who has actually seen or observed the matter by their own eyes. This will be actuated as direct evidence. For example: if A saw that B is hitting C. A will be an eyewitness to the crime scene and his testimony will be that of direct evidence.

- It refers to a fact which could be heard, it must be the evidence of a witness who says he heard it. It refers to evidence which has been given by the person who was present and has actually heard the matter by themselves, this will come under direct evidence. For example: if A overheard B’s conversation that stated; that he is going to kill C tomorrow under the bridge, A’s testimony will be that of direct evidence.

- It refers to a fact which could be perceived by any other senses or any other manner, it must be the evidence of person who says he perceived it by that sense or manner –Meaning such evidence that has been given by the person who has perceived it in any other manner or by any other senses but it has been perceived by that person itself. For example: through sense of smell or taste.

- If it refers to an opinion or to grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds – It means when a person holds any opinion on any matter or incident, only his testimony on the ground of which his opinion is formed will be admissible in the court. For example A thinks that B is not a good guy, so his testimony of that opinion will be termed under direct evidence.

Meaning of Hearsay Evidence

All of us are aware of what hearsay is; hearsay is any information which is received by any person from any other source. Hearsay means when a person does not have a personal knowledge about a particular matter or incident and he has been informed about that particular matter by any other person. As oral evidence includes first-hand knowledge thus, Hearsay evidence is excluded under the ambit of oral evidence because hearsay is not directly obtained evidence.

Rationale behind the exclusion of Hearsay Evidence

From the above head now we know that Hearsay Evidence is second-hand knowledge. But why is it excluded from oral evidence?

For oral evidence to be admissible it only accepts the rule of first-hand knowledge. It only includes what is directly seen, heard and perceived by a person. There is no room for second-hand knowledge. A conviction passed on hearsay may be truly unjustified as there is no reliability as to whether the person who has passed on the following information is credible enough or not. For example: if A has received information through B that he saw C hitting D. This will be hearsay because A himself has not administered the incident. For this reason, Hearsay has been excluded from Oral Evidence.

Statement to witnesses by persons not called

There may be some cases in which witnesses may not be called but their testimony is accepted and not treated as hearsay. In certain cases, such statements may be admissible. Opinions of experts which are embedded in things which are maintained for sale like books of authors can be accepted as oral evidence when the author of the book is dead, cannot be found, cannot come to the court for some reason or the court thinks that calling such person may be a delay of proceeding, so any such statements shall be admissible.

Child Complainant's Evidence by video-recording and television link

Oral Evidence also includes the child's complainant evidence by video recording and television link, so if there is any evidence which is presented through video recording they are admissible under oral evidence as long as they are not tampered with.

Witnessing offence on visual display of video-recording

If there is a video which displays an offence being committed it may be admissible if it ensures that it is not tampered by any means. This may also be included under oral evidence.

Section 33 as an Exception to Section 60

Section 33 of Indian Evidence Act, 1872 basically gives us a structure of exception to section 60, it has certain exceptions against rule of hearsay which we will see below:

- Res-gestae (derived from a Latin word meaning something deliberately undertaken or done)– For example, if A sees B passing by him on a bike and after that he sees that B has been injured but A has not administered the accident on his own, when A goes to B; B says that C has hit him by truck, such statement though hearsay may be admissible.
- Admission or confession- For example, A coming out of the court tells B his guilt of committing murder of C, though hearsay but statement shall be accepted as evidence.
- By any reason the person cannot come to the court if he is dead, cannot be found, is incapable of coming to court; every such information which has been passed to the other person and that person giving the testimony in the court shall be held admissible.

Difference Between Oral and Documentary Evidence

BASIS	ORAL EVIDENCE	DOCUMENTARY EVIDENCE
Meaning	Oral evidence is the evidence given by witnesses who are called in the court in regards to the trial orally.	Documentary evidence, on the other hand, is the evidence which is submitted in the court in written form including documents, papers etc
Legally defined	Oral evidence is mentioned under section 59 and 60 of the Indian Evidence Act.	Documentary evidence is dealt from section 61 to 66 of the Indian Evidence Act.
Types	Oral evidence should be given direct form.	Documentary evidence has direct documents and secondary documents.
Forms of submission	Oral evidence can be given through speaking, signs or gestures	Documentary evidence must be given in writing.

Case Laws on Oral Evidence

State v. Rajal Anand

It was held under this case that section 60 of the Indian Evidence Act only includes the word “direct” and excludes hearsay. Any evidence given must be direct and the hearsay evidence does not hold any area under oral evidence as it is not direct. But the doctrine of Res-gestae has been observed as an exception to the rule of hearsay which explained that any person who has experienced any series of relevant facts, his testimony after the incident even if he has not seen the crime being committed will be accepted.

Amar Singh v. Chhaju Singh And Anr.

A relationship between section 50 and 60 of Indian Evidence Act has been established which says that for proving an evidence completely, two things shall be fulfilled firstly, there shall be a presence of relevant facts and those facts have been presented directly by the person who has either seen them, heard them or etc.

Bhima Tima Dhotre v. The Pioneer Chemical Co.

In this case, it was held that any fact can be proved by oral evidence instead of the content of documents or electronic records. It is seen that if the person who has presented the documentary record is called to prove the records, documentary evidence loses all its significance and it will become oral evidence which will be meaningless.

Conclusion

On concluding the article, oral evidence, with its increasing approach can be appropriate for passing judgement if proved beyond a reasonable doubt. Earlier it was seen to be weak evidence but its need has been growing in modern times. In my opinion incidents and facts can be better understood through oral ways as the person who has administered the incident itself can explain it in a more clear way rather than documentary form of evidence.

2. DOCUMENTARY EVIDENCE (SECTIONS 61-78)

Document :means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means intended to be used, or which may be used, for the purpose of recording that matter.

A writing, printing, lithograph, photograph, map, a plan, an inscription on a metal plate or a stone, a plaque, a caricature etc. are documents.

Chapter V of Indian Evidence Act deal with documentary evidence. It further classifies the documentary evidence in primary and secondary evidence. original document must be produced to prove it as provided by sec.64 of Indian Evidence Act.

Contents of document can be proved by primary or secondary evidence.

Primary Evidence [Sec.62]: means the document itself produced for the inspection of the Court.

Explanation 1: Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2: Where a number of documents are all made by one uniform process, as in the case of painting, lithography or photography, each is primary evidence of the contents of the rest, but where they are all copies of a common original, they are not primary evidence of the contents of the original

Secondary Evidence [Sec.63]: means and includes

[1] certified copies ;

[2] copies made from the original by mechanical processes, and copies compared with such copies;

[3] copies made from or compared with the original;

[4] counterparts of documents as against the parties who did not execute them;

[5] oral accounts of the contents of a document by a person who has seen it.

The correctness of certified copies will be presumed under s 79; but that of other copies will have to be proved. This proof may be afforded by calling a witness who can swear that he has compared the copy tendered in evidence with the original or with what some other person read as the contents of the original and that such is correct. Certified copies of money lenders licences are admissible in evidence.

Types of Secondary Evidence: There are different types of secondary evidence.

There are 17 main types of secondary evidence which are as follow :

1. Certified copies.
2. Copies prepared by mechanical process.
3. Counter foils.
4. Photographs.

5. Xerox copy.
6. Photostat copy.
7. Carbon copy.
8. Types copy. 9. Tape records.
10. Copies made from or compared with original copy.
11. Counterparts.
12. Oral accounts.
13. Registration copy.
14. Unprobated will.
15. Age certificate.
16. Voters list.
17. Newspaper report.

Mode of proving a document

Contents of private documents are proved either by primary or secondary evidence in view of Sections 61 to 66, the *genuineness* is established by adducing evidence as per Sections 67 to 73; and the *truth* of their contents is ordinarily established by means of independent, direct or circumstantial, evidence.

A duly proved document can only be considered at the final hearing of a proceeding. Onus to prove a document is upon the party intending to rely on it. The genuineness or the truthfulness of the contents of a document are to be proved by the oral evidence and the contents thereof are to be proved either by adducing primary evidence or the secondary evidence. A document is said to be proved if following three criteria are satisfied:

- firstly, the execution of a document, i.e., the handwriting or signature on the document,if any, is proved. (genuineness of a document)
- secondly, contents of a document, and
- thirdly, truthfulness of the contents of a document.

The Evidence Act distinguishes between 'private document' and 'public document' and above mentioned criteria of proving the document do not apply to the 'public document' due to the special rules and presumptions provided by law.

(A) Execution

The process of proving the signature or handwriting in a document goes to the 'genuineness' of the document. The party who seeks to prove a particular document must get the handwriting or signature of the author, if any, identified by the author himself under Section 67 of the Act or any third person acquainted with the handwriting in question under Section 47 of the Act or by a person in whose presence the document was signed or executed under Section 67 and 68 of the Act or by an expert witness under Section 45 of the Act. Also, the signatory may himself admit having signed or executed a document, which dispense with the proof thereof vide Section 58 of the Act.

Further, the court itself is enabled under Section 73 of the Act to compare the handwriting or the signature in question with the one admitted or proved to the satisfaction of the court. Under certain circumstances enumerated at section 79 to 90A of the Evidence Act, a court is entitled to presume that the signature on a document and the document itself is genuine. Thus, under Section 79, courts may presume that certified copies are genuine. Proof of a signature or handwriting on document is sometimes referred to as mere 'formal proof of a document' as proof thereof does not automatically result in the proof of the contents of the document.

(B) Contents:

The contents of a document must ordinarily be proved by 'primary evidence'. However, where the party is not able to produce the primary evidence itself due to the reasons enumerated under Section 65 of the Act, the party is at liberty to produce the secondary evidence to prove the contents of the document. The 'proof of contents' is different from the 'truth of the contents'.

The distinction has been brought out in **Om Prakash Berlia v. Unit Trust of India**, wherein it was held that expression ' contents of a document' under the Evidence Act must mean only 'what the document states and not the truth of what the document states' and that the truth of contents of a document cannot be proved merely by producing the document for the inspection of the court.

For example, a letter is produced as having been written by ‘A’ and it contains a statement that in his presence ‘B’ paid an amount of money to ‘C’. If the 'contents' of

this letter are proved, then it can be said that A, in fact wrote this letter. But that does not mean that B actually paid such amount to C. Hence, the 'truthfulness of the contents of a document' are to be specifically proved.

(C) Truthfulness of the Contents:

Section 67 prescribes that truthfulness of the contents has to be proved by the personal knowledge. Ordinarily, the witness who has been called by the party intending to rely on a document, must have personal knowledge of the document. In other words, such witness should be the author of the document. This is proof by way of oral evidence as stipulated in Section 59 of Evidence Act. However, in another judgment of Bombay High Court, **Bima Tima Dhotre v. Pioneer Chemical Co.** observed that it was not necessary to call the writer of the document in order to prove the document as documentary evidence would become meaningless if the writer has to be called in every case.

Hence, it can be said that truth of the contents of a document must be proved either by the author or by 'the person who knows and understands the contents', that is persons having personal knowledge of a document. This is rule against hearsay. It is necessary to note that, in some cases, it will not be necessary to call the author or the writer of the document in order to prove the truthfulness of its contents.

Following are some exceptions to the Rule against Hearsay:

i. When the truth of contents is not material to be proved or is not in fact in issue.

ii. When the witnesses themselves are not available.

Such contingency is covered by the Section 32 of the Evidence Act which states that where the author of a document cannot be called as a witness either because he is dead, cannot be found, has become incapable of giving evidence, or his attendance cannot be procured without unreasonable delay, then the author of the document need not be called in order to depose the contents of the document under any of the circumstances enumerated in the section itself.

iii. Public Documents, discussed hereinafter.

iv. Summaries of voluminous documents. Under Section 65(g) of the Evidence Act, if original documents are voluminous then the summary or synopsis thereof can be prepared and admitted in evidence by a person who is not the author of the documents.

Section 58 of the Evidence Act: postulates that a document which has been admitted or not specifically denied by the opposite party need not be proved. This is merely a rule of prudence and is subject to the satisfaction of the court. Admission of a document vide Section 18 of the Act by opposite party does not by itself dispense the party to prove its truthfulness of the contents. Party may be required to prove same in accordance with the law.

In **Sudhir Engg. v. Nitco Roadways Ltd.** Delhi High Court held that, the mere admission of a document in evidence does not aamounts to its prove. It was held that a document filed by a party goes through three stages before it is held proved or disproved: Firstly, the stage in which the document is filed in court, Secondly, the stage in which the party tenders or produces the document in evidence and the court admits the document; and Thirdly, the stage in which the court applies its judicial mind and the document is held proved, disproved and not proved. Once, the above mentioned three criteria are fulfilled a document is said to be 'proved' as defined under Sec.3 of the Evidence Act. If not, then document is said to be 'disproved' or 'not proved' as the case may be.

In **Smt. J.Yashoda Vs. Smt. K. Shobha AIR 2007 SC 1721, 2007 (3) ALLMR (SC) 823** the Hon'ble Apex Court held that “Secondary evidence as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given.

The definition in Section 63 is exhaustive as the Section declares that secondary evidence “means and includes” and then follow the five kinds of secondary evidence. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it In **Ashok Dulichand v. Madahavlal Dube and Anr. [1976]1SCR246** it was held that "After hearing the learned Counsel for the

parties, we are of the opinion that the order of the High Court in this respect calls for no interference. According to clause (a) of Section 65 of Indian Evidence Act, Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to, the process of the Court of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it. Clauses (b) to (g) of Section 65 specify some other contingencies wherein secondary evidence relating to a document may be given, but we are not concerned with those clauses as it is the common case of the parties that the present case is not covered by those clauses. In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before respondent No. 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed Photostat copy.

Prayer was also made by the appellant that in case respondent No. 1 denied that the said manuscript had been written by him, the Photostat copy might be got examined from a handwriting expert.

The appellant also filed affidavit in support of his applications. It was however, nowhere stated in the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1. There was also no other material on the record to indicate the original document was in the possession of respondent No. 1. The appellant further failed to explain as to what were the circumstances under which the Photostat copy was prepared and who was in possession of the original document at the time its photograph was taken. Respondent No. 1 in his affidavit denied being in possession appeared to the High Court to be not above suspicion. In view of all the circumstances, the High Court to be not above suspicion. In view of all the circumstances, the High Court came to the conclusion that no foundation had been laid by the appellant for leading secondary evidence in the shape of the Photostat copy.

We find no infirmity in the above order of the High Court as might justify interference by this Court." Section 65 deals with the proof of the contents of the

documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Secondary evidence of the contents of a document cannot be admitted without non production of the original being first accounted for in such a manner as to bring it within one or other of the cases."

In **H. Siddiqui (Dead) by Lrs. .vs. A. Ramalingam (2011) 4 SCC 240**, it was held that though the said provision permits the parties to adduce secondary evidence, yet such a course is subject to large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the Court to allow a party to adduce secondary evidence.

Thus, secondary evidence relating to the contents of document is inadmissible, until the nonproduction of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that alleged copy is in fact a true copy of the original. It has been further held in this case that mere admission of a document in evidence does not amounts to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document in secondary evidence before making endorsement thereon.

1] Where the original is in possession of adversary or out of reach.

[2] When the existence, condition or contents of the original is admitted in writing by the person against whom it has to be proved.

[3] When the original had been lost or destroyed.

[4] When the original is not easily movable. Example bulky documents.

[5] When the original is a public document within the meaning of Section 74 of the Evidence Act.

[6] When the original consist of numerous accounts or other documents.

[7] Where the original is a document of which the evidence Act permits certified copies to be given in evidence.

Thus this Section reads merely with the foundations that has to be laid for the reception of secondary evidence. Unless a case falls within any one of the spheres of

Section 65 secondary evidence is not admissible. When the primary evidence is not available then only the secondary evidence is allowed and secondary evidence may be given when the original is in the possession or powers of opposite party or of a person who is out of reach of, or not subject to the process of the court or of any person legally bound to produce it and when such person does not produce it after notice to produce. When the existence condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representatives in interest the secondary evidence is allowed.

Electronic Records

Section 4 of Information Technology Act 2000 related with the legal recognition of electronic records. If any information or matter is rendered or made available in an electronic form, and accessible so as to the usable for a subsequent reference, shall be deemed to hve satisfied the requirement of the law which provides that information or any other matter shall be in writing or in the typewritten form.

Section 5 related with the legal recognition of digital signatures. Section 6 related with the use of electronic records and digital signatures in Government and its agencies. Section 7 related with the retention of electronic records. If any law provides that documents, records or information are required to be retained for any specific period, then, that requirement shall be deemed to have been satisfied if the same is retained in electronic form.

The Information Technology Act, 2000 was amended to allow for admissibility of digital evidence. The electronic record is any probative information stored or transmitted in digital form that a party to a Court case may use at trial. Before accepting digital evidence it is vital that the determination of its relevance veracity and authenticity be ascertained by the Court and to establish if the fact is hearsay or copy is preferred to the original. Digital evidence is information of probative value that is stored or transmitted in binary form. Section (2) clause (t) of the Information Technology Act 2000 defines the terms electronic records. It means "data, record or data generated, image or sound stored, received or sent in a electronic form micro film or computer generated micro fiche".

