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Research Topic Name-

The Critical Analysis of Recent Amendments in Laws of Evidence in Bangladesh: Amendments in 2022

This research paper is submitted in partial fulfillment of the requirements of the degree of

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Finally, I want to express my deep gratitude to my parents and all well wishes whose enormous helps assists me to complete this report.

Signature

Mahmudur Rahman Reza

CERTIFICATION BY THE RESEARCH SUPERVISOR

This is to certify that the Research Monograph titled **"*The Critical Analysis of Recent Amendments in Laws of Evidence in Bangladesh: Amendments in 2022*"** submitted by ***Mahmudur Rahman Reza (ID No: LLB-1701010010*** **)** in fulfillment of the requirements for the award of the Graduate Degree in Law from Sonargaon University, under my supervision and guidance. It is also to be certified that no part of this Research Monograph has been submitted anywhere earlier.

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DECLARATION

This is ***Mahmudur Rahman Reza ,*** a student of LLB program of Department of Law of Sonargaon University, holding ***ID No: LLB 1701010010;*** do hereby declare that the research monograph titled, **"*The Critical Analysis of Recent Amendments in Laws of Evidence in Bangladesh: Amendments in 2022"***
: An Appraisal" is an original work.

The assigned work has done by me for partial requirement of my LLB degree, as a part of academic curriculum. I certify that this thesis does not incorporate without acknowledgement any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person expect where due reference is made in the text.

I also declare that the presented work does not breach any existing copyright and no portion of this research monograph has been copied entirely from any work done earlier for a decree or otherwise.

Signature

Mahmudur Rahman Reza
LLB1701010010..

LETTER OF TRANSMITTAL

To

Md Sagor Hossain

Lecture DepartmPrinciplesh

Sonargaon University (SU).

Subject: **Submission of Research Monograph on "*The Critical Analysis of Recent Amendments in Laws of Evidence in Bangladesh: Amendments in 2022".***

Dear Sir,

It is a great pleasure for me that I have the opportunity to submit the research paper on, ***"The Critical Analysis of Recent Amendments in Laws of Evidence in Bangladesh: Amendments in 2022"***. According to your guidelines I have been able to effectively and enthusiastically accomplish the report. This report attempts to describe my observations, learning and recommendation based on general reasoning and empirical evidence. I made sincere efforts to conduct this study in reviewing related rules, documents, interview and examine relevant records for preparation of this report. During the research period, it is customary to work in this field to gather a better understanding of this arena.

I have tried my level best to put meticulous effort for the preparation of this report. Any shortcomings or fault may arise as my unintentional or clerical mistakes. I will heartedly welcome any clarification and suggestion for any review and conception disseminated through this report.

Your active supervision and crafted guidance made it possible for me to prepare this report successfully. I remain available at your convenience to clarify any quarries if necessary.

Thanking you,

Mahmudur Rahman Reza

ID No: LLB 1701010010.

ABSTRACT

31, 2022, the Evidence (Amendment) Bill was introduced before the parliament. This Bill will be an Act only after completing some legislative procedures. Under the Bill, any digital record has been included in the definition of 'document' in section 3. The definition of 'digital record' has been added in the same section which implies that any data or information generated, prepared, sent, received, or stored in magnetic or electro-magnetic, optical, computer memory, micro film, computer generated microfiche including audio, video, DVD and all records of CCTV, Drone, Cell phone, hardware, software, and all other digital devices, are to be considered as digital record.

At present, we are completely dependent on digital devices. So, it is usual that in many, if not all, cases, evidences are digital or electronic. For instance, video recording or CCTV footage can play a vital role in criminal cases. In this regard, it has been essential to make digital records admissible as evidence. The term 'digital record' has been added to sections 17, 34, 35, 36, and 39 in the Bill. Besides, section 22A says that the oral admission of digital evidence would be inadmissible unless the genuineness of the digital record is in question. For example, if the opposing party raises any question regarding the authenticity of the video footage, only then the oral admission of the witness regarding the video footage can be admissible in the court.

The term 'digital signature' has also been added to the Bill. Section 3 provides that the definition of the term 'digital signature' prescribed in the Information and Communication Technology Act, 2006 will be applicable. Section 2(1) of the Act of 2006 says that 'digital signature' means the data in an electronic form which can satisfy affixing the signatory uniquely, capable of identifying the signatory, created in sole control of the signatory, etc. The Bill also contains another provision in sections 67A and 47A so that nobody can defraud the court by only adding the digital signature. Rather, under these sections, the digital signature of the subscriber must be proved in court. Moreover, if the court is in doubt, it may take help from the opinion of the certifying authority which gives the authorisation of such signature.

The second point introduced in the Bill is the extension of the scope of the opinion of the expert in the court. Now, under section 45 of the Evidence Act,1872 only the opinion of persons specially skilled in science, arts, foreign law, the identity of handwriting or finger impressions are called 'expert opinion' which is admissible in the court when the court has to form an opinion regarding those matters. Along with the aforementioned subjects, the definition of 'expert opinion' was expanded by the Bill to cover a wide range of areas. It says that persons specially skilled in physical or forensic evidence or digital record, footprint, palm impression, typewriting, usage of trade, technical term, the identity of person or animal also are experts. Their opinion when necessary will be admitted in the court. For instance, if the court has to form an opinion regarding the trade of vehicles, the opinion of persons specially skilled in the trade of vehicles can be admissible as evidence. The opinion of the 'certifying authority' on the identification of 'digital signature' can also be considered as the 'expert opinion'.

The third point proposed in the bill is the protection of the victims of rape cases from questioning her character. In this regard, section 146(3) is proposed to be amended so that no question in cross-examination can be made as to the general immoral character or previous sexual behaviour of the victim. Besides, section 155 under which the prosecutrix of the rape case can be shown as of generally immoral character is proposed to be omitted. This provision will protect the women from humiliating and embarrassing questions during rape trial.

Some provisions should be amended because of their outdated and irrelevant nature which remained untouched in this Bill. Among these, sections 82, 89, and 166 immediately need to be revisited.

Section 82 deals with the procedure for proving a document in Bangladesh that is recognised as a public document under the laws of England and Ireland. Such a document will be recognised as admissible without showing evidence of a seal, stamp, or signature when it is presented before any Bangladeshi court. The court will assume that the seal, stamp, or signature is genuine. It was enacted for the convenience of the English Rulers in the Indian Subcontinent. There is no practical utility of this provision at present and therefore it needs to be omitted.

Section 89 says '[t]he Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.' It means that the judici

Keywords: Evidence act 1872. This Act shall be known as the evidence (amendment) act, 2022. Critical analysis of Evidence Act , section,case law,judiciary, rule of law.

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CHAPTER-1

INTRODUCTORY AND RELEVANCY FACT

INTRODUCTIN. EVIDENCE ACT, 1872 Act No. 1 of 1872[1]

The term "law" is used in various ways. In its most basic sense, it refers to any rule, law, norm, doctrine, or standard to which human beings must adhere. The entire corpus juris (body of laws) is divided into two broad categories:

Substantive laws,

Adjective laws.

The law of evidence does not fall under substantive or procedural law, but rather under the 'adjective law,' which describes the pleading and method by which substantive laws are put into operation.

In litigation, the opposing parties produce proof to disprove each other's allegations. In legal systems, the law of evidence governs this sphere. This is a significant piece of legislation. It applies to both civil and criminal law. The law of evidence is a prerequisite for any criminal or civil trial. The role of evidence law is to scientifically reconstruct the past events on which

the disputing parties disagree. The goal of evidence law is to seek the truth and to be an effective tool in the fact-finding process. The law of evidence has established two fundamental concepts, i) relevancy, and ii) admissibility. In legal terminology, relevance and admissibility are frequently used and both are frequently used interchangeably by legal practitioners in the court of law. Both principles are at the essence of the law of evidence.

(Received the assent of the Governor General on the 15th March, 1872). It is Act No. 20 of 2022. This Act shall be known as the evidence (amendment) act, 2022. It shall come into force immediately.

Preamble . Whereas it is expedient to consolidate, define and amend the law of Evidence; it is hereby enacted as follows -

.

Interpretation clause

Section 3 of the Indian Evidence Act, 1872 contains details on the interpretation of the terms – Court, Fact, Relevant, Facts in issue, Document, Evidence, Proved, Disproved, Not Proved, India – unless the context implies a contrary intention.

Court

'Court' consists of all judges and magistrates, and any person who is legally authorised to take evidence, with the exception of arbitrators and tribunals. Arbitrators and tribunals function on the basis of natural justice and are authorised to collect evidence, however, they do not come under the definition of "Court" within the meaning of this Act.

In C.I.T v. East Court Commercial Co. Ltd. (1967), it was held that income tax authorities do not fall under the definition of "Court."

It is interesting to note that the 69th Law Commission Report recommended making a comprehensive definition of "Court" to avoid confusion. The Law Commission's definition included civil, criminal, revenue courts and tribunals within the definition of "Court." However, the definition of "Court" has not been amended to include revenue courts or tribunals till date.

In Brajnandan Sinha v. Jyoti Narain (1956), the Supreme Court delved into the definition of "Court" and came to the conclusion, that such a body or forum must be capable of making a decision or judgement which is final and authoritative in nature. This is the basic quality of a judicial pronouncement, and a salient characteristic of a "Court."

deeper into the context or circumstances of the facts in issue, and help to draw inferences about them.

Admissions and confessions, statements by those who are not witnesses, precedents from case laws, statements made under special circumstances, facts which form a chain of logic with facts in issue, third party opinions, and evidence as to the character of a person – all these fall under the category of relevant facts.

Relevant facts indicate a relationship between facts, which according to a sound chain of logic and common sense, either prove or disprove the existence of each other. Relevant facts act as supplementary material to sway the opinion of the court in favour of the party making the argument with respect to the facts in issue.

For example, 'A' is accused of committing theft. A relevant fact would be that 'A' has had a history of pickpocketing and shoplifting, and has been prosecuted before. The fact in issue would be – whether A has committed theft.

Document

A document within the meaning of this Act, is any writing, marks, figures inscribed on a surface for the purpose of recording a matter. In R v. Daye (1908) the Court observed that the notches made by bakers and milkmen on wood to indicate the amount of bread or milk supplied are also documents. The surface upon which the writing or marks are inscribed is not restricted to paper. Writings, words in photographs, maps, plans, inscriptions on metallic surfaces – all these fall within the category of document.