Section 61 to 65 Indian Evidence Act, the word "Document or content of documents" have not been replaced by the word "Electronic documents or content of electronic documents". Thus, the omission of the word, "Electronic Records" in the scheme of Section 61 to 65 signifies the clear and explicit legislative intention, i.e. not to extend the applicability of Section 61 to 65 to the electronic record in view of overriding provision of Section 65B Indian Evidence Act dealing exclusively with the admissibility of the electronic record which in view of the compelling technological reasons can be admitted only in the manner specified under Section 65B Indian Evidence Act.

Objectives of special Provisions

The main objective to introduce the special provision has its origin to the technical nature of the evidence particularly as the evidence in the electronic form cannot be produced in the court of law owing to the size of computer/server, residing in the machine language and thus, requiring the interpreter to read the same. The Section 65B of the Evidence Act makes the secondary copy in the form of computer output comprising of printout or the data copied on electronic/magnetic media.

Section 65A: provides that contents of electronic records may be proved in accordence with the provisions of section 65B.

Section 65B: **Admissibility of Electronic Records**

Sec. 65B(1): Notwithstanding anything contained in this Act, anyinformation contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

Sec. 65B (2): The computer from which the record is generated was regularly used to store or process information in respect of activity regularly carried on by a person having lawful control over the period, and relates to the period over which the computer was regularly used; Information was fed in computer in the ordinary course of the activities of the person having lawful control over the computer; The computer was operating properly, and if not, was not such as to affect the electronic record or its

accuracy; Information reproduced is such as is fed into computer in the ordinary course of activity.

Sec. 65B(4) Certificate: Regarding the person who can issue the certificate and contents of certificate, it provides the certificate doing any of the following things: identifying the electronic record containing the statement and describing the manner in which it was produced; giving the particulars of device dealing with any of the matters to which the conditions mentioned in subsection

(2) relate and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it. **(Yusufali Usmail V State of Maharashtra AIR1968 147)**

Mode of proving Electronic records: For the Admissibility of electronic evidence, it must satisfy the same rules as required for traditional documentary evidence to be admitted into evidence as laid down by Indian Evidence Act. But most of electronic evidence is intangible, invisible so some help/aid from technical person/Knowledge may be required to ascertain the fact which is to be proved. The section 3 for , "Document" and "Proved" reflects that, the principles of Indian Evidence Act are not changed in any way to prove the electronic documents. Being Jorgan (technical Words) in the Information Technology Act , some may feel that, it is difficult law to understand.

How to prove email: Section 88, 88A, 114(f) of the Evidence Act with section 26 of the General Clause Act are relevant sections for sending and receipt of email and its proof. To admit emails into evidence, the proponent must show the origin and integrity of emails. He must show who or what originated the email and whether the content is complete in the form intended, free from error or fabrication. In discovery, the proponent needs to prove that the hard copy of the email evidence is consistent with the one in the computer and includes all the information held in the electronic document. Next stage follows that, before admissibility the document has to meet the requirements of authentication or identification.

This is a process of verification that establishes that the document is what it

purports to be. i.e. that the email was made by the author indicated therein and is unaltered except for the change in the document generated automatically such as adding the date and time in case of email and address. The burden is on the person adducing the data message to prove its authenticity by adducing relevant evidence therefore that the document is what it purports to be. Where best evidence is the evidence required, the rule of best evidence is fulfilled upon proof of the authenticity of the electronic records system in or by which the data was recorded or stored. In assessing the evidential weight the court shall have regard to the reliability of the manner in which the data message was generated, stored or communicated; the reliability of the manner in which the authenticity of the data message was maintained; the manner in which the originator of the data message or electronic record was identified; and any other relevant factor. The authenticity of the electronic records system such as a computer is presumed in the absence of any evidence to the contrary where there is evidence that the system was operating properly.

Where the record is stored by a party adverse to the production of the email or data message; evidence is led that the record was stored in the usual and ordinary course of business by a party who is not a party to the suit. The Act specifically provides that it does not modify the statutory or common law rules for the admissibility of evidence. For admissibility of electronic records, specific criteria have been made in the Indian Evidence Act to satisfy the prime condition of authenticity or reliability which may be strengthened by means of new techniques of security being introduced by advancing technologies. It also requires:

a] Integrity of the data.

b] Integrity of the hardware/software

c] Security of the system.

How to prove that, system was properly working ?

To show that the system was working properly, the evidence is necessary to show that, record was stores in the usual and ordinary course of business by a party (provider) who is not party to the case. If some one challenges the accuracy of the computer evidence or electronic evidence or interpolation then he must prove the same beyond reasonable doubt. Recently in case of **Anvar vs. Bashir (Civil Appeal No.**

4226/2012 decided on 18.09.14) the Hon'ble Supreme Court deliberated upon the procedure for proof of electronic evidence and concluded, *"An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible".*

1. Ark Shipping Co. Ltd. Vrs Grt Ship Management Pvt. Ltd reported in 2007(5) ALLMR 516
2. StateVrs Navjot Sandhu 2005 (11) SCC 600 (certificate under section 65B not necessary).
3. State of Delhi Vrs Mohd Afzal and others 2003(3) 11 JCC 1669
4. Commissioner of Customs Mumbai Vrs Ridhi Sidhi Furniture Fitting Co.2002 (144) ELT 444

MODULE 06

ORAL AND DOCUMENTARY EVIDENCE II

1. PRESUMPTIONS AS TO DOCUMENTS AND ELECTRONIC RECORDS (SECTIONS 79-90A)

2. EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE (SECTIONS 91-100)

1. PRESUMPTIONS AS TO DOCUMENTS AND ELECTRONIC RECORDS (SECTIONS 79-90A)

Introduction

The evidence in criminal cases plays an important role in deciding the case and to bring out justice. The Indian Evidence Act accepts two forms of evidence, documentary evidence and oral evidence. According to the Indian Evidence Act, the documents which are produced for the inspection of the court are called documentary evidence. The documentary evidence is of great help and they are very reliable during the process of investigation. The documents are mainly of two types: private document and public document. This article would deal with the presumption as to the documents

and their evidential value.

Public Documents

The interpretation clause of the Indian evidence act defines the term document. According to Section 3 of the Indian Evidence Act, document means any matter expressed or described upon any substance and it can be in various means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording particular information or matter. There are various examples given for documents in the act like map, plan, caricature and letters. Any words which are printed and lithographed are considered to be documents according to the Indian Evidence Act. Section 74 of the Indian evidence act provides the definition of the term Public document. According to this Section, the following documents are considered public documents:

- The documents forming the acts or records of acts of sovereign authority;
- The documents forming the acts or records of acts of official bodies and tribunals;
- The documents forming the acts or records of acts of various officers like public officers, legislative, judicial officers and executive working in any part of India;
- The public records which are kept in the state of private documents also come under this category.

Every other document which does not come under the above-mentioned category is considered as private documents according to Section 75 of the Indian Evidence Act. Section 76 of the Indian Evidence Act provides the power to public officers to provide certified copies of public documents when it is necessary and when the person has the right to demand copies and ask for the copy of the document.

Presumption as to Documents

Section 79 to Section 90 of the Indian Evidence Act provides various presumptions as to the documents. There are certain presumptions regarding the

documentary evidence in this act. According to the Indian Evidence Act, the presumption is of two types. There are certain cases in which the Court "shall presume" and in certain cases, it "may presume". The terms are defined in Section 4 of the IEA. According to this Section,

- "May presume" means whenever it is mentioned by this Act that the Court may presume a fact, it may either consider such fact as proved, unless and until it is disproved or may call for proof of it.
- "Shall presume" means whenever it is mentioned in this Act that the Court shall presume a fact, it shall consider such fact as proved, unless and until it is disproved.

Presumption as to the Genuineness of Certified Copies

The certified copies are the copies of public documents that are provided by the authorized officer when it is necessary for inspection. Section 79 of the Indian Evidence Act provides the presumption as to the genuineness of these certified copies. According to this Section, the court presumes the certified copy to be genuine when it comes with a valid certificate. The court also presumes that the officer who has signed the documents holds the official character of the designation mentioned in the certificate. The certified copy of the public document must contain a certificate which is provided by the authorized officer that has to mention that it is the true copy of the document and the officer has to sign the certificate with their name and they also have to mention the date and designation. The certificate should also be sealed whenever it is necessary by the authorized officer.

Presumption as to Documents produced as Records of Evidence

Section 80 of the Indian Evidence Act provides the various presumptions regarding the documents which are provided as evidence. The Court presumes that the documents which are produced for inspection are genuine. The court also presumes that any statements as to the circumstances under which it was taken, considered to be made by the person signing it, are true and that such evidence, statement or confession

was duly taken by following all the procedures. The documents provided for inspection can be a record or memorandum of the evidence that is provided by a witness during the judicial proceeding before the officer authorized by law to take evidence or it can be a statement or confession that is provided by any prisoner or person who is accused, which taken in accordance with the law and the confession must be signed by the magistrate or any other officer authorized by law.

Presumption as to Gazettes, Newspapers, Private Acts of the Parliament and other Documents

Section 81 of the Indian Evidence Act deals with the presumption regarding Gazettes, newspapers, private Acts of the Parliament. The court presumes the following documents to be genuine, according to this Section:

- The document professed to be the London Gazette, or any Official Gazette, or the Government Gazette of any colony;
- The documents which are a dependency of possession of the British Crown;
- Newspaper or journal;
- Copy of a private Act of Parliament of the United Kingdom which is printed by the Queen's Printer.

The documents must be kept in the substantial form mentioned in the law and also it must be produced from proper custody. The Court also presumes the Official gazettes kept in the electronic form is genuine if it is kept in the substantial form mentioned in the law.

Presumption as to Maps and Plans made by Government authorities

The maps and plans are also a recognized type of documentary evidence. Section 83 of the Indian Evidence Act provides the various presumptions regarding maps and plans made by the authorities of the government. According to this Section, the maps and plans are presumed to be genuine and accurate if it is made by the authority of the Central or State government.

Presumption as to a Collection of Laws and Reports

Section 84 of the Indian Evidence Act provides various presumptions regarding the laws and reports. According to this Section, the court presumes every book which contains laws and reports of the decisions of the Courts of the country to be genuine if the book is printed or published by the authority of the government.

Presumption as to the Power-of-Attorney

Section 85 of the Evidence Act provides various presumptions regarding the power of attorney. According to this Section, the court shall presume that every document that is considered to be the power of attorney, and that is executed before the authorized officer or Notary Public or any court or before any Magistrate is executed and authenticated.

Presumption as to Books, Maps and Charts

Section 87 of the Indian Evidence Act provides various presumptions regarding the books, maps and charts. The Court presumes that any book which contains any information which contains matters of public or general interest, or any published chart that are in relation with the case or any statements that contain relevant facts which are produced for inspection is written and published by the person mentioned in the book. The court also presumes that the time and place of publication which is mentioned in the book or chart to be true.

Presumption as to Telegraphic Messages

Section 88 provides various presumptions regarding the telegraphic messages. According to the Section, the court presumes “that telegraphic messages to be that a message, which is forwarded from a telegraph office to the person to whom such message which claims to be addressed, is in relation with a message that is delivered for transmission at the office from which the message purports to be sent”. The Section also mentions that the Court does not make any presumption regarding the person by whom such a message was delivered for transmission. The Section is not of any use now as the telegraph services have been stopped by the Indian Government

Presumption as to Electronic Messages

This is a very important Section as a lot of information are transferred in the electronic form in the modern days. Section 88A of the Indian Evidence Act provides various presumptions regarding electronic messages. According to this Section, the Court presumes that an electronic message, which is forwarded by the originator by means of an electronic mail server to the addressee to whom the message claims to be addressed corresponds with the message as fed into his computer for transmission. According to the Section, the terms “addressee” and “originator” has the same meaning as mentioned in the clauses (b) and (za) of sub-section (1) of Section 2 Information Technology Act,2000”.

Presumption as to due Execution of Documents not Produced

Section 89 of the Indian Evidence Act provides various presumptions regarding the due execution of documents not produced. The Court presumes that every document that is called for inspection and the documents are not produced even after the notice period, it is presumed that the documents are attested, stamped and executed in the manner which is prescribed by law.

Presumption as to Documents Thirty years old

Section 90 of the Indian Evidence Act deals with the presumption as to documents that are thirty years old. The Court presumes that any document which is produced for investigation is from proper custody and the signature corresponds to the signature of the person whose custody the document was in. The Court also presumes that any handwriting in the document is the handwriting of the person who has the custody of the document. It is also presumed by the Court that in case if the document attested or executed, that it was duly executed and attested by the persons by whom it professes to be executed and attested. The term proper custody means that the document is with the care of the person and in a place where it would naturally be. For example, ‘A’ has been in possession of a certain property for a long time. He produces from his custody deeds the various documents relating to the land showing his titles to it and the custody is held to be proper.

Presumption as to the Electronic Record of Five years old

Section 90A of the Indian Evidence Act provides the various presumptions regarding electronic records of five years old. According to this Section, the Court presumes that when any electronic record that is above five years old and it is procured from the proper custody for investigation. It is presumed that the digital signature corresponds to the particular person whose custody the record is or the signature belongs to the person who has authorized it. The term proper custody means that the electronic record is with the care of the person and in a place where it would naturally be. It is also mentioned in the Section that no custody is improper if it is proved that the custody is of legitimate origin in the particular case to render such origin possible.

Conclusion

The Sections regarding presumptions is a very important part of the Indian Evidence Act as they help in the investigation. The presumptions make the investigation easier and fast. The Court has to follow all the presumptions and it can only change its notion on presumptions only when it is necessary. The documents have a lot of evidentiary value and it is important to investigate them properly and also save the Court's valuable time at the same time. Thus the presumptions regarding the documents is a very essential part of the Indian Evidence Act.

Presumption as to Electronic Records under the Indian Evidence Act, 1872

Section 85A

This section specifically talks about the presumptions of the courts in India with regards to electronic agreements and says that the courts shall presume that every available electronic recording which has an electronic signature affixed to it shall be considered to have a valid evidentiary value under the Indian Evidence Act and in the eyes of the courts in India. Though there are a few restrictions on such presumptions which shall be discussed in the following sections.

Section 85B

This section tells us that the court shall presume that the e-contract or documents which are being presented in front of the court have not been tampered with i.e. they are presented in their original form without anyone making any alterations in it, in case it has been proved that such records have been tampered with. The secure status of such information shall be required to be maintained until a specific time. The section also tells us that once a digital signature is affixed to an agreement available online, such shall be presumed by the courts to be an acceptance of such agreements.

Section 85C

This section tells us that if a digital signature is affixed to a particular document then the court shall presume that such document is true and correct.

Section 88A

The very purpose of this section is to define the terms 'addressee' and 'originator concerning an e-contract. It mainly talks about the power of the court with regards to presumption of the addressee of an electronic communication. The section says that the courts shall presume the 'addressee' to be a person to such electronic communication has been directed by the 'originator'. Though, as per this section, the court does not have any power with regards to the presumption of who the 'originator' of the thread of electronic communication is.

Section 90A

This section helps the courts deal with a record which is more than 5 years old. In the eyes of the court and the Indian Evidence Act, if such a record is in proper custody then the court shall presume that the digital signature has been affixed with such document to authenticate its validity.

Section 65B

This section helps us understand the provisions under which an e-contract shall be admissible as evidence in front of a court in India. It says that any information which is recorded through an electronic medium and is available as on a printed paper, stored

or copied in optical or magnetic media produced by a computer shall be admissible as an evidence if it satisfies the conditions provided in this section. The conditions set forth under section 65B of the Indian Evidence Act, are as follows:

The computer output i.e. the electronic information produced as evidence should be from the computer which has been regularly used to process or store such digital information for any activity and such activities are expected to be performed by a person who has lawful control over the use of the computer.

During the concerned period, the relevant information should have been regularly fed to the computer in the ordinary course of such activities.

In case the concerned computer was not working properly during the period, it should be notified that such non-functionality did not in any way affect the electronic record or the accuracy of its contents.

The reproduction of such digital information or the derivations associated with the information should have been fed into the computer during the regular conduct of associated activities.

The section tells us that any such evidence which is provided to the court in the form of e-contract shall be accompanied with a certificate. Such a certificate shall be a confirmation by the person occupying the legally responsible position for processing the information, with regards to fulfilling all the conditions specified under Section 65B of the Indian Evidence Act, 1872. Such a person shall be the one who is responsible for operating the computer which processed all the information related to the concerned activity.

Conclusion

The conduct of commercial and social transactions through e-contracts has had a revolutionary impact on our society. The Indian Evidence Act, 1872 values e-contracts in the same way as it does for written or verbal contracts. The Indian Evidence Act and its relevant provisions help us understand the aspects with regards to the admissibility of electronic contracts in the purview of the India courts. The Indian evidence act also

helps us understand the extent of presumptions which can be made by the courts in India under the act concerning evidence recorded by the means of an electronic medium.