This short Preamble of the Act states generally the object of the Legislature in passing it. A Preamble is the head-note of a statute; it is a key to its understanding. If the wording of a section is ambiguous the preamble may be consulted to resolve the doubt. The preamble shows that the Act is a consolidating statute and not a fragmentary one.

History of the Law of Evidence. - Before passing of the Act there was no single exhaustive code containing the law of evidence of uniform application in the country. In the three Presidency Towns of Calcutta, Madras and Bombay the courts followed the English rules of evidence. The Mofussil courts on the other hand fell back upon the Mohammedan and English rules of evidence. Later on some Regulations and enactments were passed. Act 11 of 1855 partially codified the law of evidence in its application to courts both in the Mofussil and in the

Presidency towns. By the time the Act was passed a vast body of 'customary rules', mainly derived from English law, had developed chaotically. A need to replace the chaos by a code was felt and in 1868 Mr. Henry Maine prepared a draft of the Law of Evidence. It was discarded as not suited to Indian conditions. In 1871 Mr. James Stephen made a new draft which became Act I of 1872.

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1. For Statement of Objects and Reasons, see Gazette of India, 1868, p 1574; for the draft or preliminary Report of the Select Committee, dated 31st March, 1871, see ibid. , 1871, Pt. V.p. 273, and for the second Report of the Select Committee dated 30th January, 1872, see ibid, 1872, Pt. V.p. 34, for discussions in Council, see ibid, 1868. Supplement 1871, Extra Supplement, p 42, and pp. 1060 and 1209, ibid. , Supplement p. 1641, and ibid. , 1872.pp. 136 and 230. This Act has been amended in U.P. by U.P. Act 24 of 1954.
2. Raj Mal v. Harnam Singh, 104 IC 661, 1928 L 35.

The Act is not exhaustive. - Although the Act is a consolidating statute, yet it is not exhaustive. In addition to the general rules of evidence provided in the Act, there are other rules of evidence relating to special subjects contained in other enactments, e.g. Section 4 of the Prevention of Corruption Act, (Act II of 1947) and Section 66 (2) of the Bombay Prohibition Act, 1949, created new presumptions against the accused. See also Criminal Procedure Code headed 'Special Rules of Evidence'. However now it is not open to the Courts to apply in the matters of evidence principles of equity, justice and good conscience nor they can admit irregular evidence to throw light upon the issue. The principles of exclusion of evidence laid down in the Act must be strictly applied and cannot be relaxed at the discretion of the Court.

Construction . In constructing statutes the grammatical and ordinary sense of the words is to be adhered to , unless that would lead to some absurdity or repugnance or inconsistency with the rest of the statute , in which case the grammatical and ordinary meaning of the words may be modified , so as to avoid that absurdity and inconsistency , but no further . The words themselves alone best declare the intention of the law - giver .

In interpreting a statute , " the proper course is , in the first instance to examine the language of the statute and to ask what is its natural meaning , uninfluenced by any consideration derived from the previous state of the law and not to start with inquiring how the law previously stood

, and then assuming that it was probably intended to leave it unaltered , to see if the words of the enactment will bear an interpretation in conformity with this view " (Lord Herschell in Bank of England v . Vagliano) . This principle was adopted by the Privy Co uncil in Norendra Nath Sarcar v . Kamalbasini .

Heading and Side - Notes . - The headings prefixed to sections are regarded as preambles to those sections . They may be looked into for the purpose of interpreting the section . However , the marginal notes of a section cannot be so referred to.

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1. Rudolf Stallman , In re , (1911) 39 C 164. Annavi Muthiriyan v . E. , 39 M 449 .
2. See new Criminal Procedure Code , 1973.
3. Meer Jangoo v . Chote Sahib , 8 IC 1124
4. Union of India v . T.N. Verma , (1958) SCJ 142.
5. Lord Wensleydale in Grey v . Pearson , (1875) 6 HLC 61 , 106 , followed in Narayana Swami v . E. , 1939 PC 47.

Illustrations .

Illustrations are to be taken as part of the statute ' (Lord Atkinson in Ballamal v . Ahmad Shah) . They can be used in the construction of the section.[2]

Reference to English authorities . - The Act is mainly based on Taylor's Evidence . In the words of Sir James Fitzjames Stephen , " it is an attempt to reduce the English Law of Evidence in the form of express propositions arranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India . " Hence a reference to English authorities is not only permissible but useful.3 They are referred to by way of illustrations and are not in any way binding . However they form a most valuable guide to the Courts in India .

Lex fori : or rule of the place of trial . - The Evidence Act ' being ' an adjectival law , all questions of evidence must be decided according to the law of the forum in which the action is tried.5 Even where evidence is taken on commission or otherwise from abroad , its admissibility is determined by the law of evidence of the country where the action is being tried .

The Act is retrospective . - No person has a vested right in procedure . The Law of Evidence being a law of procedure , it operates retrospectively

Object of the Evidence Act . - The capital object of the Evidence Act is to prevent indiscipline in admission of evidence by enacting a correct and uniform rule of practice . If irrelevant facts

are admitted , they are likely to disguise truth than discover , it . The main principles emerging from the Act are :

(i) evidence must be pinned down to matter in issue ;

(ii) best evidence must be tendered ;

(iii) hearsay evidence must

Section-3. **Interpretation-** In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

"**Court**" includes all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence.

"**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

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place, is a fact. (b) That a man heard or saw something is a fact. (c) That a man said certain words is a fact. (d) That a man holds

a certain opinion, has a certain intention, acts in good faith or

fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact (e) That a man has a certain reputation is 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.

Facts in issue The expression "facts in issue" means and includes 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.

Illustrations

A is accused of the murder of B. At his tria the following facts may be in issue:- that A caused B's death; that A intended to cause B's death; that A had received grave and sudden provocation from B; that A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

"**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.

Illustrations

Writing is a document: Words printed, lithographed or photographed are documents: A map or plan is a document: An inscription on a metal plate or stone is a document: A caricature is a document."

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) all documents produced for the inspection of the Court, such

documents are called documentary evidence. 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.

Case Law

Where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt. Held vs State (Criminal) 60 DLR-24

Section 3-Circumstantial Evidence-It is well settled law that last seen together is a weak type of circumstantial evidence on which to have a conviction, a link between the accused and the murder has to be proved. Bablu vs State (Criminal) 60 DLR 583 Section 3- Circumstantial Evidence Circumstances in respect of which an accused was not examined under section 342 of the Code of Criminal Procedure cannot be used against him. Bablu vs State (Criminal) 60 DLR 583

Written statement submitted by the appellant when he was examined under section-342 of the Code of Criminal Procedure is not evidence within the meaning of section 3 of the Evidence Act. Such statement is to be considered along with the evidence and the circumstances and if the statement gets support from the evidence on record due weight may be given on it. [Vide 42 DLR (AD) 31]. Thus such statement cannot be the sole basis of conviction. Hasan Md vs State (Criminal) 60 DLR 56.

After amendment evidence Act. section -3.

Interpretation-clause

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-

"**Court**" includes all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence.

"**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.

Illustrations

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is 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.

"***Fact in issue***"--- The expression "facts in issue" means and includesany 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.

Illustrations

A is accused of the murder of B.

At his trial the following facts may be in issue:–

that A caused B's death;

that A intended to cause B's death;

that A had received grave and sudden provocation from B;

that A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

"**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 2[and includes any digital record].

[“**Digital record"** or **“electronic record**” means any record, data or information generated, prepared, sent, received or stored in magnetic or electro-magnetic, optical, computer memory, micro film, computer generated micro fiche including audio, video, Digital Versatile Disc or Digital Video Disc (DVD), records of Closed Circuit Television (CCTV), drone data, records from cell phone, hardware, software or any other digital device as defined in Digital Security Act, 2018 (Act No. 46 of 2018).]

Illustrations

A writing is a document:

Words printed, lithographed or photographed are documents:

A map or plan is a document:

An inscription on a metal plate or stone is a document:

A caricature is a document.

"**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) all documents produced for the inspection of the Court;

such documents are called documentary evidence.

(3**)** all materials or objects relating to blood, semen, hair, all body material, organ or part of organ, Deoxyribo Nucleic Acid (DNA), finger impression, palm impression, iris impression and foot print or any other similar material or object which may-

(i) establish that an offence has been committed or establish a link or relation between an offence and its victim or an offence and its offender; and

(ii) prove or disprove a fact:

such materials or objects are called physical or forensic evidence.]

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.

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.

A fact is said not to be proved when it is neither proved nor disproved

5[“Digital Signature" or "electronic Signature" means any electronic signature as defined in Information and Communication Technology Act, 2006 (Act No. 39 of 2006).

“Digital Signature Certificate" means any electronic signature certificate as defined in Information and Communication Technology Act, 2006 (Act No. 39 of 2006).“Certifying Authority" means Certificate Issuing Authority as defined in Information and Communication Technology Act, 2006 (Act No. 39 of 2006).]

CHAPTER-2

ADMISSION & CONFESSIONS

. **section 17 admission defined**

An admission is a statement, oral or documentary 2[or contained in digital record], which . suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Amendment admission Section 17

17. Admission defined . - An admission is a statement , oral or documentary 5 [or contained in digital record] , which suggests any inference as to any fact in issue or relevant fact , and which is made by any of the persons , and under the circumstances , hereinafter mentioned .

COMMENTARY

Principle . - Section 17 defines an admission . It is a statement of fact , oral or documentary , made by a party or a person connected with him in any of the ways set out in Sections 18 to 23 ,. under certain circumstances . Admissions are admitted because the conduct of the party to a proceeding in respect to the matter in dispute ; whether by acts , speech or writing which is clearly inconsistent with the truth of his contention ; is a fact relevant to the issue.

Ground for the reception of admission in evidence.-- Admissions and confessions are supposed to constitute one of the three exceptions to the hearsay rule , the other two exceptions being.(i) statements made by dead person (Section 32 , and (ii) statements contained in public documents (Sections 35 to 38) . The idea of hearsay is what is heard out of Court from a non - witness . The most generally accepted ground for reception of adn..ssions in evidence is that the party's declarations , whether for or against his interest , when made , may always be taken to be true as against himself . (Phipson , 6th Ed . p . 629) . For human experience shows that a man is not likely to say things against his own interest unless it were true . Thus broadly stated anything said by a party may be used against him as an admission , provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or testimony . In fact , it is in the consistency of an admission with the party's present claim that gives it logical force . The general rule of their reception is that they may be proved as against those who made them , but not in their favour subject to three exceptions provided in Section 21 .

Admission -- The definition , of the term ' admission ' as given in Section 17 is not complete as it does not define specifically the persons and circumstances concerned and we have to refer to Sections 18 to 20 to appreciate its implications . According to Section 17 , admission is a statement suggesting an inference as to the fact in issue or relevant fact , made by persons and under circumstances mentioned hereinafter .

Requisites of an admission .- (i) It is a statement , oral or documentary ; (ii) the statement must suggest any inference as to any fact in issue or relevant fact ; (iii) it must be made by any of the following persons as mentioned in Sections 18 to 20 :

(a) Party to the proceeding (Section 18) .

(b) Agent authorised by such party (Section 18) .

(c) Party's representatives , i.e. , party suing or sued in a representative character making an admission (Section 18) .

(d) Person jointly interested in the subject matter of the proceedings , i.e. , person who has any proprietary or pecuniary interest in the subject matter of the proceedings (Section 18) .

(e) Person from whom the parties to the suit have derived their interest or title to the subject matter of the suit (Section 18) .

(f) Person whose position or liability is necessary to prove against a party to a suit . This is a case of admission by strangers to the suit if they occupy such a position or are subject to such a liability (Section 19) .

(g) Referee , i.e. , person to whom a party to the suit has expressly referred for information or opinion (Section 20) . This is also a case of admission by a sconfession

(h) Statements made by accused are also admissible as admission under Section 18 .

Statement must be made under the following circumstances :

(a) Admission by representative of a party , if made while holding such representative character (Section 18) .

(b) Admission by person jointly interested , if made during the continuance of such interest (Section 18) .

(c) Admission by person , from whom the parties to the suit have derived interest or title , if made during the continuance of such interest (Section 18) .

(d) Admission by strangers to the suit ; when their statements would be relevant in a suit brought by or against them (Section 19) .

(e) Admission by a referee in a reference to a matter in dispute (Section 20).

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1 . 7 Cr LJ 251 .

2 Jogendro Chunder v . Dwarkanath , 15 Cal 681 .

3 . Govinda v . Dwarka , 20 CLJ 455.

4 Dhanpati Devi v Corporation of Calcutta , 55 CWN 751 .

5 . Ins . by Act 21 of 2000 , S. 92 and Sch . II (w.e.f. 17.10.2000) .

CONFESSIONSection 17(2) of Evidence Act, confession is an admission by an accused either by stating orsuggesting the inference that he committed that offence. In Section 24 of such Act, it laid down fewelements of inadmissible confession due to involuntary. Under this section, the confession made byaccused is irrelevant if it is caused by inducement, promise or threat from a person in authority thatby making it the accused would gain advantage or avoid any civil temporal nature in reference to theproceeding against him. In one leading case, Dato Mokhtar Hashim v PP (1983) 2 MLJ 232, theFederal Court laid down principle that the rule on admission is taken from English law. In order for aconfession to be valid, it must be made voluntarily. According to Section 24, three circumstances arerule out on the admissibility of confession. Firstly,

there must be an inducement, promise or threat. Secondly, it the confession is made before a person in authority and third, the accused gaintemporal nature. In the case of PP v Law Say Seck & Ors, Sharma J stated that the existence ofinducement, threat or promise is left to the court to opine whether it was sufficient to lead theaccused to suppose that he would gain an advantage of a temporal nature. The element of person inauthority is discussed in the case of Deokinanan v R where the Privy Council held that person inauthority is someone who is engaged in the arrest, detention, examination or prosecution of theaccused and confession made before person in authority is consider involuntarily. Besides,oppression is also one of the elements of involuntariness in confession. Referring to the case of DatoMokhtar Hashim, there was an oppressive conduct where the coaccused was put under anoverwhelming pressure that forced the co-accused to confess. The co-accused; Rahmat bin Satimansuffered diabetes and he was deprived from his medication, prayers, sleep and food. He was alsointerrogated for long hours and odd hours. When all of these factors are combined together, it isamount to oppression and confession made in oppressive manner is involuntary, thus inadmissible.The judge in Dato Mokhtar Hashim case referred to the case of R v Wilson where a confessionobtained by overbearing the will of a person in custody by tactics amount to compulsion and itshould not be received. Also, referring to the case of PP v Chong Boo See (1988) 3 MLJ 292, the testof oppression depends upon subjective considerations such as the age, health, sex and personality.However, we can compare with the case of PP v Lim Kiang Cha (2016) 4 CLJ 173, the respondent hadclaimed his confession was made involuntarily as it was given under oppressive conditions due toprolong uninterrupted and torture.

Distinction between admissions and confessions . - In the English Law the term admission is used in civil cases while the term ' confession ' is generally used in cases of acknowledgment of guilt , ie in criminal cases . In the Indian Evidence Act , the block of Sections 24 to 30 dealing with confessions , forms part of the general category of admissions and hence it is clear that no such distinction is maintained under the Act . Sections 17 to 22 are applicable both to civil as well as criminal cases . Statements made by accused as admissions under Sections 17 to 18 and prima facie evidence against the maker , but not in his favour . From the scheme of the sections it is seen that admissions

are a genus of which confessions are a species . In effect confessions are a sub - species of ' statement ' and a species of admissions . Thus all confessions are admissions but not vice versa .

The term ' Admission ' is defined in Section 17 but a ' confession ' is not defined in the Act . A confession is an admission made at any time by a person charged with a crime , standing or suggesting the inference that he committed the crime . In the case of Om Prakash v . State of U.P. , the Supreme Court has laid down that it is only when the statement of the accused can be read as a plenary admission of of the crime . " guilt in straight and clear terms that it can be taken as a confession of the crime.

Admission in pleadings or Judicial admissions , by themselves . can be made the foundations of the rights of parties.

An admission made even to a stranger at any time even before the controversy arose is admissible. A confession to be admissible must be true and voluntary.

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1. Azimuddy v . Emp . (1927) Cal 398 .

2. Q.E. v . Babu Lal , 6 All 509 , 539 (FB) .

3. AIR 1960 (2) SC 409 1960 Cr LJ 544 .

4. Satish Mohan BindI v . State of U.P. , AIR 1996 Alld . 126 (Para 9) .

Importance of the distinction . - For two reasons the distinction between them is important . A statement made by an accused may be either admission or a confession . If it is an admission , it is admissible under Section 21 unless it amounts to a confession which is admissible under Sections 24 to 30. If the statement is found to be tainted with improper inducement , threat or promise , it will be hit by Section 24 and will be inadmissible as a confession . However , it may still be admissible under Section 21 as an admission , provided it suggests an inference as to the fact in issue or relevant fact ,

provided also that it was not made to a police officer during investigation . Secondly , a statement made by the accused against his co - accused is admissible under Section 30 only if it amounts to a confession .

But if it fails snort of a confession , it is admissible against its maker as an admission , but not against his co - accused .

Oral or documentary . - Admissions may be oral or written ; and a party may make admissions by signs or silence . Sometimes silence may amount to an admission . When by a party's silence an assent is given to the assertion of a third person , that assertion is thereby adopted by the party , and therefore , may be used against him as his own statement and admission . It is statement that constitutes the admission , the conduct merely effects its adoption . (Wigmore , Section 1052) . Thus admissions are receivable which are contained in letters , previous pleadings , depositions , petitions , deeds , account books even if not regularly kept , horoscopes , first information reports etc. Even statements in cancelled , invalid instruments or unstamped docu ments are receivable . Statements made in a document which is inadmissible for want of proper attestation or registration may be admitted as admissions . Admissions may be implied from the acquiescence of a party . The general rule is that they are admissible against the party making them but not against any other party . " Exceptions to this rule are in Sections 18 to 20 .

Different kinds of admissions . - There are two kinds of admissions (i) Formal , made intentionally with a view to the proceedings (Section 58) (ii) Informal , made without a reference to the proceedings . Formal admissions may be made in six ways (1) on the pleadings (2) in answer to interrogatories , (3) in answer to a notice to admit specified facts (4) in answer to a notice to produce and admit document (5) by a solicitor óf a party during litigation and (6) in open Court by the parties or their advocates . The pleadings for the purposes of the suit are judicial admissions . (Section 58) .

An informal admission may be made in any way . It has , therefore , much less weight than formal admission and may be much easily explained away . But , if clearly proved and sufficiently explicit in terms , it shifts the burden of proof . There are exceptions to the admissibility of informal admissions . In criminal cases involuntary confession (Section 24) and in civil cases admissions are made in communi cations marked without prejudice . (Section 23) . Admission , unless explained , furnishes the best evidence.[1] An

admission would bind the maker of admission only in so far as facts are concerned but not in so far as it relates to question of law.2 Minor variation between the " what eye witnesses said in examination " and " at the cross examination " does not affect his credibility when the witness is consistent as to point of substance.[3]

Admission by conduct . - In certain cases , conduct , i.e. , flight , silence , demeanour may amount to an admission . Strictly speaking conduct itself cannot be construed as an admission as it is neither oral nor documentary (Section 17).

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1. Section 162 , Cr . P.C. , Narayanswami v . E. , 1939 PC 47 .

2 . Baboo Mahesh Chander v . Baboo Umbika Chander , 23 WR 325 .

3. Shamlal v . Laxmi Narayan , ILR 1939 All 366 .

3 . Sailesh Chandra Sarkar v . Bireshwar , 1930 Cal 559 .

Proof of admission . - An admission may be proved in any of the ways in which a statement is permitted to be proved . The precise words of an admission are material and must be proved by primary evidence of a person who made the admission or any person in whose presence the statement was made may be examined . If the admission is contained in any document , it must be proved in any of the ways available under the Act for proving a document . The proof of admission is not open to the objection that it is hearsay . Where the full text of the speech is not available , but the maker of the speech admitted that the speech as reported in the newspaper does more or less tally with the views expressed by him . The report of the speech can be relied on to determine whether the maker of speech was guilty of corrupt practice mentioned in sub - section (3 - A) of Section 123 of the Representation of People Act , 1951.[1]

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Mode of proof of admissions . - Two questions arise (1) whether an admission must be taken as a whole ; (2) whether it should be put to a party making it . Admissions must be taken as a whole . - Where a statement , which is sought to be given in evidence forms

part of a larger statement , evidence shall be given of so much of the statement as is necessary to the full understanding of the nature and effect of the statement . (Section 39) . However , if there is other evidence in the case , the Court in the light of the evidence may believe it in part and disbelieve the rest .