The presumptions with regards to certain provisions concerning e-contracts under the Indian Evidence Act, 1872 have been left open for interpretation by the Courts. With the growth in internet-related activities through digital mediums, more precise regulations with regards to e-contracts would be required. As keeping such provisions open for varied interpretations may lead to confusion amongst the members of the legal fraternity while dealing with matters related to processing and admissibility of e-contracts. Though over the period the Indian Legal Regime has adapted itself to deal with technological advancements. There is a lot of scope for improvements in the processes of dealing with e-contracts under Indian law.

2. EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE (SECTIONS 91-100)

One of the essential standards of the law of proof is that in all cases the best proof ought to be given. Where the demonstration is exemplified in a record, the record is the best proof of the reality. The maxim of law is “whatever is recorded as a hard copy must be demonstrated in the form of hard copy only“.

Section 91 of the Evidence Act- Evidence in the form of contracts, grants and other dispositions of property should be in the form of a document. This Section applies similarly to cases in which the agreement, stipends or disposition of property alluded are contained in one document or has one record, and cases in which they are contained in a greater number of reports that one.

If there are more than one original documents, then only one original needs to be proved. The statement in any document of whatever facts are mentioned under this Section, shall not prevent the admission of oral evidence as to the same fact mentioned.

Exceptions

There are two exceptions mentioned under this rule:

The general guidelines are that when some content of a document is to be proved in writing, the writing itself must be produced before the court and if it is not produced then secondary evidence should be given. Exception- when any public officer is appointed for writing and it is seen that a particular person has acted like such an officer then in such situations, the writing by which he has been appointed need not be proved. Example- Suresh appears as a witness before the court, to prove that he is a civil surgeon there is no need to show the appointment order. The surgeon only needs to show that he is working as a civil surgeon.

To the general guidelines of content of writing there is one more exception mentioned under this- At the point when a probate (the copy of will which is required to be certified by the court) has got based on a will and subsequently question emerges about the presence of that will, the mere presence of the probate will demonstrate the presence of the will and the original will require not to be produced.

Section 92- Exclusion of evidence of an oral agreement.

If any contract, grants or disposition of property which is required by law to be in writing in form of document and if it has been proved according to Section 91, then for the purpose of varying it, contradicting it or subtracting it parties or their representative is not required to give oral evidence and it is not admissible. Two points are proved from this Section:

1-If any third party gives then it is admissible.

2-If any oral evidence is given which do not contradict the contract then it is admissible.

Exceptions

Validity of document

If any contract or grant is made between the parties and fraud is done by other party or there is a mistake of fact, or mistake of law, or the party is not competent to contract then in such circumstances oral evidence can be given and it is admissible.

Matters on which document is silent

Oral evidence can be given when the documents are silent but subject to these two conditions are there:

1- The oral evidence should not contradict the document. Illustration – A sells his horse to B and told about the price but the soundness of horse is not told but oral evidence can be given that horse is of sound mind because the document is silent here.

2- In allowing the proof of oral understanding the court is to have respect the level of the custom of the record. On the off chance that the report is formal, proof of oral understanding will not be permitted even on issues on which the record is silent.

Separate oral agreement as condition precedent

In this situation, it is provided that if there is any condition precedent is constituted to the existing separate oral agreement to attaching of any obligations under a document , then it needs to be proved.

Recession or modification

This provision permits the proof of oral agreement by which the document was either revoked or altered. When documents are executed then parties orally agree to treat it as canceled or alter some of its terms, such oral agreement is admissible.

Usages or customs

If there is the existence of any particular usage or customs by which incidents are attached to a contract then it can be proved.

Relation of language to facts

If any document is written then oral evidence can be given of such a document that what is mentioned in and in what circumstances it was mentioned and how to interpret it but it should not exclusively contradict the document.

Section 93- Exclusion of evidence to explain or amend an ambiguous document. If the

language used in the document is defective or ambiguous, evidence cannot be given of facts which would show it's meaning. Illustration- A agrees to sell his cow to B in writing for Rs. 1500 or Rs. 2000. Evidence cannot be given to show which price wast to be given.

Section 94- Exclusion of evidence against the application of document to existing facts. When the language used in the document is correct and when it applies correctly to the facts mentioned, evidence cannot be given that it is to be proved that it was not meant to apply on such facts.

Section 95- Evidence as to the document unmeaning in reference to existing facts. When language used in a document is plain in itself, however, is unmeaning in reference to existing facts, reality or situations, proof might be given to demonstrate that it was used in an unusual or different way.

Section 96- Evidence as to the application of the language which can apply to one of several persons. At the point when the facts are with the end goal that the language utilized may have been intended to apply to anyone, and couldn't have been intended to apply to multiple, of a few people or things, proof might be given of certainties which shows the people or things, it was planned to apply to.

Section 97- Evidence as to the application of language to one of two sets of facts, to neither of which the whole correctly applies. When the language used is applied partially to other existing facts and partially to other existing facts but the whole does not apply to either of the facts mentioned. Evidence can be given to show that which of the two it was meant to apply.

Section 98- Evidence as to the meaning of illegible characters, etc. Proof might be given to demonstrate the significance of obscured or not ordinarily clear characters, of remote, out of date, specialized, and provincial expressions, of abbreviations and of words utilized in an exceptional sense.

Canadian-General Electric W. v. Fatda Radio Ltd held that for the explanation of artistic words and symbols used in the record oral evidence is admissible and can be used for

that purpose.

Section 99- Who may give evidence of an agreement varying term of the document?

The person who is not a party to a contract or their representative may give evidence of any fact which do not contradict with the documents.

Conclusion

The value of documentary evidence is more than oral evidence. The court mainly accepts documentary evidence but takes oral evidence into consideration. Briefly, we can say that there are two types of documents- oral and documentary evidence. In court, documentary evidence has more value. Court wants best evidence and documentary evidence is the best evidence and it consists of two parts primary evidence and secondary evidence. Primary evidence is the best evidence recognized by the court. In the absence of primary evidence, secondary evidence is given to the Court. On the other hand, oral evidence is evidence given by words and gestures and are not permanent it can be changed. Hence Section 91 and 92 exclude oral evidence by documentary evidence. Proof in the form of a document can be submitted instead of giving orally.

MODULE 07

BURDEN OF PROOF

1. BURDEN OF PROOF (SECTIONS 101-111)

2. PRESUMPTIONS (SECTIONS 111A-114 A)

3. DOCTRINE OF ESTOPPEL (SECTIONS115-117)

1. BURDEN OF PROOF (SECTIONS 101-111)

Introduction

The laws relating to the Burden of Proof and its related rules are as provided in the Indian Evidence Act of 1872. This laws clearly states that until and unless an exception is established by law, the burden of proof will rest on the person who has asserted a fact or is making any claim. When a person has proven the existence of a fact then the burden of proof belongs to such a fellow.

In the Criminal case, there are always two burdens. The first burden is on the prosecution to prove at all cost against the defendant while the second burden lies with the defendant to bring about a convincing and sufficient evidence that will prove reasonable doubts surrounding the case of the prosecution.

This article will elucidate on the aspects of Burden of Proof as contained in section 101

of the Indian Evidence Act.

WHAT IS THE BURDEN OF PROOF

In simple terms, Burden of Proof is the responsibility to prove the fact in a case. Each party must provide a fact that will either stand for or against the case. The term Burden of Proof is used to explain two major facts or burdens. The first is the Burden of production of the burden of "going forward with the evidence" and the burden of plea or persuasion.

The burden of plea or persuasion is the responsibility that rests on the single party through the period of the court sittings. The party carrying the burden can only succeed in its claims once it has absolutely satisfied the "tier of fact". For one to be presumed innocent in the court of law over a criminal case, the prosecution is faced with the burden to prove elements of the offense and disprove all defenses excluding defenses with affirmation which constitutionally are not required in the prosecution of the case.

The evidential burden should not be confused with the burden of persuasion. Evidential Burden can change hands between parties during the court proceedings. The evidential burden is only raised to provide enough evidence against a case in the court.

PRINCIPLES OF BURDEN OF PROOF

The underlining principles of the Burden of Proof are contained in the concept of Onus probandi and Factum probans. In this explanation, Onus (burden) is the liability and obligation to prove a fact which can shift between parties in the case. Sections 101, 102 and 103 of the Indian Evidence Act provides the standard laws that govern the Burden of Proof.

Section 101

This section in its explanation on Burden of Proof states that whoever wants the court to proffer judgment to a legal case or right based on the availability of facts, must prove those facts beyond any reasonable doubt.

Illustration

In a case that a person A desires the court to offer judgment on B following a crime committed, A must prove that B has committed the said crime. A has prayed to the court to give judgment that he is to own a certain land which presently is possessed by B, based on the facts he presents which B has denied. In this case, A must prove those facts to be true.

Supreme Court in a case between **Jarnail and State of Punjab A I R 1996 SC 755** that in all criminal case, the responsibility of proving if the accused had committed the crime beyond all reasonable doubt rests on the prosecution and if it fails to establish concrete evidence to shed off the burden, it cannot depend on the evidence brought by the accused on defense in the case. The prosecution does not rely on the evidence of the accused to convict the defendant.

Section 102 – Burden of Proof of Lies

In a case brought before the court, the burden of proof lies who has the tendency to fail if no evidence is supplied before the court from either of the parties.

Illustration

If A takes B to court following a feud because of a land which B is in possession and A asserts that it was left to A following a will made by C, who was B's father. If neither A or B presents any evidence, then B will retain the property.

In a case where A sues B for money resulting from a bond. Both parties have agreed to the execution of the bond, but B disagrees that it was contracted by fraud which A disagrees. If no party can establish an evidence, then A would win as the bond had been contracted but the case of fraud cannot be proved. In that case, the burden of proof rests on B.

In a case between **Triro and Dev Raj A I R 1993 J&K 14.** Because of the delay in constructing the suit, the defendant had prayed the court over a limitation of the period. The position of the plaintiff was to know the cause of the delay and the burden of

proving if the case was within the given period was on the plaintiff.

Section 103-Burden as to a fact

The burden of proof to a fact rests on that person who desires the court to believe in the existence of such fact unless a law authorizes the proof of the fact to be established by any particular individual.

Illustration

If A sues B for theft, and desires the court to accept that B admitted committing the theft to C. A must prove that fact and if B denies it, B must prove it.

The principle of this section states that once a party desires the court to accept and act based on the existence of a fact, he must prove that fact. This principle is called "rule of convenience of the burden of proof"' and is contained in sections, 104, 113, 113a and 114a.

Section 104 – Burden of proving the fact to be proved to make evidence admissible

This is a burden of proving a fact that is necessary to be proved to allow any person to establish evidence of any fact and is on the person who intends to establish such an evidence.

Illustration

If A desires to prove the declaration of death by B, A must prove that B is dead.

B intends to prove by secondary evidence, the contents of a lost document.

A must prove that the document cannot be found. This section provides the proof of a fact for which evidence can be admitted where such admission is based on the fact of which the party proves which must be in tandem with the admissibility.

Section 105 – Burden of proving that case of accused comes within exceptions

When a person is accused of an offense, the fact required to establish the circumstances surrounding the case excluding General Exceptions in the Indian Penal Code 45 of 1860, or in any regulations defining it, is upon him while the court will presume the absence of such a circumstance.

Illustration

When A who is accused of murder alleges that because of lunacy he was unaware of the nature of the act. The burden of proof rests on A. An accused of murder, alleges that because of sudden provocation, he lost self-control, the burden of proof is on A.

Section 325 of the Indian Penal Code 45 of 1860 states that whoever excluding the case of section 335 inflicts a fatal injury shall be punished. A is charged with a voluntary offense under section 325. The burden to prove the circumstances bringing the case subject to section 335 is on A. Thus, this section provides that the burden of proving lies on the accused if the claims on each case comes under the acceptable exception.

Section 106 – Burden of proving fact specially within the knowledge

When any fact confined to the knowledge of a person, the burden of proving that fact is on the person.

Illustration

The burden of proving the fact is on a person who commits an act with the intention which is different from the circumstances that the act suggest.

On an occasion that A is charged on boarding a train without a ticket, the burden of proving such a fact is on A.

In a case between **Eshwarai and Karnataka 1994 SC**, if a man and a woman is

found hiding under the bedroom of the deceased who died because of injuries sustained, the two found must proof the lies upon them and explain their presence in the room as to the circumstance to the death found.

Section 107 – Burden of proving the death of a person known to have been alive within thirty years.

In a situation of a controversy whether a person is dead or alive, and it is established that he had been alive for the last thirty years, the burden of proving that he is not alive is on the person who states it.

2013 AMENDMENT OF THE BURDEN OF PROOF ACT

Section 114A Presumption as to the absence of consent in certain prosecutions of rape

In a prosecution for rape subject to section 376 of the Indian Penal Code, where sexual intercourse is proved against the accused, if the woman asserts that it was non-consensual sex, then the court will honor the claims of the woma

In a case between **Nawab Khan and State 1990 cr lj. 1779**, the court held that the person with which the sexual intercourse is committed tells the court it was a non-consensual sex, then the court will assume there was no consent. If the accused claims that there was a consent, then the burden of proof lies with the accused.

Conclusion

The rule governing the burden of proof is that whoever lays a claim must present evidence or proof. This rule is subject to the principles that the burden of proof rests on the party that either asserts a claim or denies it. This implies that whoever brings a case against another to the court must prove the fact he claims. In criminal cases, the burden of proof on defendants is based on the evidence that is established before the court which states the fact that he committed the crime as adduced. An accused can only be presumed guilty based on the fact established by the plaintiff to the court in accordance with the Burden of Proof that rules the case.

2. PRESUMPTIONS (SECTIONS 111A-114 A)

Introduction

Presumption generally means a process of ascertaining few facts on the basis of possibility or it is the consequence of some acts in general which strengthen the possibility and when such possibility has great substantiate value then generally facts can be ascertained. A presumption in law means inferences which are concluded by the court with respect to the existence of certain facts. The inferences can either be affirmative or negative drawn from circumstance by using a process of best probable reasoning of such circumstances. The basic rule of presumption is when one fact of the case or circumstances are considered as primary facts and if they are proving the other facts related to it, then the facts can be presumed as if they are proved until disproved. Section 114 of Indian Evidence Act specifically deals with the concept that 'the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of (a) natural events, (b) human conduct, and (c) public and private business, in their relation to the facts of the particular case'.

Difference between Presumption of Facts and Presumption of Law

Topic	Presumption of Facts	Presumption of Law
Definition	When presumptions are established on the basis of facts or groups of facts or from the collection of facts.	When presumptions are acknowledged without the help of proof in certain situations or circumstances where court me presumes some facts itself.
Position of Presumption	Uncertain position.	Certain and uniform position.
Performance	They are always rebuttable and can be challenged after	They are conclusive presumption unless proven

	establishing probative evidence.	with probative evidence.
Discretionary Power of Court	Court enjoys discretionary power, either to presume any facts or not.	Court has no discretionary power, and they are bound to presume some facts as such facts are presumed itself by the law.
Source of Presumption	They are derived on the basis of natural law, customary practices, and general mankind experiences.	Judicial customs & practices, the law under the statues are the only sources of presumption of law.
Examples	Presumption of Foreign Judicial Records, Presumptions of Abetment as to Suicide by a Married Women etc.	Presumption of Innocence, Presumption of declared death in absentia etc.

Difference between May Presume Shall Presume and Conclusive proof

May presume is a condition when the court enjoys its discretion power to presume any/ certain/ few facts and recognize it either proved or may ask for corroborative evidence to confirm or reconfirm the presumption set by the court in its discretion. Section 4 of the Indian Evidence Act provides that a fact or a group of facts may be regarded as proved, until and unless they are disapproved. The concept is defined under Section 4 of this act that 'May Presume' deals with rebuttable presumption and is not a branch of jurisprudence.

Whereas, **shall presume** denotes a strong assertion or intention to determine any

fact. Section 4 of Indian evidence Act explains the principle of 'Shall Presume' that the court does not have any discretionary power in the course of presumption of 'Shall Presume', rather the court has presumed facts or groups of facts and regard them as if they are proved until they are disproved by the other party. Section 4 of the Indian Evidence Act explains that the concept of 'Shall Presume' may also be called 'Presumption of Law' or 'Artificial Presumption' or 'Obligatory Presumption' or 'Rebuttable Presumption of Law' and tells that it is a branch of jurisprudence.

While, **Conclusive Presumptions/ Proofs**, this can be considered as one of the strongest presumptions a court may assume but at the same time the presumptions are not completely based on logic rather court believes that such presumptions are for the welfare or upbringing of the society. With regards to Conclusive proofs, the law has absolute power and shall not allow any proofs contrary to the presumption which means if the facts presumed under conclusive proofs cannot be challenged even if the presumption is challenged on the basis of probative evidence. This is the strongest kind of all the existing presumptions whereas Section 41, 112 and 113 of the Evidence Act and S. 82 of the Indian Penal Code are one of the most important provisions related to the irrebuttable form of presumptions or Conclusive Presumption.