Should an admission be put to the maker ? -On this point there is a conflict of views . It has been held in veral decisions that when an admission is sought to be given in evidence , it must be put to the party making it to enable it to explain the admissions . However , it is submitted that this view is untenable . The Privy Council decision in Bal Gangadhar Tilak v . Shriniwas Pandit , which is relied on is no authority for this view . In that case certain documents were used and inferences drawn from them by the Bombay High Court to discredit the evidence of the witnesses in the case , without these documents or inferences drawn from them being put to them . This was held to be contrary to Section 145 , which provides that when it is intended to contradict the witness by a previous inconsistent statement of his , his attention must be drawn to that part of the statement by which it is intended to contradict him . Section 145 does not apply to admissions . An admission is admissible proprio vigore and is given in evidence as substantive evidence and not for contradiction purposes . Further rule in Ude Bhan's case , offends against the well recognized rule that an admission shifts the onus and that it was for its maker to get rid of it by showing that it was untrue . Further it is an original evidence and not a hearsay and hence the maker need not be called at all . In Des Raj Faqir Chand v . Piarey Lal Avaram , a Full Beach of the Lahore High Court held that the rule as to confrontation does not apply when the person making the admission has not been examined as a witness or if examined , has not in his evidence stated anything inconsistent with his previous admissions but that if he has in his evidence said something inconsistent with or contradictory to his previous admissions he must be confronted with such admission and where this course is not adopted the previous admission is not admissible . An admission duly proved is admissible evidence irrespective of whether the party making it appears in the witness box or not and whether such party appearing as witness was confronted with those statements in case that party made a statement contrary to the admission . The purpose of contradicting the witness . under Section 145 of the Evidence Act is quite different from the purpose of proving the admission . Admission used against a party only

as a piece of evidence in partition suit and a finding arrived at , held , finding was not vitiated.

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1. Ebrahim Suleiman Saifor

. M.C. Mohammad , AIR 1980 SC 354 at p . 356 .

2. Ude Bhan v . Daulat Ram , 170 IC 315 . 39 Bom 441 .

3. Ude Bhan v . Daulat Ram , 170 IC 315 . 1946 Lahore 65 (FB)for

4. Ramji Dayawala & Sons (P.) Ltd. v . Invest Import , AIR 1981 SC 2085 at p . 2093 .

5 . Banarsi Das v . Kanshi Ram ,. AIR 1963 SC 1165 at p . 1169 .

6. State of Maharashtra v . Krishnamurti Laxmipati Naidu , AIR 1981 SC 617 at p . 623 ,

Oral admission section- 22 & 22A

Section- 22

When oral admissions as to contents of documents are relevant . - Oral admissions as to the contents of a document are not relevant , unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained , or unless the genuineness of a document produced is in question .

After Amendment, Section-22A

[**22 - A . When oral admission as to contents of electronic records are relevant** . - Oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.

Best available evidence must be produced; If Not, Adverse Presumption will be Taken

Generally, it is the duty of the party to lead the best evidence in his possession even though onus of proof do not lie on him, and he is not called upon to produce the said evidence; and the Court will draw adverse inference under Section 114(g) of the Evidence Act if such evidence is withheld.

But this rule cannot be applied blindly. Mere non-production of documents would not result in adverse inference, invariably (as shown below). Courts take into consideration the pleadings and decide whether the document/evidence withheld has any relevance. The court also cannot lose sight of the fact that burden of proof is on the party which makes a factual averment. The conduct and diligence of the other party is also important. Existence of some other circumstances may justify non-production (Union of India v. Ibrahim Uddin, (2012) 8 SCC 148).

1968 SC 1413)."

In Jitendra v. State of M.P (2003) our Apex Court observed that charas and ganja seized from the accused was the best evidence in that case and the non-production of the same in court was seriously taken note of by the court and observed that that mere oral evidence as to the same was insufficient.

"22. To invoke Section 106 of the Evidence Act, the main point to be established by the prosecution is that the accused persons were present in the hotel room at the relevant time. PW-1 Ram Singh-Hotel Manager stated that CCTV cameras are installed in the boundaries, near the reception, in the kitchen, in the restaurant and all three floors. Since CCTV cameras were installed in the prominent places, CCTV footage would have been best evidence to prove whether the accused remained inside the room and whether or not they have gone out. CCTV footage is a strong piece of evidence which would have indicated whether the accused remained inside the hotel and whether they were responsible for the commission of a crime. It would have also shown whether or not the

accused had gone out of the hotel. CCTV footage being a crucial piece of evidence, it is for the prosecution to have produced the best evidence which is missing. Omission to produce CCTV footage, in our view, which is the best evidence, raises serious doubts about the prosecution case."

Certified Copy alone Admitted as Secondary Evidence , Not Xerox Copy

Relying on Kalyan Singh v. Chhoti, AIR 1990 SC 396, the Madras High Court, in Ananthkrishnan V. K G Rangasamy, 2020-1 MadLW 355, observed that when a document was a registered one, the xerox copy of the same was not admissible as secondary evidence; and the court found it bad to create an equitable mortgage with xerox copy. The same view is taken by the Kerala High Court in Syndicate Bank v. Modern Tile and Clay Works, 1980 KLT 550. It is followed in Biju Paul Vs. Nedungadi Bank,2012-245 KerLR 291.

But, the AP High Court observed in G Balamani v. Parimi Manga Devi, 2019-4 ALD 401,

2019-3 CIVCC 590, 2019-4 ALT 203, that a valid equitable mortgage could be created by deposit of photostat copies of title deeds.

Non-Examination of Registrar

There is a presumption on registration of deeds. Therefore, the best evidence rule requires examination of Registrar when one seeks to rebut or displace the presumption. In Muruga Udayar v. Thirumalai Enterprises, 2011-3 LW 513, the Madras High Court took it seriously that the party, who raised dispute as to the execution of the agreement, did not

chose to examine the Sub-Registrar, for proving his case that he did not appear before the Sub-Registrar and put his signature towards registration.

Oral Evidence must be Direct; Hearsay Evidence, Inadmissible

As per the Evidence Act (Sec. 3), 'evidence' means and includes oral evidence and documentary evidence. As stated earlier, Sec. 59 of the Evidence Act says that all facts, except the contents of documents or electronic records may be proved by oral evidence. Sec. 60 directs that the oral evidence must be direct.

Oral Evidence on contents of Documents – No Use, Unless Secondary Evidence Permitted

Sec. 22 and 144 of the Evidence Act postulate that the oral admissions or assertions as to contents of documents are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under Sec. 65, or unless the genuineness of a document produced is in question.

Sec. 22 emphasises that oral evidence as to contents of documents , even if adduced, will be of no use, as it will be 'irrelevant'. By virtue of Sec. 144 of the Evidence Act, the adverse party may object to giving oral evidence as to contents of the same until such document itself is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Sec. 22 of the Evidence Act reads as under:

22. When oral admissions as to contents of documents are relevant.—Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to

prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

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1. Nursinghnath Deb v . Banamali Pande , AIR 1970 Orissa 218 at p . 221 .

2. Ram Naresh v . Board of Revenue U.P. , 1986 ALJ 157 .

3. Nagubai v . B. Shama Rao , 1956 SCR 451. See also K.S. Shrinivas v . Union . of . . . India , 1958 SCR 1295 .

4. Suraj Mal v . State (Delhi Administration) , AIR 1979 SC 1408 at p . 1409

5. Munji Singh v . Smt . Kalawati , 1984 ALJ 390 .

6. Jagabandhu Senapati v . Bhagu Senapati , AIR 1974 Orissa 120 at p . 126 .

7. Smt . Krishnawati v . Shri Hans Raj , AIR 1974 SC 280 at p . 283 .

CHAPTER-3

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES

. Entries in books of account when relevant . - Entries in the books of account , regularly kept in the course of business , are relevant whenever they refer to a matter into which the Court has to inquire , but such statements shall not alone be sufficient evidence to charge any person with liability .

Illustration

A sues B for Taka 1,000 , and shows entries in his account books showing B to be indebted to him to this amount . The entries are relevant , but are not sufficient , without other evidence , to prove the debt .

Section 34. After amendment 2022

Scope of Sections 34 to 38. - This is the fourth set of provision dealing with relevancy of facts . They consist of statements made under special circumstances . This block of sections deals with two general classes of statements (1) Entries in books of account , regularly kept in the course of business , Section 34 , and (2) entries in public documents , Sections 35 , 36 or in documents of a public nature , Sections 37 , 38. They are relevant as statements made under special circumstances , whether the maker thereof is a party to the suit or not or whether he is examined as a witness or not , These are made admissible because the special character and the special circumstances under which they are made afford a guarantee for the truth .

34. Entries in books of account when relevant . - Entries in the books of account [including those maintained in or digital record] , gularly kept in the course of business , are relevant whenever they refer to a matter into which the Court has to inquire , but such statements shall not alone be sufficient evidence to charge any person with liability .

Illustration A sues B for Taka 1,000 , and shows entries in his account books showing B to be indebted to him to this amount . The entries are relevant , but are not sufficient , without other evidence , to prove the debt .

Sections 34 to 37 are placed under the heading "statements made under special circumstances".

Section 34 of the Act (as amended by Act 21/2000) reads as follows:

"Section 34: Entries in books of account when relevant.- Entries in the books of account [including those maintained in an electronic form] regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

There is an illustration below section 34, which reads as follows:

"Illustration: A sues B for Rs.1000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence to prove the debt."

In the 69th Report of the Law Commission, in Chapter 13, under the heading "Entries in Books of Account", the section has been critically examined. Part I of the chapter is 'Introductory', Part II contains the 'previous law', Part III refers to 'English Law and Roman Law', Part IV with 'corroboration', Part V with 'Interpretation and Procedure', Part VI contains the conclusion (see para 13.27).

Reference was made to the language in the corresponding section of the Evidence Act of 1855 and to section 43 therein which was in different language:

"Section 43. Books proved to have been regularly kept in the course of business, shall be admissible as corroborative but not as independent proof of the facts stated there"

It was pointed out that the present Act uses the words 'proved to have been regularly kept' for the words 'regularly kept' used in the Act and that there is a change in the law, as pointed by Markby J. in Belaet v. Rash Beharie: (1874) 22 W.R. 549.

Reference was made to the provisions of section 54 of the (English) Chancery Practice Amendment Act, 1852 which made entries 'prima facie' evidence and to the practice of 'supplementary oath' under the Roman law (see also Or. 30. R7 of the Supreme Court Rules, added in 1894) (Sarkar, 15th Ed., 1999 p. 756).

Under the present Act, books of account, according to the 69th Report (see para 13.16), when not used to charge a person with liability (civil or criminal) may be used as independent evidence without the need for any further corroboration but when sought to make any person liable, the books would require corroboration (see Sarkar, ibid p. 758). Other evidence may be that of the maker of the entry or for that matter, any 'fact' relevant under the Evidence Act (para 13.17).

It was pointed out that entries in books of account could be relevant under other provisions of the Act also, e.g. section 32(2) as statements made by a person in the ordinary course of business or under section 159, to refresh the memory of a witness, if the entry has been made by that witness himself and relates to some transaction concerning which he is now giving evidence.

Absence of an entry in the book is not relevant under section 34 but can become relevant under sections 9 and 11.

The 69th Report concluded by stating (see para 13.27) that section 34 did not require any substantial amendment except for a verbal change by substituting the words "such entries" for the words "such statement".

In the Hawala case which went up to the Supreme Court CBI v. V.C. Shukla AIR 1998 SC 1406, which more or less affirmed the judgment of the Delhi High Court in L.K. Advani v. CBI (1997) Crl LJ 2559, the section came under elaborate scrutiny. In that case, the verdict in favour of the accused was based in the High court, upon the conclusion that the alleged entries in diaries were mere entries kept by a person as a memorandum and there were no debit or credit entries and were not account books falling under section 34.

The Supreme Court, on appeal, observed that spiral pads and spiral note books is a book of account but not loose sheets of papers contained in a file. The court however observed that it was not necessary that the entry should be made at or about the time the related transaction

took place so as to pass the test of having been 'regularly kept'. Again, activities carried on continuously in an organized manner with a set purpose to augment one's own resources may amount to 'business'.

The Privy Council had occasion to interpret section 34 of the Act and the corresponding provision under the 1855 Act, in Bhoy Hong Kong v. Ramanathan: ILR 29 Cal 334 = 29 IA 43; Jaswant v. Sheo Narain, 21 IA; Ganga Prasad v. Inderjit, 23 WR 390; Rajeshwari v. Bal Kishen, 14 IA 142; Dy. Commr. v. Ram Prasad, 26 IA 254; Dwarkadass v. Janki Dass, 6 MIA 88; Imambandi v. Mota Suddi, AIR 1918 PC 11; Gopal v. Sri Thakurji, AIR 1943 PC 83; Sorabjee v. Koonmarjee, 1 MIA 47; Seth Lakshmi v. Seth Indra, 13 MIA 365; Srikishen v. Harikishen, 5 MIA 432; Mulka v. Tekaeth, 14 WR 24 (PC); Seth Maganmal v. Darbari Lal, AIR 1929 PC 39; Farraquharson v. Wwarka, 14 MIA 259.

The Supreme Court of India too had occasion to deal with this section. We have already referred to CBI v. V.C. Shukla, AIR 1998 SC 1406.

In State Bank of India v. Ramayanapu Krishna Rao: (AIR 1995 SC 244), the Supreme Court observed that the certified copy of ledger accounts maintained in the regular course of business is admissible under section 34 and can be used as a piece of evidence corroborating any substantive evidence on record indicating liability if any. That was a case of a Bank. Otherwise, ordinarily, in courts, entries in a Day Book, contained in the regular course of business are given greater evidentiary value than mere entries in ledgers. Earlier, in Mahasay v. Narendra: AIR 1953 SC 431, the Supreme Court stated that loose sheets of account have not the same probative force as books of accounts regularly kept.

No particular form of books of account is generally prescribed, although books are far more satisfactory when kept in the form of daily entries of debits and credits in a day book or journal. But it must be a regular account-book as would explain itself and as appears on its face to create a liability in an account with the party against whom it is offered, and not to be a mere memorandum for some other purpose.

Hence, mere loose sheets of papers are not admissible and a single entry does not constitute an account book (Jones, section 575). Books of account must be held to have been proved even in the absence of their being written, upon proof of their being properly maintained and kept: Ramjanki v. Juggilal: AIR 1971 SC 2551. Where a debit entry at the end of a page showed sale of certain goods written closely in a cramped manner and in a different ink, it was not accepted: Venkata Mallayya v. Ramaswami & Co.: AIR 1964 SC 818.

In S v. Ganeswara: AIR 1963 SC 1850, it was held that the entries, though relevant, are however, not by themselves sufficient to charge anyone with liability. The entry in A's account books, though in his own favour as a piece of evidence may be taken into consideration along with the evidence of A that the amount was paid by A to B. In Chandradhar v. Gauhati Bank, AIR 1967 SC 1058, it was held that mere entries in Banks books of account or copies thereof are not sufficient to charge a person with liability except where the person concerned accepts the correctness of entries. In Dadarao v. State, AIR 1974 SC 388, it was held that mere entries of account are not sufficient evidence of entrustment so as to substantiate a plea of breach of trust, AIR 1974 SC 388.

Non-existence of entry in books of account was held to be relevant under sections 5 and 11 in State v. C. Ganeswara: AIR 1963 SC 1850. In State Bank of India v. Yammam Gouramani Singh: AIR 1994 SC 1644, it was held that entries in books of account corroborated by the evidence of the Branch Manager and other bank officials was sufficient proof of the loan transaction.

It may here be noted that for Banker's Books, special provision is made in the Banker's Books Evidence Act (19/1889 as amended by Act 12/1900). It has also been amended by the Information and Technology Act (21/2000). After Barker v. Wilson: 1980(1) WLR 884, regarding the applicability to 'microfilm' of Banker's Books, the same has been given legislative approval by Banking Act, 1987; Trust Savings Banks Act, 1981; Building Solicitors Act, 1986. 'Banker's Books' now include (i) ledgers (ii) day book (iii) cash books (iv) account books (v) other records used in the ordinary business of the Bank whether those

records are kept on microfilm, magnetic tape or any other form of mechanical data retrieval mechanism. As to entries, see also section 54 of the Indian Companies Act (1/1956), Or 7 CPC.

In England, it has been held that a person's medical record kept by a National Health Service Hospital is not 'a record relating to trade or business' within section 1(1)(a) of the (English) Criminal Evidence Act, 1965 (See R v. Caryden 1978 (2) All ER 700 (CA)). However, under that Act, Bills of Lading and cargo manifest have been held to be business records (R v. Sullivan: 1978 (2) All ER 718 (IA)).

Having considered the above case law and other aspects, we do not think any further amendment of section 34 is needed. We, therefore, agree with conclusion in the 69th Report (see para 13.27 of 69th Report) that the words "such statements" be substituted by the words "such entries".

COMMENTARY

Principle . The principle in Section 34 is that entries made regularly in the course of business are presumed to be accurate and truthful because in such cases the author has full knowledge , no motive for fraud and hence there is very strong probability of truth . According to Wigmore the two principles involved are , viz . , the necessity principle and the circumstantial guarantee of trust worthiness . Section 21 enacts the general rule that man cannot make evidence for himself and hence excludes from evidence admissions in one's own favour , but Section 34 makes the entries in regularly kept books of accounts admissible in favour of the maker even in his lifetime . Thus it is an exception to Section 21 .

Scope . This section lays down the relevancy of entries in account books and their probative value . It provides that (1) entries in books of accounts regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to inquire and hence admissible , (2) but such entries though admissible are not alone sufficient to charge a person with liability , unless corroborated by the evidence . Thus the section seeks to avoid the dangerous consequence of admitting this self serving kind of evidence by declaring that such

entries are not conclusive by themselves and call for corroboration which depends on the circumstances of each case . The section , by way of safeguard , further lays down also the probative value of such entries .

English Law . - Under the English Law such entries are not admissible as violating the rule that no man shall be allowed to manufacture evidence in his favour . They are admissible , if shown to be made contemporaneously with the acts to which they relate .

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1. Maqboolan v . Ahmad Hussain , 31 IA 38 .

2 . Mehar Singh v . Mahendra Singh , AIR 1987 Delhi 300 (DB)

3. Foolkissory Dassee v . Nobin Chander Bhunjo , 23 Cal 441 .

4 . Ins . by Act 21 of 2000 , S. 92 and Seh . II (w.e.f. 17.10.2000) .

5 . Gopeswar Sen v . Bejoy Chand Mahtab , 55 Cal 1167 .

6 . Ram Peyarabhai v . Balai , 28 Bom 249 .

section 34 and section 32(2).- Accounts admissible under Section 34 require corroboration in order to charge any person with liability ; whereas those relevant under Section 32 (2) are in them selves sufficient evidence and it is not necessary that they should be corroborated as a matter of law.[2]

Accounts relevant under other sections also . - An entry in a book of account may become relevant also under Section 2 if it is against the interest of maker and requires no corroboration as under Section 34. The entry may be used as substantive or independent evidence under Section 32 (2) , or may be used to contradict (Section 145) or to corroborate the testimony (Section 157) , or to refresh the memory of the witness under Sections 159 , 160. Entries in an account book written by an agent will be admissible against the party as admissions . ! If

account books are suspicious they cannot be relied upon . In this regard , See Halsbury's Laws of England , Fourth Ed .

Ingredients of Section 34. - To make an entry in an account book relevant under Section 34 it must be shown that , (1) the entry kept in the course of business . is in a book , (2) the book is a book of account , (3) the book is regularly kept in the course of business.

Books of Accounts section 34. - The word ' book ' signifies a lection of sheets of papers bound together . Loose shects or unstitched sheets of paper have no probative force of a book of account . To account is to reckon , hence a book containing successive entries of items may be a good memorandum book , until these entries are totalled or balanced or both , there is no reckoning and consquently no accounting

Hotel register - not Books of accounts " .- The Supreme Court observed that the Sessions Court and the High Court have concurrently held that those circumstances were well established with reliable evidence . The first wa proved by a register of Hotel Sanjay in which there is an entry made on 24.2.1994 that a person who styled himself as " Ramesh Chander Sharma " had stayed in the hotel and the testimony of the hand - writing expert stating that the hand which wrote the said entry was that of Manish Dixit . Section 34 of the Evidence Act contains a rider that " such statements shall not alone be sufficient to charge any person with liability . The rider primarily pertains to pecuniary transactions . A register kept at the counter of a hotel is not covered by the expression " books of accounts " . The other circumstance is that even it is presumed that a register kept in a hotel can be treated as a book of accounts , the entry therein cannot become the sole premise to charge a person with liability , Why did A - 2 write a name in the register on a date which was the date immediately following the date of murder of Gulshan Makhija . He only knows why he did so . In the absence of any explanation

from him it is open to the court to draw an inference that A - 2 had some reasons to conceal his identity from the hotel people and hence he wrote a pseudonymous name in the register

Section 35.