The general definition of Conclusive Proof is a condition when one fact is established, then the other facts or conditions become conclusive proof of another as declared by this Act. The Court in its consideration shall regard all other facts to be proved, only if one fact of the case is proven without any reasonable doubt. And if the other facts are proved on the basis of proving of one fact that the court shall not allow any evidence contrary to other facts which are presumed as conclusive proofs.

Illustration- A and B married on June 1 and the husband left home to his work for 6 months later he discovered that her wife is pregnant he divorced the wife and challenges that he is not liable for paying damages either to his wife or to his illegitimate son. And also explains that he never consumed his marriage as just after one day of marriage he left his home for his work. But in this case, the court will conclusively presumed that the son born out of his wife is legitimate because he was with his wife for at least 1 day and shall not allow any proof contrary to the conclusive

proof even if he provides probative evidence.

General Classification of Presumption

The traditional approach of common law system has classified presumption only under two categories that are a presumption of law and presumption of facts but to avoid any ambiguity in deciding any case the Indian legal system has adopted the third classification that is mixed presumptions which includes both the aspects of facts as well as law. Hence the existing legal system has three types of presumptions which are as follows:

1) Presumption of Facts- Presumptions of facts are those inferences that are naturally and reasonably concluded on the basis of observations and circumstances in the course of basic human conduct. These are also known as material or natural presumptions. Natural Presumptions are basically instances of circumstantial evidence as it is believed that it is very good to act in the course of reasoning where much inferences can be easily concluded from other evidence otherwise it will keep much ambiguity on the legal system because it will be much more difficult because of the legal system to prove every fact to capture the offenders or law conflicted member of the society. Natural Presumptions are generally rebuttable in nature.

There are few provisions that are directly expressing about Natural Presumptions such as Section 86- 88, Section 90, Section 113A, Section 113 B of Indian Evidence Act. Where Section 113A & 113 B are one of the most important provisions of presumptions under this Act, whereas Section 86 talk about certified copies of foreign judicial records, Section 87 expresses presumption of Books, Maps and Charts, Section 88 deals with presumption related to Telegraphic Messages, Section 90 deals with documents aged thirty years old, whereas Section 113 A deals with hardcore crime that is Presumption as to abatement of suicide by a married women and Section 113 B deals with the presumption as to dowry death. Under the Presumptions of Facts, the concept of ‘shall presume’ is utilized. And by the concept, the court will presume that a fact ascertained before them are proven facts until and unless they are proven disproved by the accused. The concept of ‘shall presume’ expresses that the courts are bound to maintain and

recognise some facts as proven by making a mandatory presumption and the court has to consider them as completely proven until such presumption are challenged and disapproved. When these presumptions are disproved by the challenging party then the court has no discretion on maintaining such presumptions.

1.1) Few Conditions Where Court May Use the Presumption of Facts To Ascertain Some Facts:-

Foreign Judicial Records- Section 86 explains the principle that the court has the discretionary power to make presumptions with respect to the originality and accuracy of the certified copies of a different foreign country's judicial records and the called document should be consistent with the local or domestic rules. The presumption explained under this Section has a very significant role, therefore, should be complied with it. It is also observed that if the court does not feel that the foreign judgments are not consistent with the local laws then these judgments lose the evidentiary values in the court.

Abetment as to Suicide by a Married Women- Section 113A deals with the presumptions of abetment of suicide of a married woman either by her husband or any of his relatives. The court has mentioned few essentials to check that whether a suicide executed by married women is inconsistent with the essentials mentioned under the provision, and if they are consistent to it then the court in such cases will presume that such suicide has been abetted either by the husband or his relative. The essentials of this provision are:

(i) The incident of suicide was committed within a period of seven years from the date of her marriage; and

(ii) Her husband, or his relative, has subjected her to cruelty as according to the Section 498A of IPC.

In **Chhagan Singh v State of Madhya Pradesh**, the victim was badly beaten by the accused at some place and for such guilty act the accused explains the reasons that the victim was stealing rice and because of it, he has beaten the victim. But just after the few days of the incident victim committed suicide. The court in this matter acquitted

the accused or discharged the accused of offence mentioned under Section 113A of Indian Evidence Act as the court didn't find any evidence subject to cruelty and also mentioned that the essentials of Section 113A are not fulfilled with the facts of the cases, hence in the case of murder legal presumptions of Section 113A is not a part of it. Because the death of the person is caused due to other reasons and the legal principles of 113A cannot be just applied blindly as one has to see the nexus of it. The advantage of the presumption of Section 113A can only be granted if either her husband or any of his relative has treated the women with cruelty in any sense.

In, **Nilakantha Pati v State of Orissa**, in this case, the accused married the victim in April 1982 and has been benefited with a dowry. But later the accused desired to purchase a house, and of the purpose, he asked the victim to get Rs 70,00 from her parents. When she could not get the amount she was tortured and in 1986 she died. The accused supported his arguments with proper reasoning and logic that the court found the presumption to be of rebuttable nature. As the arguments advanced by the accused have enough relevance, the accused was acquitted of Section 113A. The High Court said that they presumption exited here is rebuttable and such presumption can be escalated whenever the circumstances of the case match the essentials or the interpretation of the legal provisions. And here, in this case, the accused has disproved all the presumptions of the court hence, the accused was released.

In, **Mangal Ram & Anor v State of Madhya Pradesh**, in this case, the wife of the accused was living with her parents for many years and has no visited her matrimonial home for a long time. But within one month of returning to her matrimonial home, she committed suicide. Therefore the court presumed the circumstance that the accused is responsible for the death of the lady and the case comes under Section 113B of Indian Evidence Act. But the husband and her in-laws proved that the death was not caused because of the reasons subjected to cruelty. The court in that matter said that the presumption was of rebuttable nature and the presumption can't be sustained anymore, hence the accused acquitted.

Abetment of Suicide to married Women for the purpose of Dowry- Section 114B of Indian Evidence Act deals with the principles of presumption related to abetment of

suicide to married women for the purpose of dowry. This Section empowers the court to presume that the husband and his relative are the abettors of suicide and the wife was subjected to cruelty or any torture related to demand of dowry. While explaining the concept of Section 113B the court explains certain essentials which are to be fulfilled for raising any presumption related to abetment of dowry death. The essentials of Section 113B are completely the same as of essentials of Section 113A of Indian Evidence Act.

But a thin line difference between Section 113A & 114B is that the presumption of Section 114B only comes to the picture if the prosecution has certain proofs that the cause of death was cruelty or maltreatment or harassment for dowry demand. Hence, under this Section, the presumption is carried only when the prosecution proves the case.

In, **Hem Chand v State of Haryana** the couple married on 24 May of 1962. The wife left her husband's home just after 2 months of her marriage and explained the reason to her parents that her husband is demanding for a TV and a refrigerator. After listening to such demands her father out of his hard money gave her around Rs. 6,000 and she left for her matrimonial home. But the husband's desire was not finishing and he again asked her to get twenty-five thousand rupees from her home as he is willing to buy some real estate property. Thereafter the accused took his wife to her parents' home and said that he'll take back her only if he will be paid Rs. 25,000. One year after she came back to her matrimonial home with Rs. 15,000 and promised the balance amount will be paid soon. But on the same day, she died of strangulation in her husband's home. The trial court and both Supreme Court found accused to be guilty and convicted on carrying the presumptions that her husband has performed cruelty against her and the reason for her death could be the husband's cruelty for the purpose of dowry.

In **Shanti v State of Haryana**, The Supreme Court held that the victim's death should be soon after the victim was subjected to cruelty or harassment for the purpose of dowry. But in this matter, the wife was taken back to her home as the dispute was solved by the local panchayat and this incident happened before 10-15 days of her

death. However, the facts seem to be so clear but the presumption cannot be made as there was no evidence which indicates that she was treated with cruelty for the purpose of raising dowry when she was taken back to her matrimonial home. Hence in these circumstances, the presumption for dowry death cannot be raised and Section 113B of the Indian Evidence Act cannot be brought into action.

In, **Baijnath & Others v. State of Madhya Pradesh**, Supreme Court expounded that, "One of the essential ingredients of dowry death under Section 304B of the Penal Code is that the women must have subjected to cruelty either by the husband or his relatives for the purpose of dowry soon before her death and bring it as an essential ingredient of Section 304B of IPC the prosecution has to prove the connection of the victim's death with the act of cruelty by the husband or by his relative for the purpose of demanding dowry and the connection must be proved beyond reasonable doubt then only the court will put the case into the window of Section 113B of Indian Evidence Act.

May Presume- Section 114 of the Indian Evidence Act deals with the concept 'presumption of certain facts by the court'. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations-

Every negotiable instrument is presumed that it is drawn for the purpose of good consideration.

There shall be continuity of things unless proven contrary like if a property is considered to be an ancestral property, it shall be presumed that it is so until it is proven contrary to the presumption (**Chito Mahtoo v Lila Mahto**).

- If a person refuses to answer a question, which is not compelled by the law to answer, the court may presume that if he answers the question then the answer would be unfavourable to him.
- That if a man possesses some stolen goods soon after the theft then it is

believed that he is either the thief or has received the goods knowing the nature of the goods unless he can account for his possession.

2) Presumption of Law-

Presumptions of law are such inferences and beliefs which are established or assumed by the law itself. It can further be divided into rebuttable presumptions of law and irrebuttable presumptions of law.

Rebuttable Presumptions (praesumptio iuris tantum): Rebuttable Presumptions are certain presumption which is regarded as evidence of good quality and does not lose their quality until proven contrary to the presumption. Although it does not easily measure the extent of such presumption as their validity only exists until they are not proven wrong. The basic example of rebuttable presumptions can be- if a person who is in possession of some stolen property than it is quite obvious that he can either be a thief or a receiver.

Matrimonial offences are one of the best examples to explain any presumption because in such offence the possibility of getting evidence is nearly low as these offences that take place within the closed area of matrimonial house. Hence the presumption is very important in such cases/offences. There are broadly three important provisions regarding the presumption in matrimonial offences which are:

- Presumption as to abetment of suicide by a married woman within seven years of marriage covered under Section 113A of Indian Evidence Act.
- Presumption as to dowry death within seven years of marriage covered under Section 113B of Indian Evidence Act.
- Birth during the marriage is the conclusive proof of legitimacy covered under Section 112 of the Indian Evidence Act.

In, **Shanti v. State of Haryana**, the in-laws of the bride did not allow her to visit her maternal house to meet her parents, and when the bride's parents came to meet her they were not permitted to enter the house and complained to them about the amount

of dowry that the demand of scooter & TV was not fulfilled. Soon after the incident, the wife of the accused suffered an unnatural death. The Supreme Court allowed the presumption stated under Section 113B of Indian Evidence Act as the death was caused within seven years of marriage and that too just after such incident prohibited under this Act, and on the basis of applications of this Section one of the in-laws was convicted for causing dowry death.

In **State of M.P. v. Sk. Lallu**, a newly wedded wife was facing severe beating regularly by her in-laws from the very first day of her marriage, and at last, she ends up dying with 100% of burn injuries. The Court executed the application of presumption stated under Section 113A and explained that such presumption can be invoked to punish the accused.

Ir-rebuttable Presumption (praesumptio iuris et de iure)- Such presumptions cannot be ruled out by any additional probative evidence or argument. Therefore the presumption explained comes under the roof of conclusive presumption which cannot be proven contrary. Eg. A child under the age of seven years is presumed that he is not capable of committing any crime.

2.1) Few Conditions Where Court May Use the Presumption of Law To Ascertain Some Facts:

Presumption of Innocence (ei incumbit probatio qui dicit, non qui negat)- According to this legal maxim, the burden of proof is with the person who declares the facts, not the person who denies the fact. The presumption of innocence is the legal principle which means every person should be considered as an innocent person unless it is proven guilty or until court believes that the person is in charge of acts prohibited under law.

In, **Chandra Shekhar v. State of Himachal Pradesh** the High Court made great observations and mentioned that freedom of any individual is the prime objective of the constitution and such right cannot be dissolved by any means unless provided by the law itself. It is concluded that unless the person is proved guilty he must be presumed as innocent.

In, **Dataram Singh v. State of Uttar Pradesh & anr**., the Supreme Court said that a person should be presumed and believed to be innocent unless proven guilty.

Birth During Marriage- The Latin maxim 'pater est quem muptice demonstrat', explains a basic assumption that the person who marries women is the father of son/ daughter out of wife. Section 112 of the Indian Evidence Act deals with the legitimacy of a child born during the marriage. The Section implies that if a child is born during the continuance of a valid marriage between the couple then it is conclusive proof of that the child is legitimate and the only ground which is available to either of the parties to prove the illegitimacy is to prove any access to each other in such a way that their marriage was not consumed. The main objective of the lawmaker institute is to provide legitimacy to the child born during a valid marriage and the legislature also explains that such presumption is not only limited to provide legitimacy to the child but also it is to maintain the public morality so that the legitimacy of the child cannot be questioned.

It must be noted that the application used under the Section 112 derives from Section 4 of the same Act and must be read together to understand the general applicability Section 4 which expresses that wherever there is a doubt of the legitimacy of children born during a valid marriage the court will presume, fact that the person whom the mother married the father of that child. Hence to achieve the objective of the legislature the court must assume it to be a case of 'conclusive proof'. Just like all laws, no law is absolute therefore the legitimacy of such a child can only be rebutted the party proves no non-access to each other or if no marriage was consumed. Which means even the DNA test other such tests are not capable of disproving the presumption.

In **Revanasiddappa v. Mallikarjun** the Supreme Court opined that: the objective of the Constitution is broadly expressed in the Preamble of our Constitution which focuses on equality, equity, equal opportunity and separate individual's dignity. The Court while adjudicating such cases must remember the objectives of the constitution that everybody has separate and individual dignity of his own, therefore the court has to look into the matter that illegal or immoral or illegitimate relationships of parent do not hinder the dignity of the child born out of such relationships. As a child born out of such a relationship is innocent and has all the rights empowered to him under the

Constitution and the status of the child must be as equal to as of child born out of valid marriage.

In **Shanta Ram v. Smt. Dargubai**, the Bombay High Court expressed its view that the child born out of void marriages would be deemed to be legitimate child irrespective of any nullity, although such child would not acquire the same right of succession as the original successor will enjoy.

Gautam Kundu v. State of West Bengal the Supreme Court in its observations expresses that-

- Courts have no authority to direct blood test to challenge the legitimacy of the child.
- The husband has only one possibility to get rid of such presumption and for that, he must satisfy the court by proving no- access to consume the marriage.
- The Court should carefully examine the fact that what will be the consequences if the blood test comes in favour of a husband who is challenging the legitimacy of the child. And what if the further consequence has a serious impact on the child's legitimacy or makes the mother as an impure/ unchaste woman.

Presumption of Death- The presumption of death is explained under Section 107 and 108 of Indian Evidence Act which refers to a situation when a person has disappeared for many years, and after such situations the law presumes him to be dead.Section 108 of this Act describes the amount or the tenure i.e. 7 years, where, there should be no proof of the existence of the person in the society.

In **Balambal v. Kannammal**, the court held that the presumption of death could only be invoked if the death or inexistence of that person is proved when the presumption is raised in the court and no person can utilise such presumption for generating any type of death record of the called person.

In **T.K Rathnam v. K. Varadarajulu**, the dissenting opinion of the learned judge explains in his judgment that the presumption of the existence of the person or death of

the person is always rebuttable. He also observed that the accurate timing of death is not a matter of presumption rather it is a matter of evidence.

Presumption of Sanity- It refers to the mental state of a person facing a criminal trial. Specifically, the court assumes that every person is sane and is fit to his mental capacity until someone proves contrary to the assumptions of the court.

Presumption of Constitutionality- The presumption of constitutionality refers to a concept that all statutes, bills, policies, guidelines etc., drafted by different levels of governments are consistent with the constitutional requirements. The court generally presumes that the statues are meeting the constitutional requirements' and are helping in achieving the constitutional objective. But the person, who interprets these statues in such a manner which makes such statues contrary to constitutional requirements, then has to prove the same.

Presumption of Possession- Section 110 deals with such presumption and explains it as when a person who is enjoying the possession of anything and he claims himself as the owner then the court inferences that he is the real owner. These are generally rebuttable presumptions and do not lose their substantiality until they are proven contrary by the affecting party.

3) Mixed Presumptions (Presumption of Fact and law both):

Mixed presumptions is a blend of different concepts explained above in this article. When the court in its inferences uses such blend consists of different classification of presumption i.e., Presumption of Facts and Presumption of Law then the presumption is considered to be a Mixed Presumption. The principles of such presumptions are only reflected in the English which specifically deals with statute of real property. But in the Indian legal system, the principles of presumptions are expressed specifically and The Indian Evidence Act deals with such principles. The Indian Evidence Act has mentioned few provisions both for the presumption of law and for presumptions of facts. The scope of this statute just does not end here rather it also has different provisions which deal with the discretionary power of Indian Court in raising presumption such as- - Principles of May Presume, Shall Presume and

Conclusive Proof.