Relevancy of entry in public record made in performance of duty . - An entry in any public or other official book , register or , 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 , or record for an electronic record] is kept , is itself a relevant fact .

After amedment Section 35.

Relevancy of entry in public record made in performance of duty . - An entry in any public or other official book , register or record or digital 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 , or record for an electronic record] is kept , is itself a relevant fact .

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1 . Nanilal v . Nutbehari , 28 CWN 861 .

2. Siddalingappa v . .M . C . Moben , AIR. . 1978 Kant 10 .

3.See P it Ram Singh v . Vimla Devi , AIR . 1992 Raj 149 (p 152) .

4. Ganesh Prasad Ray v . Nurendra Nath Sen , AIR 1953 SC 34 .

5. Manish Dixit v . State of Rajasthan , [2001) 1 SCC 596 .

COMMENTARY

Principle . The entries in public records made in performance of duty are relevant . This section is also an exception to the hearsay rule . The general ground for reception of this evidence is that the statement documents are made by authorised and accredited agents of the public under the sanction of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community . The law reposes such confidence in the public officers that it presumes they will discharge their several trusts with accuracy and fidelity . The principle is that it should be a public enquiry , a public document and made by a public officer in performance of a public duty or a duty specially enjoined by the law . " (Lord Blackburn).

Scope - Three conditions must be satisfied to render a document admissible under Section 35 :

(1) The entry relied upon must be in any public or other official book , register , or record ;

(2) It must be an entry stating a fact in issue or a relevant fact ;

(3) It must be made by a public servant in the discharge of his official duty , or by any other person in the performance of a duty specially enjoined by law .

ection 35: 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."

There are no illustrations below the section.

In the 69th Report, this section is referred to in Chapter 14. Part I thereof is introductory, Part II refers to English law, Part III to 'two classes of entries', Part IV to 'illustrations' with reference to case law, Part V to 'other provisions' and Part VI to 'Recommendations'. The recommendation is only one of form, namely, that the entry which must be made in performance of a statutory duty is applicable only to the latter-half of the section. Under the earlier part of section 35, the emphasis is only on "public or official character" of the entry and not to its statutory character. The section is split up into clause (a) and clause (b) as stated below (see para 14.20 of that Report). In other words, the clause 'specially enjoined' does not qualify public servants.

'Public servant' is defined in section 21 of the Indian Penal Code. Entries must have been made by a public servant or by a person so enjoined by a law. The acts or records of 'public functionaries' are dealt with in section 74 as 'public documents'. The entry under section 34 may be regarding a fact in issue or a relevant fact.

The section is based upon the assumption that public officials must have performed an official duty correctly and that the entries made by persons statutorily enjoined also do it correctly and

after lapse of several years, they may not be available to give evidence. Section 35 refers to book, register or record.

Public register or record kept outside India or under foreign law are within section 35 as decided by case law. The duty may be enjoined by Act or Rules.

First information taken under section 154 Code of Criminal Procedure, 1973 amounts to an entry by a public servant in the discharge of his official duty and falls within section 35 but it is not substantive evidence and is not evidence of facts it mentions. It can be used merely by way of previous statement for corroboration (section 157 of Evidence Act) or contradiction (Section 145 of Evidence Act) (Hasib v. State: AIR 1972 SC 283).

Absence of an entry does not fall within Section 35 but may fall under Section 9 or Section 11.

There are a large number of decisions of the Privy Council under Section 35. There are also a large number of a decisions of the Supreme Court rendered before 1977 when the 69th Report was submitted and between 1997 248 to 2002. We are not referring to them in as much as some of them apply the provisions of Section 35 to make certain record, register relevant and some not.

See in this connection Section 7 of the English Civil Evidence Act, 1968 (Phipson, 15th Ed, 2000 Chapter 36 and para 44.85 at p. 1321-1322).

Suffice it to say that we agree with the recommendation in the 69th Report (see para 14.20) that Section 35 be revised with slight modification as follows:

"35. Relevancy of entry in public record or in electronic record made in performance of public duty .- An entry in any public or other official book, register, record or electronic record stating a fact in issue or relevant fact, and made by:

"(a) a public servant in the discharge of his official duty, or

(b) any other person in performance of a duty specially enjoined by the law of the country in which such book, register, record or electronic record is kept, is itself a relevant fact."

. 1. Mohan Lal Bodh Raj v . Dwarka Nath , AIR 1985 JK 85 .

2.Siddalingappa v . M.C. Moben , AIR 1978 Kant 10 .

3. Sturla v . Freccia , 5 AC 643 .Ishwar Dass v . Sohan Lal , AIR 2000 SC 426 .

4 . Ins . by Act 21 of 2000 , s . 92 and Seh . II (w.e.f. 17.10.2000) .

5. Tarak Chandra Chakraburty v . Prosanna . Kumar Saha , 1924 Cal 654 .

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Section 36 before amendment

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 Government , as to matters usually represented or stated in such maps , charts or plans , are themselves relevant facts **.**

Section 36. After amendment 2022

Relevancy of statements in maps, charts 2[, plans and digital record]

Statements of facts in issue or relevant facts, made in published 3[maps, charts or digital record] generally offered for public sale, or in 4[maps, plans or digital record] made under the authority of the Government, as to matters usually represented or stated in such 5[maps, charts, plans or digital record], are themselves relevant facts.

COMMENTARY

Principle . Section 35 deals with public records , while Section 36 deals with particular clauses of documents , viz . , maps , charts and plans .

Scope . This section deals with two classes of maps (1) The maps or charts generally offered for public sale , which may be called quasi public documents , and (2) maps and plans made under the authority of Government . The admissibility of the former depends on grounds similar to those on which a Judge may refer to a dictionary or to a historical work under Section 57. The public maps being accessible to the whole community and open to the criticism of all the probabilities are in favour of any inaccuracy being challenged and exposed . The admissibility of the latter rests upon the ground that such documents contain the results of enquiries made under competent authority and concerning matter in which the public is interested . (Taylor's Evidence , Section 1767) .

Plans made under the authority . - Under Section 83 the Court shall presume that maps or plans purporting to be made by the authority of Government were so made and are accurate ; but maps or plans made for the p urpose of any cause must be proved to be accurate . When the sale of copies of maps printed by Government is stopped and a copy is sold to a party by mistake , the copíes are inadmissible , e.g. , Rennel's map . ?

Section 36

Section 36. refers to relevancy of statements in maps, charts and plans and reads (as amended in 1948, 1950) as follows:

"Section.36: Statement 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, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts."

In the 69th Report, it was pointed out firstly (see para 14.32) that the words 'maps or plans or charts' must appear in the first and second parts of Section 36. As at present, in the first part which refers to those offered for public sale, 'plans' are not included while in the second part which refers to those made under the authority of Government, 'charts' are not included. Secondly, it was stated (see para 14.34) that the opening part of the section which refers to "statements of facts in issue or relevant facts" is governed by the words in the latter part, namely, "as to matters usually represented or stated" and that this idea must be prominently brought out by suitable amendment.

In this context, we may refer to Ram Kishore Sen v. Union of India, AIR 1966 SC 644 and Dharam Singh v. State of UP, 1962 Suppl (3) SCR 769 to the effect that the section deals with relevancy only of matters 'usually represented or stated' by such plans, maps or charts and not if such plans or charts or maps are prepared for the specific purpose of a litigation between the Government and a particular person. In that event, the facts stated in the plans or charts or maps will have to be established by the Government independently.

We may add that under Order 26 R10, Code of Civil Procedure, 1908, a map prepared by a Commissioner who makes a local investigation is by itself evidence.

We do not think it necessary to accept the second part of the recommendation of the 69th report. Further, the words "as to matters usually represented or stated" cannot easily be particularized.

We, therefore, recommend, that the recommendations made in the 69th report be accepted by referring to the words 'maps, charts and plans' in both parts of Section 36 and further Section 36 may be recast as follows:

"36. Relevancy of statements in maps, charts and plans.- Statements of facts in issue or relevant fact.-

(a) made in published maps, charts or plans generally offered for public sale; or

(b) contained in published maps, charts or plan 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 relevant facts."

Survey Maps . - Maps and surveys in India for revenue purposes are official documents made by competent persons and with such publicity and notice to persons concerned as to be admissible in evidence and to be valuable evidence of the state of things at the time they were made . They are good but not conclusive evidence of possession.

CHAPTER-4

HOW MUCH OF A STATMENT IS TO BE PROVIDED

Before Section 39

What evidence to be given when statement forms part of a conversation , document , 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 of a connected series of letters or papers , evidence shall be given of so muchand no more of the statement , conversation , document , book of 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 .

After amendment of section 39

What evidence to be given when statement forms part of a conversation, document, 2[book, digital record] 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 3[forms part of a book, or of part of a digital 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, book of 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.

Section 39

This single section is dealt with under the heading 'How much of a statement is to be proved'. It reads as follows (as amended by Act 21/2000):

"Section 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 an 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."

In a very interesting discussion, the 69th Report, reviewed the corresponding English and American law on the subject and suggested some 'improvements' to this section. While a party should be restricted to 'so much' of the "statement, conversation, document, electronic record, book or series of letters or papers", the question is whether the words "as the Court considers necessary" gives a discretion to the court and if so, to what extent? The more important question is whether the opposite party has a 'right' to place the entire statement, conversation, document etc. before the court, for a proper understanding of the "nature and effect" of the statement etc.

The section deals with two interesting situations, namely, (i) that a party should not be allowed to place before court wasteful or inadmissible parts of a statement, conversation etc. and (ii) that he does not rely on a truncated parts of the statement, conversation etc.

The proposed 'improvement' concerns this second aspect and the need to provide a right to the opposite party. Taylor states (Section 733) that basically if a part of a conversation is relied upon as an admission, the adverse party can give evidence only as to so much of the same conversation as may explain or qualify the matter already before the court. But, there are exceptions. Sarkar (15th Ed, 1999 p.814) refers to the decision of Abbot CJ in Queen's case (1820) 2 B&B 297 where the learned Judge refers to conversation which a witness may have had with a party to the suit and one with a third person.

In the first case, if the conversation with a party to the suit is itself evidence against him (the party), then the party has a right to lay before the court the whole of the conversation and not merely so much as may explain or qualify the matter introduced by the previous examination, but even matters not properly connected with the part introduced in the previous examination, provided it related to the 'subject matter of the suit'. On the other hand, as held in Prince v. Samo: 7 Ad&E 627, if it is the case of a non-party witness who has given evidence, he cannot be cross-examined with respect to other unconnected assertions of the plaintiff.