Conclusion

In Tukaram v State of Maharashtra, This case was decided on considering the facts of Mathura Rape Case and while adjudicating the case the Court justified the need and necessities of such presumptions. The Court also explained that Presumptions has a wider scope as they don't only help the victim in the fast trial but it also helps in giving direction to the case. Therefore such presumption can effectively help the judiciary in providing quick and complete justice to the society. According to Stephen presumption is mandatory, not permissive presumption and especially permissive is dealt in Section 90 of the evidence act. Permissive presumption means it is on the court discretion whether to believe or not to believe.

3. DOCTRINE OF ESTOPPEL (SECTIONS115-117)

Introduction

Dealt from Section 115 to 117 of the Indian Evidence Act, 1872 Doctrine of Estoppel is that provision which prohibits a person from giving false evidence by preventing them from making contradicting statements in a Court of Law. The objective of this doctrine is to avert the commission of fraud by one person against another person. This doctrine holds a person accountable for false representations made by him, either through his words or through his conduct.

Meaning of Estoppel

Section 115 of the Indian Evidence Act, 1872 incorporates the meaning of estoppel as when one person either by his act or omission, or by declaration, has made another person believe something to be true and persuaded that person to act upon it, then in no case can he or his representative deny the truth of that thing later in the suit or in the proceedings. In simple words, estoppel means one cannot contradict, deny or declare to be false the previous statement made by him in the Court.

Exempli gratia,

Simran, a leading entrepreneur, wants to buy a car. Raj is her good friend who owns a classic car of great worth. When Simran contacts Raj to help her in purchasing a car, he says that she can buy his car which he has been planning to sell for some time now. Simran buys his car. Later on, the car becomes Raj's property. Raj takes the defense that when he sold that car to Simran, he had no title over it. The court held that Raj would be liable and will have to prove his want of title.

If Thanos is an employee of company XYZ but in court, he denies to be an employee of that company, then, later on he could not claim the salaries and emoluments from that company.

A, an agent of C, mortgaged his property to B which he was in the possession of but was not the owner. B, the mortgagee, in good faith, believing the representation to be true took the mortgage. Thereafter, he obtained a decree and the property was sold. The real owner of the property, C, claimed that it was his property and that A had no power to mortgage them. The court would stop A from making such a claim under the doctrine of estoppel.

M, a tenant in the house of N, falsely representing to Q that he had transferable rights over the property and thereafter transferring property to N, later on, cannot claim that he had no transferable interest in the property. He would be estopped from doing so under the doctrine of estoppel.

Principles of Estoppel

Conditions for application of Doctrine of Estoppel

The following conditions are to be satisfied in order to apply the doctrine of estoppel:

- The representation must be made by one person to another person.
- The representation made must be as to facts and not as to the law.
- The representation must be made as to an existing fact.
- The representation must be made in a manner which makes the other person

believe that it is true.

- The person to whom the representation is being made must act upon that belief.
- The person to whom the representation would be made should suffer a loss by such representation.

Nature of estoppel

The legal principle of the doctrine of estoppel is viewed as a substantive rule of law, albeit, it has been described as a principle under the Indian Evidence Act, 1872.

Provisions of estoppel

There are three sections under the Indian Evidence Act, 1872 which talks about the situations where the plea of estoppel can be taken and where it cannot be taken, and they are Section 115, 116 and 117.

Section 115

It defines estoppel as a principle which prohibits a person from denying what was earlier said by him in the Court. The court in **Pickard v. Sears** said that estoppel is where:

- **One party by his words or actions makes a representation**
- **The other party believing in his words acts on that**
- **Or alters his position**
- **then the party would not be allowed to deny the things he previously said.**

In the third clause, the altering of the position should be such that going back would be unjust or unfair in the eyes of law, as established in the case of **Pratima Chowdhury v. Kalpana Mukherjee**.

Necessary Elements of Representation

The representation made can be done in two ways:

- By words
- Through conduct which includes negligence

In **Bhagwati Vanaspati Traders v. senior Superintendent of Post Offices, Meerut** the plaintiff purchased one N.S.C. for which he paid only a certain amount and not the entire amount of money. The defendant closed the account of the plaintiff and refunded the amount without any interest on the ground that it was not opened in according to the rules and regulations. On the plea of estoppel, the court said that the plaintiff himself had purchased the N.S.C. and that no misrepresentation was made to him by the defendant.

Intention to deceive

The main requirement of estoppel is to bring the person into action based on the representations made to him. It is not important that the person making the representation has the knowledge or motive behind the representation being made. It is also not necessary that the representation being made is fraudulent in nature or that it has been made under a mistake or misapprehension.

Only the person to whom the representation is being made can act

The principle of estoppel would not apply to a person who got a piece of second hand information about the representation, unless the representation was intended to be made towards him or that it was a general representation where anybody could act upon it.

For example, Tarak Mehta, head of a telecom company, makes an announcement that upon a recharge of 200 rupees one would get unlimited talk time for one year. Mr. Atmaram, a vendor, seeing the add started working hard and collect the required amount. Now, acting upon it got the recharge done of the said amount. After 2 months he complained that the offer has stopped on his phone. Later on, he finds that the

company has terminated its earlier policy and reduced the time limit to 1.5 months. The doctrine of estoppel would apply as he had relied on the representations made to him.

Should be based on existing facts

In order to apply this doctrine, it has to be ensured that the representation made should be based upon the existing facts and must not be a representation relating to a future promise.

For example, if Donkey Pandey promises to his friend Monkey Pandey that whenever he would be making his will, he would be signing it in his name. Later on, when Donkey makes his will, not even a part of his will was in monkey's name. Now, such promises have no legal consequences as it is a de future promise.

In **Steel Authority of India Ltd. v. Union of India** it was held that once the party has claimed that they are contractors and not employees of the company, although they were one, they cannot, later on, change the plea and say that they are the employees of the company.

Party is required to plead estoppel

Since the doctrine of estoppel is a rule under the Indian Evidence Act, it is required that it should be pleaded. The party claiming the plea of estoppel must clearly mention in its pleading the facts which point that he had acted upon the representations made to him by the other party. In case the party does not mention this in its pleading the above said requirement, then it cannot claim the doctrine at a later stage.

Representation includes representation of law

Representation includes representation of facts as well as representation of the law. Suppose, the director of a company withdrew bills on the grounds that a private law gives them the power to do so. In this case, while the statement of facts is true there

has been an error in the inference of the law. The person making the representation, i.e. the director, in this case, would not be estopped from denying that the inference of the law was not correctly made. However, in the particular case, the fraudulent representation made as to the legal effect of those bills and gained some advantages out of it would be estopped from retaining the advantages gained.

Representation being made should not be debatable

The representation being made should be clear and bereft of any ambiguity. It might be that the representation has more than one interpretation but those interpretations should be such that the purpose for which the representation is being made should not be defeated, that is, the sense for which the representation contended should not be destroyed.

Acting ultra vires is not permitted

If a party through representation succeed at creating a state of things which he is otherwise barred from creating by the law then he would be stopped from acting beyond its powers. “Thus, a corporate or statutory body cannot be estopped from denying that it has entered into a contract which was ultra vires for it to make.”

If the Truth is known to both the parties

If the party to whom the representation was being made somehow recognizes that it was a false representation then he would not be entitled to the claim of the doctrine of estoppel as decided in the case of **Permanand v. Champa Lal**.

In **Madhuri Patel v. Addl. Commissioner, Tribal development** the party who took admission in a school by fraud was not allowed to continue studying in that school upon the claim of estoppel.

Representation by the party seeking advantage

The plea of the doctrine of estoppel cannot be sought in a case where the representation has acted as a breach of duty on the part of that party who was to take advantage of such representation. If a party who was to make use of a representation

conceals certain facts than the doctrine of estoppel won't apply.

Intention

If the party making the representation-

- Has the intention to act upon it in the same manner in which it was represented to be acted upon
- Has made it in such a way that any reasonable, prudent person would consider it as true, and makes the other person believe that he also has to act upon it in the same manner
- In that case it would not be necessary that the representation be false to the knowledge of the party who is making it.

In **B. Coleman & Co. v. P.P. Das Gupta** it was observed that the doctrine of estoppel does not apply unless the representation being made amounts to the contract or license of the party who is making it.

The other party acted upon the representations made to him

It is an essential requirement for the claim of estoppel that the party to whom the representation was made acted upon it by having faith in it. The party must make a change in his position based on the representation made.

It has to be ensured that no other party or say, some third party take advantage of representation being made to some party. For example, if A has made a false representation to B and planting his faith in it, B has acted upon the representation, then only he can claim the plea of the doctrine of estoppel. Some third party, suppose C cannot take advantage of the same.

Also, it is not sufficient that the party to whom the representation was made has acted upon it by believing it to be true, it has to be proved that the representation has influenced him and based on that influence he has altered his position.

The party making the representation can also revoke it

The party making the representation can anytime withdraw it even if it has been acted upon by the party to whom it was made. After withdrawal the party can make the same representation to some other party, acting in a manner that it has never been previously made.

Representation after alteration in position

It is important that the party to whom the representation was made had altered his position based on his belief in the representation made to him. Representation after alteration in position would not allow a party to seek the claim of estoppel.

When an agent makes a representation

Representation made by the agent who was appointed by the principal to act on behalf of him will invite the pea of estoppel and it would be as much effectual as it would have been when made by the principal himself.

Party must act

It is imperative that the party to whom the representation is being made acts upon it by having considered it to be true. The motive and knowledge of the subject on which the representation is being made may not be known to the party who is making it.

Representation by words

Cases of representation made through conduct or made negligently by the party are more common than that of those made through words or statements. In a case where the reversioner of the widow along with the widow fraudulently misrepresented that the widow was a major and competent to handle her deceased husband's business. The plaintiff believing this to be true entered into a contract with the widow. In the suit filed, the defendant was estopped from claiming that at the time of entering into the contract, the widow was a minor.

Representation through action or conduct

Representation under estoppel means that a party through his actions or conduct has intimated the other party that his actions is true and needs to be acted upon. The act should induce the other person to perform the act which he would otherwise have not done.

In **Mohammad Imdadullah v. Mt. Bishmillah** , Mohammeden acquired a piece of land in order to construct a school. For many years he made others believe that he has been carrying out this work under the authority of some other school. When he wanted to transfer the school building for making it an orphanage, the court estopped him from doing so.

In **Mahboob Sahab v. Syed Ismail** the son of the Muslim father attested the deed in the sale of land by his father. The son at the time of attesting the deed raised no questions although he knew that it was not in his interest. So, later on when he filed a suit, he was estopped from challenging the sale.

Who can take advantage

Under the doctrine of estoppel the party who is making the representation, to whom the representation was made or to whom it was intended to be made can seek advantage. In case the representation is general in nature then any party can take advantage.

Evidence as a rule of law

As laid down in the case of **Maritime E. Co. v. General Diaries** that estoppel is only a rule of evidence which can bring the party to an action. It cannot give rise to a cause of action.

In **Hard M.B. v. H. Electricity Supply Co** the court held that since estoppel is only a rule of evidence which can be pleaded under certain circumstances, it cannot be used to discharge a party from the legal obligation to obey a law.

Estoppel when applied to Insurance Company

In Life Insurance Corporation v. O.P. Bhalla and Ors., the assured failed to pay the second installment and the policy lapsed. Later, the corporation accepted 3rd and 4th installment and also the 2nd installment with an interest. This policy ultimately came to an end with the death of the assured. The nominee of the assured claimed the insured amount from the corporation. It was found that before entering into a contract with the corporation, the assured had undergone an operation about which he didn't inform the insurer. The court said that the assured's act of keeping the information with him would not allow him to take the plea of estoppel. The defence that disclosing it would not have made any difference if it was not accepted.

Estoppel when applied to Educational Institutions

In **Sanatan Gauda v. Bharampur University**, the student took admission in a law college and successfully complete his two years. In his final year university objected from releasing his result of the pre and intermediate examination on the ground that he is not eligible to do so. The Student had submitted all the required documents at the time of admission and also has obtained the card for writing his final examination. The court declared that the university would be estopped from doing so, i.e. declaring the result of that student.

In **Kumar Nilofar Insaf (Dr.) v. State of Madhya Pradesh**, while taking the admission in the medical college, the college released a merit list for house-job. When the same merit list was released for the admission in the M.D. course, the plaintiff filed a suit. The court estopped the plaintiff since he had consented to the first merit list.

Estoppel when applied to tenancy

In **Dataram S. Victore v. Tukaram S. Victor** the tenants while filling the form for an agreement clearly stated that he would be living along with his brother and his wife and it was accepted. The court dismissed the order of eviction and estopped the landlord from terminating the tenancy on the ground of lease.

Estoppel when applied to employers

In Shiv Kumar Tiwari deceased represented by **L.R. v. Jagat Narain Rai and**

Ors.,the plaintiff was a lecturer in college. He was appointed on a temporary basis and was given approval on a yearly basis. After some years the college stopped giving approval to him and a new lecturer who is the defendant in the case was appointed by the education department.

The plaintiff filed a suit against the college. The civil court decided in favour of the plaintiff and said that the plaintiff was a permanent lecturer. This decision was taken in the absence of the education department and the defendant. Subsequent to this, the Deputy Director of that locality, basing his decision on the judgement of the Civil court, declared that the plaintiff was the permanent lecturer of the college. The plaintiff's plea of estoppel was not considered acceptable as the Deputy Director was not a party to the decision taken by the court and therefore he has no authority to make such decisions. Further, the judgement given by the civil court could be challenged under the Specific Relief Act.

In **Anil Bajaj (Dr.) v. Post Graduate Institute of Medical Education and Research**, the plaintiff was allowed to go abroad on the condition that within 2 years he will have to resume office else his service would be terminated. He did not return within 2 years and as said he was terminated from the job. The plaintiff cannot rely on the doctrine of estoppel as he was aware of the consequences that would follow.

Estoppel when applied to employees

In **State of Maharashtra v. Anita**, the court upheld that once the person has been appointed as an employee under a contract and has accepted all its terms and conditions, he would be estopped if in the later stage he challenges the term of the appointment.

Estoppel when applied to the selection board

In **Central Airman Selection Board v. Surendra Kumar Das** the apex court laid down that if the person himself has made false representation and induced the authority to act upon it then he could not challenge it on the grounds of promissory estoppel. The authority upon finding that it has been misled can cancel the agreement.

Estoppel when applied to Development Authority

In **H.V. Nirmala v. Karnataka State Financial Corporation**, an inquiry officer was appointed with appellant's consent. He participated in the inquiry proceeding and cross-examined a number of witnesses and still found nothing in favour of the appellant. The appellant could not question his appointment.

Section 116

The section states that during the continuance of the tenancy, the tenant of the immovable property or any person claiming through such tenancy can deny to the fact that at the beginning of the tenancy it was the landlord who had the title over the immovable property. Further, the Section also explains that a person who came upon an immovable property by the license cannot deny the fact that the person from whom he got the license, that is, in whose possession the immovable property, had the title at the time when he got his license.

Tenant- landlord relationship

A relationship between a tenant and a landlord can be created either by written contract or verbal contract. The beginning of the tenancy can be marked by the taking of possession of the land, or by the payment of rent, or other circumstances.

If X leases his land to Y and Y takes the possession and starts paying the rent and later on X sales the land to Z, then Y can make his payment to Z. Here, Y and Z have formed the tenant-landlord relationship.

Scope of section 116

It is concerned with those estoppels which occurs between:

- Tenant and his landlord
- Licensor and licensee

Title of the landlord cannot be denied

Once a tenant enters into a relationship of landlord and tenant, receives the possession of the property and finally enters into the premise, during the period of such possession may deny to things or course of action by the landlord which is against to what was mentioned in the agreement. A tenant in no case claim that the landlord has no title over the property.

In **Moti Lal v. Yar Md** , the judge said that the tenant cannot say that the landlord has no more interest in the property when the landlord filed a suit for default payment and ejectment. It is only after leaving the possession can the holding of title by the landlord be questioned as mentioned in Suraj Bali Ram v. Dhani Ram.

In **Sri S.K. Sharma v. Mahesh Kumar Verma**, where defendant upon attaining a higher post was allotted a premise by the railway company. In the case, it was said that even when it was not known whether the land belonged to the railway company or not, the officer will have to evacuate the premises after retirement.

Can landlord plead estoppel

In the following situations, the landlord can plead estoppel:

- When the tenancy itself stands disputed then the tenant can challenge the landlord's title on the property. The tenant would not be estopped from doing so.
- In cases where the tenancy has been moved by fraud, coercion, misrepresentation or mistake.
- If no such circumstances occur than the tenants would be restricted by the doctrine of estoppel. However, the tenants are always at liberty to overturn the lease or change its status as a lessee.

The Case is similar in the licensor- licensee relationship.

In **E. Parashuram v. V. Doraiswamy**, the Bangalore Mahanagar Palike owned land which was leased to Mr. Dhanpal for the period of next 10 years. It was found that Mr.

Dhanpal had decreed the land to Mr. Doraiswamy. A decree was passed in the name of Mr. Dhanpal whereby the vendors were directed to execute the reconveyance of deed in Dhanpal's favour. Thereafter, pursuant to the orders, all the documents were to be kept in Dhanpal's possession. Sooner it was found that the vendors were trying to claim ownership over the property. This was brought to the notice of the assignee, Mr. Doraiswamy, who filed a suit of eviction in court.

In the second instance regarding the purchasing of land by Mr. Doraiswamy, it was found that at the initial stage, the signature of Mr. Doraiswamy was also taken along with Mr. Dhanpal and when this mistake was rectified by the corporation by deleting the signature of Mr. Doraiswamy, he challenged it.

The court in the first instance upheld that the landlord could not be denied the title to the land even though certain disputes still remain unresolved with the corporation. In the second instance, the court said that no jural relationship existed and thus exceptions under Section 116 of the Indian Evidence Act cannot be pleaded.

Estoppel applied when tenancy is in existence

In **Udai Pratap v. Krishna Pradhan** , the continuance of tenancy was defined as a period during which the tenant enjoys the possession of the property and is seeking benefits from it. The Tenant cannot deny the title to the landlord, neither at the beginning of the tenancy nor during its continuance. The Tenant would be estopped from denying the title of the landlord only when the tenancy is continuing. Once the tenancy ceases to exist, the tenant will have the right to deny title to the landlord.

For example, HUM is the tenant of land which belongs to TUM. As soon as HUM takes possession of the property, the tenancy comes into existence and continues until it comes to an end. During this TUM cannot be denied title to the property by HUM. But once the tenancy lapses, HUM will have the right to question the interest of TUM in the property.

Title at the beginning

The tenant can not deny the title to the landlord at the beginning of the tenancy.

However, tenants can exercise certain powers like:

- He would not be estopped from claiming that on the death of the landlord the property would be transferred or the title would be delegated to the tenant and not to some third party.
- He can prove that till the day before signing the lease, the landlord had no title over it.
- The tenant can prove that during the tenancy period the landlord lost his title over the property either through his acts or because he was barred by the law.

Licensor- Licensee relationship

In licensor- licensee relationship the same rule operates like that in the landlord-tenant relationship. When a licensee obtains the possession through licence cannot deny the title to the licensor unless the relationship ceases to exist.

A allowed B to use the washroom in his backyard. B fraudulently made the duplicate keys of those washrooms and refused to vacate. In court A cannot in his suit for ejectment say that B holds no title over those washrooms as he was the one who gave him access to them.

Estoppel in mortgagor- mortgagee relationship

When upon the contract of mortgage, a property has been mortgaged by one person to another and the person to whom it has been mortgaged, i.e. the mortgagee, has taken possession, then the parties to the contract cannot deny the right of each other under the contract as proposed in **Arjun Singh v. Mahasaband** .

In a situation where the mortgage is about the end and payment has to be made by the mortgagee, in that period if the mortgagee claims that the mortgagor seems to have no interest in the property, he would be estopped from doing so. The rule under mortgagor-mortgagee relationship gives rise to the doctrine of estoppel only when the claims under the suit filed is based on the contract of mortgage and in cases of repudiation of the mortgage.

Section 117

The section states that the acceptor of the bills of exchange cannot deny the person who is supposed to draw the bills, from drawing it or endorsing it. Also no bailee or licensee can deny the fact that at the time when the bailment and license began, the bailor and the licensor had the authority to make bailment or to give license. The person accepting the bills of exchange can deny that the bills of exchange were really drawn by the very person who showed to have drawn it. If the bailor mistakenly delivers the goods to some third party instead of the bailee, he can prove that a third party has the right over the goods bailed against the bailor.

Scope

This section demarcates that the person who accepts the bills of exchange although cannot deny that the person drawing the bills has the authority to draw or to endorse it but can deny that the bills were actually drawn by the person by whom it appeared to have been drawn. The bailee or the licensor cannot deny the fact that at the beginning of bailment or grant, the bailor or the licensor had the authority to perform it. But a bailee can prove that the third party to whom the goods were delivered instead of the bailor had the right against the bailee.

Conclusion

The Doctrine of estoppel is an important principle which protects people against fraud or misrepresentation. There are several instances where an innocent person becomes a prey to false representations made to them by some party. Sometimes the case may be such that the plaintiff suffered huge losses. This doctrine avoids such situations and charges the person for his wrongful conduct. This legal principle gives an incentive to every one of those people who tries to make false representations to other and induces them to act upon it by planting their faith in them, and incur losses as a result of such false representations, by not performing such acts, else they would be held liable.

MODULE 08
WITNESSES AND EXAMINATIONS OF WITNESSES
1. WITNESSES (SECTIONS 118-134)
2. EXAMINATIONS OF WITNESSES (SECTIONS 135-166)
3. IMPROPER ADMISSION OR REJECTION OF EVIDENCE (SECTIONS 167)

1. WITNESSES (SECTIONS 118-134)

Introduction

A witness is a person who has personally seen an event happen. The event could be a crime or an accident or anything. Sections 118 – 134 of the Indian Evidence Act, 1872 talks about who can testify as a witness, how can one testify, what statements will be considered as testimony, and so on.

Capacity of witness

A witness who needs to testify before the Court must at least have the capacity to understand the questions that are posed to him and answer such questions with rationality. Sections 118, 121 and 133 of the Act talks about the capacity of a witness.

Who may testify

Any person who has witnessed the event is competent to testify, unless – the Court considers that they are unable to understand the questions posed to them, or unable to give rational answers as prescribed in Section 118. Rational answers should not be expected from those of tender age, extreme old age, or a person with a mental disability. The section says that generally, a lunatic does not have the capacity to testify unless his lunacy does not prevent him from understanding the question and give a rational answer.

Can a child testify

A small child of even 6 or 7 years of age can testify if the Court is satisfied that they are capable of giving a rational testimony.

In the case of **Raju Devendra Choubey v. State of Chhatisgarh**, the sole eyewitness of murder was a child of 13 years old, who worked as a house servant where the incident took place.

He identified the accused persons in the Court. However, the accused persons had no prior animosity with the deceased and were acquitted as the case could not be proved against them beyond reasonable doubts. The Supreme Court on this matter held that – the child had no reason to falsely implicate the accused, as the accused raised him and provided him with food, shelter, clothing, and education. Therefore, the testimony of a child cannot be discarded as untrue.

In **Dhanraj & ors v. the State of Maharashtra**, a child of class VIII was a witness to the event. The Apex Court observed that a student of 8th standard these days is smarter, and has enough intelligence to perceive a fact and narrate the same. The Court held that the statement of a child who is not very small is a good testimony for the same reason. Therefore, a child can testify provided that he is not a toddler.

Witness unable to communicate verbally

Section 119 of the Act says that a person who is not able to communicate verbally can testify by way of writing or signs. A person who has taken a vow of silence and is unable to speak as a result of that vow will fall under this category for the purpose of this Section.

In the case of **Chander Singh v. State,** the High Court of Delhi observed that the vocabulary of a deaf and dumb witness may be very limited and due care must be taken when such witness is under cross-examination. Such witnesses may not be able to explain every little detail and answer every question in detail using the sign language, but this limitation of vocabulary does not in any way mean that the person is any less competent to be a witness. A lack of vocabulary does not affect her competence or credibility in any way.

If a dumb person can read and write, the statements of such persons must be

taken in writing. The same was held by the Supreme Court in State of Rajasthan v. Darshan Singh.

Can judges testify

A judge or a magistrate is not compelled to answer any question regarding his own conduct in the Court, or anything that came to his knowledge in the Court – except when asked via special order by a Superior Court as stated in Section 121. He may, however, be subject to examination regarding other matters that happened in his presence while he was acting as a judge or a magistrate. For a better understanding of this provision, let's look into the illustrations provided.

- Harry is being tried before the Court of Session. He says that deposition was improperly taken by Magistrate Draco. Draco is not obligated to answer unless there is special order by a Superior Court.
- Hermoine is accused of having given false evidence before the Court of Magistrate Draco. He cannot be asked what Hermoine said unless there is a special order by a Superior Court.
- Ron is accused of attempting to murder a witness during his trial in the Court of Magistrate Draco. Draco may be examined regarding the incident.

This section gives a judge or a magistrate the privilege of a witness and if he wishes to give it away, no one can raise any objection. So, if a magistrate has been summoned to testify regarding his conduct in the Court, no one can raise any objection if he is willing to do so. A magistrate or a judge is a competent witness and they can testify if they want to but they are not compelled to answer any question regarding their conduct in the Court.

Can a Judge testify in a case being tried by him

We have already seen that a judge can be a competent witness if he wants, but what if the case is being tried by himself?

In the case of **Empress v Donnelly**, the High Court of Calcutta stated that a Judge before whom a case is being tried must conceal any fact that he knows regarding the case unless he is the sole judge and cannot depose as a witness. It was held that such a judge cannot be impartial on deciding the admissibility of his own testimony. He will not be capable of comparing his own testimony against that of others. If he has to testify, then he must leave the bench and give away his privileges in order to act as a witness in the case.

Can accomplice be a witness

Section 133 of the Act says that an accomplice to a crime is competent to be a witness against the accused. The conviction made on the basis of such testimony is not illegal. An accomplice is a person who is guilty of helping the accused to commit a crime. He can be appropriately described as a partner in the crime of the accused.

In the case of **C.M. Sharma v. The State of A.P**, it was held that if a person has no other option than to bribe a public officer for getting his work done, such a person will not be considered as an accomplice. Cases of bribery are difficult to corroborate as bribes are usually taken where no one else can see, but, in this case, there was a shadow witness who accompanied the bribe giver (a contractor in this case) and the case could be corroborated with his help. The public officer pleaded to treat the contractor to be treated as an accomplice, but his plea was rejected on the ground that the money was extracted from the contractor against his will.

Therefore, an accomplice is someone who has either wilfully participated in committing a crime with an accused or helped him in some manner. If he has been forced to break any law against his will, then he may not be regarded as an accomplice. It is also clear from this case that an injured person or a victim will be a competent witness in a case. This type of witness is called ‘injured witness’.

In the case of **Khokan Giri v. The State of West Bengal,** it was held by the Apex

Court that even though an accomplice can be a competent witness, it would not be very safe to make a decision solely relying on his testimony. The Court suggested that the testimony of an accomplice should not be accepted by any court without corroboration of material facts. Such corroboration must be able to connect the accused with the crime and it must be done by an independent, credible source.

This means that one accomplice cannot corroborate with another. With respect to corroboration of statements given by an accomplice, in another case of Sitaram Sao v. State of Jharkhand, the Supreme Court held that Section 133 must not be read by itself, but, should be read with Section 114(b) which says that an accomplice is not worthy of credit unless corroborated with material particulars.

This Apex Court further says that the Court should always presume that an accomplice is unworthy of credit, and no decision must be made solely based on his testimony unless the facts have been corroborated.

Types of accomplices

For the purposes of this section, accomplices can be divided into three categories.

The principal in the first degree: Also called 'principal offender', this is a person who has actually committed the crime. There can be multiple persons who committed the crime together, each one of them will be principal offenders.

- For example – Harry and Ron plan to murder Tom.
  - Both drive to Tom's house and shoot him.

    In this case, Harry and Ron both are the principal offenders.

The principal in the second degree: This refers to someone who is present at the crime scene and helps the principal offender in any way.

- For example – Ron and Harry plan to murder Tom.
  - Ron provides Harry with weapons.

– Harry drives to Tom's house and shoots him.

In this case, Harry is the principal offender and Ron is the principal of the second degree.

How many witnesses can there be

There is no prescribed number for minimum or maximum witnesses to be in a case in any provision. Section 134 lays down the same. It says that there is no requirement of a particular number of witnesses to prove any fact. In the case where there are multiple witnesses that have seen the same event, not all of them are required to be examined for proving a fact, examining two or three of them would be enough to establish the case. The same was held in the case of Amar Singh v. Balwinder Singh, wherein the Supreme Court said that if out of all the witnesses, only two or three have been examined, it will not mean that the prosecution was incorrect.

The credibility of a single witness

It is a general rule that goes unsaid that the Court must act on the testimony of a witness even if he is the only one and his statements are uncorroborated. In the case of **Ramesh Krishna v. the State of Maharashtra**, there were multiple witnesses who could not stand with their statements given during the investigation. On the other hand, one of them stood firmly with his statement who was deemed to be a credible witness. The Court, in this case, held that – the testimony of one credible witness will outweigh the same given by other questionable witnesses. A witness is considered to be credible if he stands by his statements and the same can be proved later on. Witnesses may also need to identify the accused person, and there is no minimum number of witnesses required to identify an accused in order to get him sentenced.

In **Binay Kumar v. the State of Bihar**, the Supreme Court said the same; it held that there is no rule of evidence that conviction can not happen unless there is a particular number of witnesses to identify the accused. Any conviction is not influenced by the quantity of the witnesses but by the quality and credibility of witness testimonies.

Conclusion

The laws in India regarding competence and protection of witnesses are up to par and are legislated keeping everyone in mind. Judiciary has further strengthened this act by way of interpretations, broadening its scope and applicability. It is irrelevant whether a person can speak or not, if he is capable of understanding questions and answering them, he is capable of being a witness.

PRIVILEGED COMMUNICATIONS UNDER THE INDIAN EVIDENCE ACT, 1872

Introduction

Evidence is an essential part of a trial as it is used to establish any relevant fact and reach a conclusion. Evidence can be in many forms; witness testimony is one of them. A witness can testify based on any event they have seen or any communication they have heard or been a part of. However, some conversations do not need to be disclosed, even if required during a trial. Such conversations are known as privileged communications. These communications can be privileged because of personal or professional reasons.

Communications during marriage

The communications between a husband and a wife have been given the status of privileged communication under Section 122 of the Evidence Act. It states that a married person: Shall not be compelled to disclose any communication made to them during the marriage by their spouse or ex-spouse. They are not permitted to disclose anything without their spouse's or ex-spouse's consent even if they are willing to.

In the case of **S.J. Choudhary v. The State**, the Court held that compelling spouses to disclose their private communications is far worse than not getting any

information at all. Therefore, such communications must be privileged.

The idea behind this privilege is that if testimonies are accepted from private communications between spouses, such testimonies have the power to destroy household peace among families and create a domestic broil. It will hamper the mutual trust and confidence between the spouses and weaken the marital bond.

What communication is confidential?

Under this section, it is irrelevant whether the communication was sensitive or confidential in nature or not. Any conversation or communication between a husband and wife is privileged no matter what the means of communicating was. The same was held in the case of **Emperor v. Ramachandra.** However, this rule was overruled in the case of **Bhalchandra Namdeo Shinde v. the State of Maharashtra**, wherein the Court laid down that Section 122 must not have any broad interpretations that expand the scope of this section.

The literal rule of interpretation must be followed if the Court has to interpret it and the scope must be kept limited because it reduces the scope of admissibility of evidence in the Court, which could be very essential in any case. The Court further held that communication for the purpose of this Section would refer to only verbal or written words said by a spouse and not their actions. The wife, in this case, was called in to give testimony against her husband who was being tried for allegedly committing a murder. She was allowed to testify regarding his conduct and actions but not the communication between them. Also, for the purpose of this Section, the communication must be made only by a spouse during a marriage for it to be privileged. Any communication made before the marriage or after its dissolution will not have this privilege.

In the case of **Ram Bharosey v. The State of Uttar Pradesh**, the Court laid down that mere doing of an act in the presence of the spouse can not be considered as communication between them. It is not like any domestic act will be considered as communication. Communication must be conveyed in some way; be it verbal, or non verbal. In the instant case, the wife has seen her husband coming down from the roof

and then coming out of the bathroom again with changed clothes. The wife testified regarding the same and the testimony was admissible as the act of the husband was not a communication.

Is this privilege absolute?

The privilege provided under Section 122 is for the welfare of the marital bond shared between spouses and for protecting their families. However, this privilege is not absolute and information can be disclosed if:

- The person who made such communication or their representative gives free consent; or
- There is a suit between a married couple; or
- One of the spouses has been prosecuted for any crime committed against the other.

In the case of **Nawab Howladar v. Emperor**, a widow wanted to act as a witness and disclose communications made by her deceased husband. The Court held that in order to be admissible as evidence – the consent for disclosure must be express and can not be implied. In case there is no representative in interest, it would be impossible to obtain consent and therefore such communication is entirely inadmissible. A widow is not a representative in the interest of her deceased husband, and hence, cannot give her consent. Further, the Court clarified that communications between spouses must be confidential only if it had happened during the marriage and not before marriage or after the dissolution of marriage. Any conversation made before marriage or after its dissolution is not protected by this provision.