Sarkar (p.814-815) also quotes Wigmore (para 2113) to say that the "opponent against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal, a complete understanding of the total tenor and effect of the utterance. There is much opportunity for difference of opinion whether the proponent in the first instance must put the whole.

But there is and could be no difference of opinion as to the opponent's right, if a part only has been put in, himself to put in the remainder". This is subject to three conditions (a) No utterance irrelevant to the issue is receivable; (b) No more of the remainder of the utterance that concerns the same subject and is explanatory of the first part, is receivable; (c) The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.

Sarkar (see p.815) quotes Norton (pp.203-204) to say that the judge is therefore a referee, by whose decision is limited the quantity of the document etc. containing the statements which shall be put in evidence. His discretion is to be guided by the principle of letting so much, and so much only as makes clear "the nature of the effect of the statement and the circumstances under which it was made".

In the 69th Report, it is stated (see para 15.10) that while the principle has been adequately reflected in Section 39, "the section could be improved in one respect, by an express provision spelling out the rights of the opposite party."

The Report then quotes Section 1854 of California Code as follows:

"When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the subject may be enquired into by the other; thus, when a letter is read, the answer may be given, and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation or writing which is necessary to make it understood may also be given in evidence."

The Montana Code provides in Section 3130:

"When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be enquired into by the other; thus, when a letter is read, all other matters on the same subject between the parties may be given."

The 69th Report then states (see para 15.14 and 15.20) that it is not as if Section 39 gives a discretion to the court. It uses the words 'court considers it necessary'. The Report refers to police diaries and then to the Full Bench decision of the Allahabad High court in Queen Empress v. Mannu (1897) ILR 19 All 390 (para 15.27) where the majority treated the section as giving a 'discretion' while the minority view of P.C. Banerji J was that the accused had the right which he may use at his discretion. The point here was examined from the point of view concerning use of 'police diaries' by the prosecution for 'refreshing memory'.

Section 172 of the Code (Criminal Procedure Code, 1898) provides that if a police officer used a diary to refresh his memory, the Evidence Act would apply, bringing into effect Section 161 of the Evidence Act and also Section 145. Section 161 Evidence Act reads as follows:

"Section 161. Right of adverse party as to writing used to refresh memory: Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon."

Section 145 reads as follows:

"Section 145: Cross-examination as to previous statements in writing: A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

The 69th Report says that the majority in the Allahabad case while holding that the court has a 'discretion' did not refer to Section 161 and 145 of the Evidence Act. The Report, therefore, recommended that a subsection be added in Section 39 that where a party has failed to give evidence, any part of the statement, conversation etc. which is necessary, as aforesaid, the other party may give that part in evidence. The proviso in the existing Section 39 'as the court considers necessary' is to be deleted. Discretion of the court is substituted by discretion given to the other party. Section 39 is split up into two subsections and a revised Section 39 is recommended as follows (the underlined words are new):

"39. (1) When any statement of which evidence is give.-

(a) forms part of a longer statement or of a conversation or part of an isolated document, or

(b) is contained in a document which forms part of a book or of a connected series of letters or papers,

then, subject to the provisions of subsection (2), the party giving evidence of the statement shall give in evidence so much, and no more, of the statement, conversation, document, electronic record, book or series of letters or papers as is 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.

(2) Where such party has failed to give in evidence any part of the statement, conversation, document, electronic record, book or series of letters or papers which is necessary as aforesaid, the other party may give that part in evidence."

We agree with the above recommendation subject to the further amendment consequent to Act 21/2000 by adding the words 'or is contained in part of electronic record' after the word 'book' in proposed clause (b) of subsection (1) and later adding the words 'electronic record' after the word 'document' in the same subsection (1). We also recommend that the words 'electronic record' be added after the word 'document' in proposed subsection (2) also.

The revised section 39 should read as follows

CHAPTER-5
OPINIONS OF THIRD PERSONS,WHEN RELEVANT

Before section 45

Opinions of experts :

When the Court has to form an opinion upon a point of foreign law , or of science , or art , or as to identity of hand writing or finger impressions , the opinions upon that point of persons specially skilled in such foreign law , science or art , or in questions as to identity of handwriting or finger impressions are relevant facts . Such persons are called experts .

(a) The question is , whether the death of A was caused by poison . Illustrations The opinion of experts as to the symptoms produced by the poison by which A is supposed to have died , are relevant .

(b) The questions is , whether A , at the time of doing a certain act , was , by reason of unsoundness of mind , incapable of knowing the nature of the act , or that he was doing what was either wrong of contrary to law .

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind , and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do , or of knowing that what they do is either wrong or contrary to law , are relevant .

(c) The question is whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

Night Mode To The opinions of experts on the question whether the two documents were written by the same person or by different persons , are relevant .

section 45

Opinion of Experts

When the Court has to form an opinion upon a point of foreign law, or of science, physical or forensic evidence or digital record, or art, or as to identity of hand writing or finger impression or footprint or palm impression or iris impression or typewriting or usage of trade or technical terms or identity of person or animal, the opinion upon that point of person specially skilled in such foreign law, science, physical or forensic evidence or digital record or art, or in questions as to identity of handwriting or finger impression, footprint, palm impression, typewriting, usage of trade, technical term or identity of person or animal, as the case may be, are relevant facts.

Such persons are called experts.

Illustrations

(a) The question is, whether the death of A was caused by poison.

The opinion of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The questions is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.(c) The question is whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.]

Opinion of experts on physical or forensic evidence

2[45A. (1) Except by leave of the Court a witness shall not testify as an expert on physical or forensic unless a copy of his report has, pursuant to sub-section (2), been given to all the parties.

(2) An expert's report shall be addressed to the Court and not to the party on whose behalf he is examined and he shall owe a duty to help the Court.]

Who is an expert ? -Section 45 defines an expert as a person specially skilled in foreign Law , etc. The test of judging the competency of an expert as put by Lord Russell is this : " Is he peritus ? Is he skilled ? Has he adequate knowledge ?

An expert is a person who has special knowledge and skill in a particular calling to which the inquiry relates . (Lawson on Expert Testimony , Second Edition , 229) .

Difference between expert and non - expert witness . - Like a non expert witness the testimony of an expert need not confine to actual facts and he may give evidence on facts as

stated by other witnesses , e.g. , a doctor who might not have seen the patient personally can opine as to the cause of his death on facts deposed . He may cite text books in support of his opinion or to refresh his memory (Section 159) . He may speak about experiments made by him in absence of parties (illustration to Section 51) . He may depose to facts relating to other cases of similar nature .

The opinion of an e xpert witness , however eminent in his field he may be , must not be read as conclusive of the fact which the Court has to try . However , evidence of eminent literary persons as experts can be relied upon . Recitals in books are not sufficient guide for testing the correctness of the evidence of an experts

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1 . " Peritus virtute official " , i.e. , the holder of some official position which requires and , therefore , presumes a knowledge of that law .

2. U.S. Shipping Board v . The Ship " St. Albans " , 1931 PC 189 .

3. Kamala Kuer v . Ratan Lal , AIR 1971 All 304 .

4. Samaresh Basu v . Amal Mara , 1985 SCC (Cr) 523 .

The competency and credit of an expert . - Under Section 45 the evidence of an expert can be led on a question of foreign law , etc. , to enable the tribunal to come to a satisfactory conclusion (Powell , Tenth Edition , 39) . It is for the Court to decide the competency or fitness of a witness . The test is to see if the witness is sufficiency qualified by experience . His credit can be challenged by cross - examination , or by the contrary evidence of another expert or by showing that he had expressed a different opinion on the same question previously or in any of the modes allowed under Sections 146 to 153 and 155 to impeach the credit of a witness generally . The questions put to an expert are generally hypothetical as they assume something for the time being . An expert witness must himself come and give evidence in court . His certificate cannot go in automatically without proof , unless permitted by statutory exceptions like Section 509 (Medical Certificate) , or Section 510 or the Code of Criminal Procedure (Report of the chemical analyst) .

Age of the victim . - In a case a doctor fixed up the age of a girl at 10 years on the date of her examination . This was testified to by the doctor on the strength of clinical examination

conducted by him . But the doctor did not conduct other ossification test or any other pathological tests to reach at least the approximate age of the victim . The Supreme Court held that the doctor's assessment regarding age is based on fragile premises .

Foreign Law . - Law which is not in force in India is foreign law . In England it can be proved by leading expert evidence . In India it may be proved the same way under Section 45 or by production of official books and reports on foreign Law under Section 38. Foreign Law is a question of fact . Hindu Law and Mohammadan Law are laws of the land and it is the duty of the Court to interpret the law of the land and hence the opinions of experts , however learned , are irrelevant .

Science or art . - Davis , J. , observed : " Art in its legal significance embraces every operation of human intelligence whereby something is produced outside of nature ; and the term Science includes all human knowledge which has been generalised and systematised , and has obtained method , relations and the forms of law . The expressions science or art includes all subjects on which a course of special study or experience is necessary to the formation of an opinion

The words " science or art " are to be broadly construed , the term ' science ' not being limited to higher sciences and the term ' art ' not being limited to fine arts ; but having its original sense of handicrafts , trade , profession and skill in work , which with the advance of culture , has been carried beyond the sphere of common pursuits of life into that of artistic or scientific action . To determine whether a particular matter is of a scientific nature or not , the test to be applied is whether the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without the assistance of experts , and whether it so far partakes of the character of a science or art as to require a course of previous habit or study in order to obtain a competent knowledge of its nature . (Taylor , Section 1418) . The study of customs and manners of tribes and castes may come within " Science or Art .

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1 . Piara Singh v . State of Punjab , AIR 1977 SC 2274 1979 MLJ (Cr .) 186 : see R. Saraswethy v . P. Bhavathy Ammal , AIR 1989 Ker . 228 .

2. Gopeswar v . Biseswar , 16 CWN 265 285 .

3. See new Criminal Procedure Code , 1973 .

4. Kamal Kishore v . State of Himachal Pradesh , AIR 2000 SC 1920 .

5. Khoday Gangadhara Sah v . Swaminath Mudali , 1926 Mad 218 .

6. Aziz Bano v . Mohammad Ibrahim Hussain , 47 All 823 .

7. Aitchison & Co. , R. R. Co. v . U. S. , 15 Ct . of Claims 140 .

Medical experts . - Medical men are constantly allowed to give their opinions as to causes of disease and death , the effect of poison , the nature of wounds the conditions of gestation , etc. The deposition of a medical officer in court and his report is the evidence . A mere post - mortem report is no evidence , no facts could be taken from it.[2]

There is no fixed method of determining the time for which a dead body has been under water . Various factors like age and sex of deceased or temperature and velocity of the current of water affect the body.[3]

Medical evidence is not so perfect as yet to determine the exact time of death nor can the same be determined so as to be accurate to the last second .