For example:

Situation 1

Ron and Hermoine are soon to be married; Ron tells Hermoine how he committed fraud. Hermoine's testimony is admissible before the Court as the communication was not made during the marriage.

Situation 2

Harry and Ginny are husband and wife. Harry tells Ginny about how he diverted funds to his own account. Ginny's testimony will be inadmissible as the communication was made during their marriage.

Situation 3

James and Lily have recently been divorced. Lily tells James about how she stole the gold. James can testify regarding the same and his testimony will be admissible as the parties were not married during such communication.

Professional Privileges

Communications made between an attorney and his client is a privileged one, and no one can compel either the advocate or his client to disclose anything regarding the same. Section 126 of the Act says that – a barrister, attorney, pleader or vakil is permitted to disclose any communication made to him by his client during the course and for the purpose of his employment without the consent of his client. The privilege under this Section is applicable to anyone who is registered as a legal practitioner in India and falls under the aforementioned categories, which simply means an advocate.

In the case of **Maneka Gandhi v. Rani Jethmalani**, the Court observed that everyone has the right to a fair trial, and for obtaining such right one might need to seek help from an attorney. People have a hard time trusting their advocates and are often scared of sharing the entire facts with them. They are under constant fear that their advocate might expose them. With the fear of being exposed in mind, they might not be able to express their problems properly and get proper legal advice. To ensure that advocates cannot expose their clients, the conversations between them have been made privileged under this act.

In order for a conversation to be privileged under this section, the client-attorney relationship must exist when the communication took place. Any communication made with a lawyer before actually appointing him is not protected under this Section. Similar to Spousal Privileges, this privilege is not absolute. The Act itself states that this

privilege does not apply under some conditions. Communication in furtherance of an illegal purpose could be one example of the same.

In order to understand this better, let's look at some illustrations.

Situation 1

Harry, a client, says to Ron, an attorney – "I have murdered a man and the body is in my freezer. I want your advice on how I should get rid of it". This communication is made in furtherance of a criminal purpose, it is not protected from disclosure.

Situation 2

Hermoine wants to appoint Draco as her lawyer but Vakalatnama (a document empowering an advocate to represent his client in the Court) has not been signed yet.

She tells Draco about how Tom was brutally killed by her and her friends.

The communication is not protected from disclosure because the client-advocate relationship does not exist as the Vakalatnama has not been signed yet.

Situation 3

Harry, a client, says to Ron, an attorney – "I stole a BMW and sold its parts in the black-market". This communication is protected from disclosure as the crime is already done and the client-advocate relationship exists between them.

State Privileges

Affairs of the State

Section 123 of The Indian Evidence Act states that no person is allowed to give any evidence that may be derived from any unpublished records of any state affairs. Unless with the permission of the officer-in-charge or the head officer at the concerned department. Such an officer can give or withhold permissions regarding the same as he thinks fit.

In the case of **Duncan v. Cammell Laird & Co. Ltd,** it was held that in case such a

situation arises, the Court is bound to accept the decision of the public-officer without any questions. Further, the decision ruling out of such documents is entirely the decision of the Judge. It is the Court who is in charge of a trial and not the executive. The phrase “Affairs of State” has not been per se described in this section or any other provision in this Act. So, it is not very practical for the judiciary to come up with a single definition of the phrase. Therefore, the Court must determine whether any documents fall under this category, depending upon the facts and circumstances of every case. However, it is clear that only the Court has the power to decide whether any document can be classified as an ‘unpublished document of state affairs’.

Official Communications

Section 124 of the Evidence Act talks about official communications. It states that a public officer can not be compelled to disclose any communication made to him in official confidence if he believes that such disclosure could harm the public interests. While Section 123 talks about unpublished documents related to affairs of the state, section 124 restrains the disclosure of all communication made in an official capacity, be it in writing or not and it is immaterial whether they relate to state affairs or not.

In the case of **In re Mantubhai Mehta**, it was held that it is upon the Court to determine whether a document is a communication made to a public officer in official confidence and if the document does not deal with any affairs of the State, it may be taken up as evidence. While determining whether the communication was made in official confidence or not, only primary evidence must be used and the same cannot be determined by secondary evidence, as laid down by the High Court of Madras in **Sivasankaram Pillai v. Agali Narayana Rao**.

Secret Informants

Section 125 of the Evidence Act states that a Magistrate or a Police Officer can not be compelled to reveal as to how they got any information regarding the commission of a crime. The section further states that a Revenue Officer can not be compelled to reveal as to how he got any information regarding the commission of any offence against the public revenue.

For example:

Situation 1

Harry is a Police Officer. Someone told Harry about riots that are being planned to happen later today. Harry can not be compelled to tell where he received such information.

Situation 2

Ron is a Revenue Officer. Someone told him that Draco is hiding millions of rupees in black money in his basement. Ron can not be compelled to tell as to where he received such information.

Conclusion

The intention behind giving such privilege to some communications is to protect the public. Be it regarding the safeguarding of their marriage or preventing government information from getting leaked. In the absence of this Act, multiple classified information could have been easily leaked in the name of trial and could have compromised the security of the country. Also, letting a husband or a wife testify against the other would make people lose trust over marital bonds and disrupt peace among families. It would start family broils, that could have the capacity to destroy families.

This Indian Evidence Act, 1872, is a wholesome act and the laws regarding privilege communications are up to par and have been legislated keeping public welfare in mind. There are separate provisions for family issues, professional issues, and issues relating to the state.

2. EXAMINATIONS OF WITNESSES (SECTIONS 135-166)

Introduction

The examination of witnesses is an integral part of a criminal trial. Witness testimonies are one of the most reliable evidence because the person giving the statements has personally witnessed the event happen. Section 135–165 of the

Evidence Act, 1872 deals with examination and cross-examination of witnesses. This article will cover each section one by one, along with case laws.

Admissibility of evidence

Under the Evidence Act, 1872 Section 5 states that evidence is admissible only when it supports a relevant fact in issue. It is further provided in Section 136 that the judge may ask the parties if the evidence they have adduced deals with a relevant fact or not. For evidence to be admissible in Court, the judge must be convinced that the evidence is relevant and does help establish a relevant fact in issue.

Examination Order

Witnesses are required to answer the relevant questions presented to them. A question asked to a witness must be relevant to a fact in issue, and must help establish the same. Their answers when recorded are called testimonies of witnesses. This questioning of the witness and recording their answers is called witness examination.

Examination of witness

Examination of a witness is asking the witness questions regarding relevant facts in the case and recording the statements of witnesses as evidence. There are three parts to the examination of a witness and Section 138 of the Evidence Act states that the witness must be examined in the following order:

- First, the party that called the witness examines him, this process is called examination-in-chief as mentioned under Section 137 of the Indian Evidence Act.
- After the completion of the examination-in-chief, if the opposite party wants to, they can take over the witness and cross-question him about his previous answers. The opposite party may ask him any question regarding all the relevant facts and not merely the facts discussed during the examination-in-chief. This process has been described in Section 137 of the act as cross-examination.
- If the party that called the witness sees the need to examine the witness again after cross-examination, they may examine the witness one more time. This has

been laid down as re-examination in Section 137 of the Indian Evidence Act, 1872.

Section 138 states that the re-examination must be directed by the Court for explaining matters referred to in cross-examination. The section further states that if any new fact or issue arises during re-examination, the opposite party can further cross-examine the witness on that fact or issue. In the case of **Ghulam Rasool Khan v. Wali Khan**, it was held by the High Court of Jammu and Kashmir that- cross-examination might not be necessary if the witness testimony is prima facie unacceptable.

So, if no relevant facts are answered by the witness or there is no credibility to his statements, his testimony can be rejected and there is no need for cross-examination in that case.

The examination of a witness must be done specifically in the sequence mentioned under Section 138. In the case of **Sharadamma v. Renchamma,** it was held that examination-in-chief must be done before the cross-examination. The opposite is neither possible nor permissible.

Examination of non-witness

Section 139

Apart from witness testimonies, there are numerous other forms of evidence admissible in the Court of law.

Documentary evidence as described in Section 3(2)(e) of the act is one of them. A person might be called just in order to produce a document. Section 139 of the Act states that- such a person called in for producing documents, does not become a witness. He can be examined in order to establish the credibility of the document. But, he cannot be cross-examined unless he has been called as a witness.

Section 140

Section 140 talks about the character of a party. “Character” of someone refers to their quality or characteristics that distinguish them. Especially mental and moral characteristics. It also includes a person’s reputation in society. The section states that

the witness to a party's character can be cross-examined if the examination-in-chief has already been completed. The evidence of character is helpful to assist the Court in determining the value of statements given by the witnesses.

Leading Questions

While examining, cross-examining, or re-examining a witness, the parties must refrain from asking leading questions. Leading questions have been described in Section 141 of the Act as- any question that suggests the answer which the person questioning expects to receive. One party must object if the other party asks a leading question to the witness.

A leading question suggests the witness the answer, for example: "You saw Harry wearing a black robe, didn't you?" This question by itself suggests that Harry was wearing a black robe, this question is leading the witness to reply with what the questioner wants.

"What was Harry wearing?"

The answer to this question could be the same as the previous one, however, there are no suggestions in the question. It is a simple question and not leading in any way. These types of questions are permitted.

This is because the witness must answer every question by himself as he is the one who has witnessed the fact. If there is a suggestion in the question, the questioner would be feeding responses to the witness.

Can leading questions be asked to a witness?

Even though asking leading questions is prohibited by Section 141 as it feeds the witness with responses and must be objected by the opposite party when asked to a witness. However, Section 142 says that leading questions can be asked in an

examination-in-chief, or in a re-examination if the Court permits.

The section further states that leading questions can be permitted by the Court in cases where the facts are introductory or undisputed or those in the opinion of the Court have already been sufficiently proved. The same was supported by the High Court of Kerela in the case of **Varkey Joseph v. the State of Kerela**.

Section 142 does not mention asking leading questions during cross-examination. But, Section 143 states that leading questions can be asked even in cross-examination. Leading questions cannot be asked in examination-in-chief, cross-examination, or re-examination only if objected by the other party. Such questions may be asked if the other party does not object. Even when a leading question has been objected, it is at the discretion of the Court whether to allow it or not and the discretion will not be interfered by the Court of appeal or revision except in extreme cases.

Oral evidence of written documents

Section 144 states that any witness may be asked questions regarding the contents of a document or contract that is not present in the document. If the witness gives statements regarding such documents, it must be produced before the Court.

The opposite party can object to such evidence until it has been produced in the Court.

For example:

Harry claims that overheard Hermoine telling Ron that “Tom has written a letter threatening to kill my family and I will kill him before he can do anything”.

This statement is relevant in showing Hermoine’s intention for the murder, and evidence may be given for it, though no other evidence is given about the letter.

If a witness is giving evidence regarding a contract, grant or any other disposition of property he may be asked whether there is a documentation of the same. If he answers with yes, then Section 91 of the Act becomes applicable and oral evidence of the terms of the said document will not be permitted.

In the case of **Atul Bora v. Akan Bora**, the Court held that Section 144 has no application when the witness is sought to be cross-examined by the election-petitioner, has not been asked any question on any contract, grant or other disposition of property.

Cross-examination on previous statements

Every statement given by a witness must be reduced to writing. He can on a later stage of cross-examination be contradicted on his prior made statements.

Section 145 of the act states that such contradictions can be made in relevant questions without showing the writings to the witness before they are proved. Once the statements have been proved to be true, there is no use of contradicting the witness then. In the case of **Purshottam Jethanand v. The State Of Kutch**, the Court observed that this section does not help the accused to get the statements made during the investigation, but it does help him to use such statements in case he somehow obtained them. The statement on which the witness is being contradicted must be relevant to the matter issue.

Lawful Questions

The witness's statements will be taken as evidence by the Court, but it must be proved that the witness is actually telling the truth. Section 146 states that during cross-examination of a witness, he may be in addition to the aforementioned questions also be asked questions that try to:

- Test his accuracy or truthfulness.
- Understand more about the witness and his position in life.
- To shake his credit by questioning his character.
- Even though the answers to these questions have the capacity to directly or indirectly criminate or expose him or directly or indirectly lead him to penalty or forfeiture, the witness is compelled to answer such questions.

However, the section does not permit to adduce any evidence or ask any questions

in cross-examination that may include the victim's moral character or previous sexual experience with any person.

Is the witness compelled to answer

Section 147 of the Act states that if any question related to a relevant issue of the case, then Section 132 shall be applicable. Section 132 says that the witness will not be excused from answering any question on the grounds that the answer might criminalize him or lead to a penalty or forfeiture on any question regarding a relevant issue in the case.

The proviso to the section says that no such answer shall subject him to arrest or prosecution or be proved against him in any criminal proceeding. Apart from prosecution for giving false evidence by his statements. It is mentioned in Section 148 of the Act, that the Court must decide whether a witness should be compelled to answer or not. This statute provides the witness with protection from aggressive cross-examination. He is not obligated to answer questions that: Injures his character, or Doubts his credibility.

In **Bombay Cotton Manufacturing Co. v. R.B. Motilal Shivlal**, it has been pointed out that such questions relate to relevant facts and are relevant only to the issue whether the witness should or should not be believed. In cases where the decision is solely dependent on oral evidence, it is most important to answer such questions.

Therefore, the Court can decide when a witness is compelled to answer questions and if the questions tend to criminalize him in any way, he cannot be prosecuted on the basis of his statements. He has been granted protection by the statute.

Questions must be on reasonable grounds

No question must be asked to the accused without any reasonable ground as mentioned in Section 149 of the Evidence Act. The section states that any questions referred to in Section 148 are to be asked only when there are reasonable grounds to ask such questions that might injure the witness's character or expose him.To

understand the provision better, let's look at illustrations of Section 149:

A barrister is informed by an advocate that the witness is a dacoit. This is a reasonable ground to ask whether the witness is a dacoit or not. When nothing is known about a witness and he is randomly asked whether he is a dacoit. There are no reasonable grounds for this question. It is clear upon reading the illustration that this Section also intends to protect the witness from getting his character injured.

Further, Section 150 mentions that if any barrister, pleader, vakil or attorney asks such questions as mentioned above, without any reasonable grounds, then the Court must report the matter to the High Court or other authority to which such advocate is the subject in the exercise of his profession.

Forbidden Questions

The Court has been conferred with the power under Section 151 to forbid such questions that are indecent or scandalous. In the case of **Mohammad Mian v. Emperor**, it was held that these questions may only be allowed if they are related to the matter and are regarding a relevant fact in issue, or essential for finding out whether some fact in issue exists. The Court can also forbid questions that are intended to insult or annoy as stated in Section 152 of the act. The section further states that the Court might forbid a question even if it is proper, but the Court thinks that it is needlessly offensive in form.

Questions should not attack the witness's character

A question asked during an examination of a witness must establish a fact in the case, it should not be asked merely to shake his credit or injure his character. It is stated in Section 153 of the Act. It says that if any question has been asked and the witness has answered it and it only causes injury to the witness's character, no evidence shall be given to contradict him. Unless he answers falsely, in which case he will be charged for giving false statements.

There are two exceptions to this section, which are:

- If a witness has been asked whether or not he was previously convicted. On denial of the witness, the evidence regarding the proof of his previous conviction can be given.
- If a witness has been asked a question that impeaches is impartiality, on denial of witness, he may be contradicted.

It means that if a party has sufficient grounds to believe that the witness is not impartial, they may contradict him and try to furnish proof. In the case of **State of Karnataka v. Yarappa Reddy**, the Supreme Court added that the basic requirement for adducing such contradictory evidence is that the witness, whose impartiality is in question, must be presented with evidence and asked about it and he should have denied it. Without adopting such preliminary measures, it would be meaningless and unfair to bring a new witness to speak something fresh about a witness already examined.

To understand this better, here's a hypothetical situation:

A claims to have seen B at Delhi on a certain date, A is asked whether he himself was at Calcutta that very day or not, A denies it, Evidence is adduced to show A was actually in Calcutta. The evidence is admissible, not as contradicting A on the fact which affects his credit but as contradicting the alleged fact that he saw B in Delhi on that same date. The same was held in the case of **Reg. v. Sakharam Mukundjee**.

Questions by a party to his own witness

Section 154 of the Evidence Act allows a party who calls a witness to ask any question to their own witness like they are cross-examining him. Sometimes a witness can turn hostile and it is necessary for the party that called a witness to cross-examine him if such a situation occurs. In the case of **Sat Paul v. Delhi Administration**, the Supreme Court has interpreted this section and defined a hostile witness as one who is not willing, to tell the truth when a party calls him. For the purpose of cross-examination under this section, there must be enough evidence to show that the witness is not telling the truth and he has turned hostile as held in **Atul Bora v. Akan Bora**.

In the **State of Rajasthan v. Bhera,** the Court observed that a previous testimony of a hostile witness can be used as evidence as they are still on record. If the party does not resist the hostility of the witness, then it is upon the Court to find out the truth.

The Section clearly states that it is the discretion of the Court to allow such cross -examination or not. In **Mattam Ravi v. Mattam Raja Yellaiah**, the Court held that: The Courts have a legal obligation to exercise their discretionary powers in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission for cross-examination with regard to Section 154 cannot and should not be granted on mere asking.

Impeaching credit of witnesses

If the witness has turned hostile, his credit can be impeached by the opposite party, or by the party that calls him (subject to permission from the Court). Section 155 provides three ways of doing so:

- By calling such a person who can from their personal experience and knowledge testify against the witness and establish that the witness in question is unworthy of credit.
- By furnishing proof that the witness has taken a bribe, or has accepted to take a bribe, or any other incentive to turn hostile.
- By showing inconsistency in his former statements and contradicting him to the extent permitted by Section 153 as held in Zahira Habibullah Sheikh v. Sate of Gujarat.

Corroboration of evidence

Sometimes merely asking the most relevant fact may not be enough to obtain all the necessary facts from a witness. Some questions that do not seem very much connected to the relevant fact can be asked if they help corroborate such fact. Section 156 allows parties with the permission of the Court to beat around the bush a little with the intention of connecting the dots and establishing the relevant fact in issue. Previous

statements given by the witness can also be used to corroborate the later testimony regarding the same fact as prescribed under Section 157 of the Act. The prior statements do not need to be given to the Court, it can be any conversation regarding the facts of the case.

In the case of **Rameshwar v. State of Rajasthan**, a young girl had been raped and she had told her mother about it. Later that statement of the girl given to her mother was corroborated with her other statements in order to establish the case.

It is stated in Section 158 of the act that any statement which is relevant under Section 32 or 33 and has been proved, all matters have to be proved in order to confirm or negate it, or for impeaching or crediting the person that made such statement, to the extent as if that person had been called as a witness.

Refreshing Memory

We humans, sometimes tend to forget things and it is extremely important to keep remembering the entirety of the facts if we have been called as a witness. Someone's life could be at the line and our statements may help the Court serve justice to someone. A witness may be under a lot of pressure and due to all the stress he might need to refresh his memory.

Section 159

That is why Section 159 of the Evidence Act says that a witness can refresh his memory while under examination. He may do so by referring to any writing made by himself at the time of the event taking place regarding which he has been questioned, or a while later as long as the Court considers it to be fresh in his memory. The witness can also refer to someone else's notes prepared within the aforementioned time frame, and decide whether it is correct or not. The section further says that the witness may use a copy or photocopy of a document with the permission of the Court in order to refresh his memory.

The word 'writing' for the sake of this section includes printed matter. A witness who heard a speech may refer to his memory by referring to a newspaper account of it

if he read it soon afterwards, and if, at the time he read it, he knew it to be correct.

Section 160

This section states that a witness must testify to the facts that were mentioned in any such document as mentioned in Section 159. It is irrelevant whether he remembers all the facts that were recorded with every little detail as long as he is certain that the facts have been recorded correctly by him. To better understand this section, we need to look into the illustration provided in the section, which says: A book-keeper will need to testify the facts he has recorded in the books regularly kept during the course of his business. He might not be able to remember every detail about his entry, but as long as he knows that the facts entered were correct and the book was kept correctly, he is good to go.

The fundamental difference between Section 159 and Section 160 is that:

The former talks about the recollection of memory of the witness and not the document.

Whereas, in the latter, the document itself becomes evidence of the facts mentioned therein.

Section 161

This section states that any writing or document mentioned in the last two sections above must be produced and provided to the opposite party if they require it.

The opposite party may cross-examine the witness over the document if the need be. When a document is produced under Section 161, it becomes subject to a general inspection and cross-examination by the opposite party. But the cross-examination on the portion referred to by the witness does not make the document evidence against the cross-examiner.

It has been made clear in the case of **Pran Dutt v. State of Uttar Pradesh** that a

statement of record by the investigating officer such as police reports, under Section 161 is not usable for contradicting a witness.

Production of documents

Section 162

This section says that a witness when summoned to produce a document must produce it if he **has** it in his possession. If there are any objections with regard to its production or admissibility, the Court will deal with it. The Court may also inspect the document unless it refers to matters of the state. In case the documents need to be translated, it can be done so by a translator who must keep the contents confidential. If the translator leaks the content of the said document, he shall be charged under Section 166, IPC for disobeying the law.

Section 163

This section mentions that when a party asks another party for a document to be produced, and it has been produced and inspected by the party that asked for it, he must give it as evidence if the party producing thinks fit. To understand this better, let us say:

Harry and Ron are parties to a case.

Harry wants a document that is in possession of Ron.

Harry must give Ron notice to produce the document.

After receiving the notice, Ron has given the document to Harry.

Harry has inspected the document given by Ron.

Now, Harry must give that document as evidence to the Court if Ron says so.

Section 164

This Section talks about the consequences when a party upon receiving the notice to produce a document, does not do so. If under the aforementioned situation:

Ron does not give the document to Harry. If sometime later, Ron wants to use that document as evidence, he will not be able to do so without Harry's consent.

Power of the judge

Section 165 of the Evidence Act talks about the power of the judge to pose questions and order the production of evidence. In order to procure proof of relevant facts, the judge may ask any question that suits him. It does not matter whether the question posed by him is relevant or irrelevant. The question may be asked at any time during the trial, it may take any form and he could ask anyone, be it the witness or the parties. However, the judge cannot compel the witness to answer his questions and his decisions should not be solely based on his questions. The decisions must be based on relevant facts and evidence produced.

Conclusion

The Indian Evidence Act, 1872 is very necessary for protecting the witnesses, letting him speak freely without the fear of prosecution. Judicial interpretations have brought significant positive changes in this act to meet the needs of the time and have made some provisions more practical.

LAW RELATING TO HOSTILE WITNESSES

A person is said to be hostile when he is "very unfriendly or aggressive and ready to argue or fight". The term 'hostile witness' is not defined anywhere in Indian Law. During a trial, when the prosecution council calls a person to witness in his favor and such person when called upon does not confirm to his previous statement which was collected during the investigation is called a hostile witness. The common law describes a person as a hostile witness when the person is not desirous of telling the truth in favor of the party that called him. A hostile witness testifies for the opposing party or a witness who offers adverse testimony to the calling party during direct examination. Only the judge has the right to declare a person as hostile on the request of the examiner. The concept of hostile witness first arose in the case of, **Sat Pal v Delhi Administration**, Supreme Court here gave the meaning to the term 'hostile witnesses'.

STEPS TAKEN FOR HOSTILE WITNESS

Attorneys have a trust on the witness they are calling that, they would testify in favour of the party. But sometimes a witness may turn hostile and demolish advocate's purpose. However, in such a case the attorney can request the judge to declare the witness as a hostile witness. Then he could cross- examine the witness to get a testimony more favourable to his case. In practice, when the Attorney gets the court judge's approval for treating a witness as a hostile witness, he could usually enjoy great freedom as how to question the witness. Hence, while giving evidence, if the witness tends to be opposed to the calling party, it is generally open to being condemned as his conduct is highly reprehensible and irresponsible.

Thus, where the witness is suspected of being adverse to the calling party, The Attorney who is calling him to testify could use the method of cross-examination in order to reveal the witnesses complicity too. Interestingly, the witness could turn to hostility either in the prosecution or defense. The prosecution witnesses turn hostile, especially during the cross-examination. Conviction of the guilty person in a criminal case develops the devotion and sincerity among the public. But nowadays most criminal cases are at risk of turning hostile.

Relevant Legal Provisions

Section 154 of the Indian Evidence Act States: The court may, in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

A close scrutiny of sec 154 will bring following points into picture:-

- The provision permits only those questions that can be asked during a cross-examination.
- The law nowhere mentions the need to declare the witness as "hostile" before the provision can be evoked.
- The request to declare a person as a hostile can be invoked only when the

examining party feels that the statement presently spoken or the testimony given by the witness would be against his duty to speak the truth.

- It can be thus inferred that, unlike common law system, there is no distinction between a 'hostile witness' or 'adverse witness' for the purpose of cross-examining.
- All that the law seeks to elicit hidden facts for the sole purpose of determining the truth.

Section 193 of Indian Penal Code,1860:- talks about the person who intentionally gives false evidence in any stage of a judicial proceeding. This provision states that any person doing such would be liable for punishment with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation 1: A trial before a Court-martial is a judicial proceeding.

Explanation 2: An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding though that investigation may not take place before a Court of Justice.

Section 196 of Indian Penal Code, 1860: talks about the person who corruptly uses or attempts to use as genuine or true evidence which he is aware of being false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

Section 199 of Indian Penal Code, 1860:- if a person who is bound by the law to receive any evidence, makes a false statement, which he knows to be false in nature and that such a statement touches upon any material point in the case, should be punishable in the same manner as if he gave false evidence.

In India, the law relating to the offence of perjury is given a statutory definition under Section 191 and Chapter XI of the Indian Penal Code, incorporated to deal with the offences relating to giving false evidence against public justice.

Evidentiary value of the statements:

The Indian law says that just because a person has turned hostile, that doesn't mean that whole of his statement should be turned down." In **State of U.P. V. Ramesh Prasad Mishra and anr.**,"It is the law that the statement of the hostile witness to be taken as the evidence would not be totally rejected just because the person has moved away from his duty to speak the truth , or that he has not spoken in the favor of the prosecution. However, in such a case, the court can scrutinize the statement of the witness and can reject only the part that is inconsistent with the case or arguments of the prosecution ".

The Jessica Lal case

Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi)

The biggest case that involved the hostile witness was the case of the Jessica Lal's murder. In this case, the total of 80 witnesses had turned hostile.

FACTS

In this case, Jessica Lal was a model working in an unlicensed bar at Delhi. By midnight, the bar ran out of liquor, and Jessica Lal refused to serve Manu Sharma, who was with a group of three friends. Sharma then produced a pistol and fired it twice: the first bullet hit the ceiling and the second hit Jessica in the head and killed her.

After eluding police for a few days, with the assistance of accomplices, Khanna and Gill were arrested on 4 May and Sharma on 6 May. The murder weapon ware not recovered and was thought to have been passed on to a friend who had been visiting from the US and who may subsequently have returned there.

A person named Munshi was the key witness in the case. During the reading of the First Information Report, he said that "the statement that he gave to the police was recorded in Hindi while he had narrated the whole story in English." Munshi in his previous statement said that he saw total 2 guns on the night of the murder. He however, turned from his statement and latter told that he just saw two gentlemen at the bar counter and nothing about the gun.

JUDICIAL DECISION

In the year 2006, the trial court based on the statements of the hostile witnesses, acquitted Sharma. This decision of the trial court was followed by a huge uproar throughout the country. The appeal regarding this decision of the trial court was accepted which was based on the evidence already taken by the lower court. Sharma was punished with a sentence of life imprisonment and a fine. The other accused, Yadav and Gill, were fined and given four years' rigorous imprisonment. A plea for Sharma to be sentenced to death was rejected on the grounds that the murder, although intentional, was not premeditated and Sharma was not considered to be a threat to the society.

BEST BAKERY CASE,

Best Bakery trial is one of the best example that one can be given regarding miscarriage of justice. In this case, the powerful and rich accussed forced the witnesses to turn hostile. The witness failed to identify the accused so the prosecution failed to prove that charges. Later, one of the witnesses who had turned hostile accepted that she had turned hostile under threat and fear for her life.

BMW HIT AND RUN CASE,

A boy named Sanjeev Nanda was alleged to have run his BMW over sleeping pavement dwellers in Delhi. Three people died on the spot and other received serious injuries. In this case, again a large number of the witnesses were bought by the powerful accused and Monoj Mallick, who was the lone survivor told the court that he was hit by a truck. The key witness, Hari Shankar, refused to identify the BMW, and another witness absconded. In fact, none of the witnesses supported the prosecution. The accused were acquitted.

Reasons for people turning hostile:

There might be many reasons for a witness to turn hostile. Some of the

important reasons are:

- The absence of Witness Protection.
- Prolonged trials.
- Easy bail of the rich accused.
- The absence of adequate facilities of the court to the witnesses.
- Usage of the money and power by the accused.
- Threat by the accused.
- Other factors like, fear of police or legal system, political fear, etc.[6]

SUGGESTIONS

Delayed trials along with prolonged investigations are the main reasons for the accused to make a witness hostile. So in the cases in which there is a possibility that the witness can turn hostile, speedy trial should be practiced. There is a need for stringent laws as, the leniency of the judicial system help the witnesses to easily turn hostile. The criminality of "buying" witnesses by rich and powerful can be handled only by the presence of strict laws. In order to curb the situation like Jessica Lal's case, it is very important that the court, to protect the witness should:

- Hold in-camera trials.
- Keep identity of the witness secret.
- Make arrangement to ensure the protection of witness.
- The court should make provisions to compensate the witness for the amount that he incurred to come to court and testify.
- Attention should be paid to the comfort and dignity of the witness.

3. IMPROPER ADMISSION OR REJECTION OF EVIDENCE (SECTIONS 167)

Section 167

Evidence must be legally relevant in order to be admissible. The admission must be made and received in compliance with the Evidence Act. Section 167 of the Indian Evidence Act talks about 'no new trial for improper admission or rejection of evidence'. It says: Improper admission or rejection of evidence is not a ground for initiating a new trial or reversal of any decision; If there were enough evidence to justify the decision; or If the evidence that has been rejected had been received; The evidence rejected or improperly submitted should not be so significant that the decision could have been different if it was admitted.

Therefore, if an appeal is filed on the ground of improper exclusion of evidence or admission of evidence, the appellant must be able to prove that:

- There was improper admission or exclusion of evidence, and
- There has been a mockery of justice.

This section is applicable to both criminal and civil cases.

Effects of improper admission or rejection of evidence in civil cases

In civil cases, it is pretty obvious that where there is enough evidence to justify a

decision it is immaterial whether the evidence has been admitted or rejected, initiating a new trial all together is not required.

Section 167 uses the phrase “reversal of judgment”, and judgments can only be reversed by an appellate court. It means that this section is applicable to appeals as well. In the case of **Abdul Rahim v. King-Emperor,** it was laid down that:

- Acceptance of inadmissible evidence is not an ipso facto ground for a new trial.
- Acceptance of inadmissible evidence is not a ground to set aside a judgment.

Provided that there is other evidence to support the findings and reach the same decision. The High Court of Karnataka, in the case of **State of Mysore v. Sampangiramiah** observed that: Acceptance of inadmissible evidence is less injurious than the rejection of admissible evidence. Because in the former case – while deciding the verdict, the evidence improperly admitted can be excluded from consideration. But, in the latter case – evidence wrongly rejected can only be recorded by having recourse to further proceedings.

In case a decision is made by the trial court based on a wrongly admitted evidence. Such evidence must be set aside and see if they are relevant. If the decision is solely based on such wrongly admitted evidence, then it must be reversed.

Effects of improper admission or rejection of evidence in criminal cases

This section will be applicable to criminal cases also, as held by The High Court of Bombay in the case of Abdul Rahim v. King-Emperor. It was laid down that if evidence has been wrongly admitted in a criminal case at the trial stage, The High Court on appeal should try to exclude that inadmissible evidence and still keep the decision the same. Provided that the evidence already available was enough to clearly establish the case and reach the same decision. It means that: In case the High Court on appeal is unsure if a fact was missing the opinion or decision of a certain authority would be the same or not. The High Court interferes but only if it is totally certain that there would have been no other decision. In that case, the irrelevant circumstances above would totally wreck the order, as observed in **Madan Lal v. Principal, H.B.T. Institute.**

The court in the case of **Abdul Rahim v. King-Emperor** said that it may be misdirection, and it is not sufficient ground to change the verdict. Therefore, if the evidence is improperly admitted and there was already enough evidence to establish the case. Such improperly admitted evidence can be ignored and the decision would still remain the same. Or else there has to be a new trial.

Rejection of evidence

In the case of **Narain v. State of Punjab**, the prosecution had cited a certain person as a witness but, they were not very keen to examine him. When that witness opposed giving evidence, he was dropped by the prosecution. The court held that in such case evidence cannot be said to have been rejected within Section 167 of the Indian Evidence Act. In such a case the prosecution does not actually tender the person as a witness. The judge observed that the real question regarding Section 167 is not so much as to whether the rejected evidence would not have been accepted against other testimony on record as to whether the evidence – "ought not to have varied decision".

Conclusion

Evidence is the only way to establish someone's case in court. The Justice is blind and it seeks only evidence in order to serve justice. The law in India regarding the admissibility of evidence is up to par and really helpful. A wrongful submission of evidence can change the entire course of the trial and deny justice. Not just by the parties, it has happened on multiple occasions that the court has wrongly accepted some evidence that resulted in the change in entire judgment, only to be overturned by the appellate jurisdiction.

- Only relevant facts are admissible;
- A relevant fact must be legally relevant in order to be admissible;
- Admission must be made in compliance with the Indian Evidence Act, 1872.