Identity of the corpus delicti . - The Supreme Court observed that there was overwhelming evidence to show that the dead body on which autopsy was conducted was that of the victim . The sister of the victim who saw the dead body before it was cremated did not have any doubt that it was her brother . The nephew of the victim identified it as being of his uncle in the hospital . The specialist in Forensic Medicine who conducted the post - mortem examination did not find any evidence of circumcision on the dead body . Another doctor only a stripling in the profession who had just completed his internship deposed that the foreskin of gland penis was rolled back . The Supreme Court observed that it did not think that such a slipshod observation regarding such a vitally important identification mark can be

taken as a seriously observed feature particularly when the senior doctor did not observe any such thing . Similarly the age estimated by this novice medical practitioner without conducting any medical tests in that regard is hardly sufficient to conclude that the dead body was that of a person aged 40. Even otherwise the approximation of age made by looking at the dead body is not enough to offset the age spoken by the kith and kin of the deceased . The Supreme Court held that plea that the identity of the corpus delicti was not established cannot be allowed.

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1. Mahadeo v . Vyamkemmabai , 1948 Nag 297 .

2. Ramsarup , 6 CWN 98 .

3. Haribandhu v. State of Orissa , ILR (1972) Cut 1181 1972 Cut LR Cr 526 (1972) 38 Cut LT 1044 .

4. Pattipati Venkaiah v . State of A P .. AIR 1985 SC 1715 (1716) (1985) 2 Crimes 146 (148) (1985) 4 SCC 80 .

Determination of time of death . - The evidence of two doctors indicated that the occurrence took place at night and not in the morning between 6 to 7 a.m. P.W. 2 who conducted the autopsy on the dead body in examination chief deposed that the death was possible on 6.9.1977 at 7 and 7 % a.m. But in his cross - examination he deposed that it may be possible that death occurred in the mid night of 5 / 6-7 . 1977. Similarly P.W. 4 another doctor deposed in examina - tion chief that the injuries could be caused on 6.9.1977 between 6-7 a.m. but in cross - examination deposed that injuries could have been caused at any time after 10 a.m. The Supreme Court observed that by no stress of imagination it can be held that the occurrence did not take place between 6-7 a.m. on 6.7.1977 . The Supreme Court agreed with the High Court that it is well known that doctor can never be absolutely certain on the point of time so far as duration of injuries are concerned .

Value of medical evidence . - Expert evidence should be approached with considerable care and caution . An expert witness however impartial is naturally biased in favour of the party who calls him . He is often called by one side simply and solely because it has been ascertained that he holds view favourable to its interest.[1] Norman , J. , observed " The evidence of a medical man or other skilled witness , however eminent , as to what he thinks may or may not have taken place under a particular combination of circumstances however confidently he may speak , is ordinarily a matter of mere opinion . Human judgment is fallible , human knowledge is limited and imperfect . New and previously unobserved

phenomena , which till they have been recorded are supposed to be impossible are constantly being noticed " . The Supreme Court of India held that the Court should not rely upon medical text - books to discredit medical evidence , without putting these passages to the medical witness . Medical evidence is not direct evidence and the value of such evidence lies only on the extent to which it supports and lends weight to the direct evidence of eye - witnesses or contradicts that evidence and removes the possibility that the injury could take place in the manner alleged by those witnesses . The opinion of the Court itself untrained in medicine , and without expert assistance on questions of medicine is valueless.[2] The opinion of a doctor is entitled to great weight but may be discarded for good grounds.[3]

Doctors are experts in their own right and when they give an opinion on , examining the persons concerned it does not normally mean that the opinion is not correct . Evidence of the medical expert medical officer is preferable to that of the expert who was in medical teaching profession.

Evidence of an armourer . - The Supreme Court observed that the type of gun which was found from the appellant was ' Mujhal ' or Toreda gun . This type of a gun can be fired by first - filling it with gun powder and for such a weapon no further test firing was necessary in order to find out whether it was in a working condition or not . Once it was found by the police officer that the mechanism was in order it could be reasonably inferred that it was in working condition even in the absence of any evidence of an armourer or an expert of that type evidence of a police officer who is trained in handling guns can be accepted . The Supreme Court confirmed the conviction and order of sentence passed .

Value of medical opinion as to age . The only sure proof of age is the birth certificate . - When it is not available medical evidence may be looked at . If the opinion of a doctor as to the age is based on careful physical examination of the person , and the recognised pointers and indices for determining age , such as the stage of ossification , and that evidence is supported by the evidence of relatives , and in the cross - examination of the prosecution witnesses nothing has come out which throws a doubt on their testimony , the court would be justified in relying upon such evidence for determining the age of a person . " The court , will prefer the evidence of the radiologist to the evidence of the father of the victim , especially so when he is illiterate and a gap of age if any stated by him would be obviously by guess . " When medical evidence shows that a girl was within 14 % and 16 and her body was developed, she is to be held to be more than 16 years of age.

Such persons are called experts."

There are three illustrations set out below Section 45. One deals with an opinion as to 'poisoning', the other as to 'unsoundness of mind' and third as to 'identity of handwriting'.

In the 69th Report, after an elaborate discussion, the Commission recommended (end of para 17.44) to include 'footprints, palm impressions or typewriting, as the case may be' in Section 45 and further recommended insertion of Section 45A in regard to the duty of an expert witness to supply copy of his report to all parties, along with the grounds for opinion.

It may be noted that in State (through CBI v. S.J. Choudhary AIR 1996 SC 1491, while holding that experts could be examined with regard to 'typewriting', the 69th Report of the Law Commission was quoted.

Section 45B was proposed to cover expert opinion on 'foreign law' as in the British statutes of 1859, 1861 with two subsections.

Section 45 has to be read along with Section 11 (when facts not otherwise relevant become relevant), Section 38 (relevancy of statements as to any law contained in law books), and also the proviso to Section 60 which deals with a situation where because no expert is available, treatises can be quoted.

Section 45 deals with expert evidence and not with mechanical evidence such as automatic photographs, computer printouts etc.

In UK, the relevancy of expert evidence is contained in the Civil Evidence Act, 1972, and the recent Civil Procedure Rules, 1995 (based on Lord Woolf's Report on 'Access to Justice') (which impose an overriding duty on the expert to give his opinion, irrespective of whether

he was being examined by one party or the other. (LPR PC 35 R3); and in criminal cases, by the Police and Criminal Evidence Act, 1984 and Criminal Justice Act, 1988 (see Phipson, 15th Ed, 1999, para 37.09).

Section 45 speaks of experts on points of "foreign law, science or art, or as to identity of handwriting or finger impressions".

Phipson (15th Ed, 1999, para 37.53 to 37.63) includes one more item of 'trade' in this list. He says (referring to case law):

"The opinions of shopkeepers are admissible to prove the average waste resulting from the retail sale of goods, those of persons conversant with a market, to prove market value; those of accountants, to prove what losses are chargeable to capital; and those of businessmen, to prove the meaning of trade terms. So, though formerly doubtful, it is now well-settled that the opinions of underwriters are receivable as to what facts are 'material' in a policy of marine insurance. The opinions of medical men are similarly admissible as to what maladies are in an insurance proposal."

However, he states:

"The opinion of tradesmen is inadmissible on the question of whether or not a trade name is calculated to deceive, whether for the purposes of a passing off action or in proceedings under the Trade Descriptions Act, 1968. It is equally inadmissible on the question of whether or not tradesmen would in fact be or be likely to be deceived."

It is also pointed out:

"Where there is a question as to whether or not a covenant in restraint of trade is reasonable, evidence may be given by those engaged in the trade of the nature of the trade, what is usual in it, of any particular precautions required to be taken but their opinion is inadmissible as to the reasonableness or otherwise of the restraint."And

"Similarly, definition of the nature of a trade or of the terms used in the trade may be subject to expert evidence from those engaged in the trade. There is a good deal of ancient learning on the evidence what is admissible to prove trade customs and trade usages; but it is probable that no modern court would exclude expert evidence on these topics unless precluded by authority directly on the point and binding on the court. In income tax inquiry, the commissioners may, but are not bound to receive expert evidence."

One other aspect alluded to by Phipson in para 37.56 refer to "technical terms". Local or technical terms may always be explained by experts, unless they are equally intelligible to ordinary readers; thus the opinions of engineers are not admissible to show what matters are "delineated" upon statutory plans, nor those of surveyors and auctioners as to the meaning of 'nominal rent' in a statute. But, in Patent cases, experts obviously have a good deal of experience and may be called upon

(1) to explain the technical terms employed;

(2) to instruct the court in the relevant scientific principles;

(3) to show the state of scientific knowledge at the time of the grant;

(4) to explain the nature, working, characteristic features and probable mechanical results of an invention, together with what is old or new in the specifications, and how far any scientific advance has been made thereby, as well as

(5) in the case of rival inventions, to point out the similarities or differences therein and how far these are material or unimportant."

On the other hand:

"They may not however give evidence as to the construction of the specification, or as to whether there is or is not a want of novelty, or whether the defendant's invention infringes the plaintiff's patent or not, because these are matters for the court to decide."

Coming to questions of identity, the relevance of identity has been dealt with in Section 9. (see also Section 112) Here we are, however, concerned with the opinions of experts and the relevance of the said opinion on the questions of identity.

Again, 'identity' of persons, today, is a matter of expert evidence according to Phipson (ibid, para 37.62). Fingerprint evidence has long been available for this purpose and evidence of blood tests has been admissible (especially in paternity suits) for many years. In recent years, other types of scientific processes have been put before the court by appropriately qualified experts. Evidence of facial mapping has been admitted, both by a more or less sophisticated method (see R v. Stockwell (1993) 97 Crl. App Rep 260 (CA) and R v. Clarke (1995) (2) Crl App Rep 425 (CA). Similarly, voice identification by a person experienced in the task is admissible even though the expert relies on audatory impression and not on acoustic measurement (R v. Robb) (1991) 93 Crl App R 1GL (CA).

There can also be expert evidence in relation to identity of animals. Such a question may arise, for instance, when somebody's pet dog is stolen allegedly by an accused.

DNA evidence is yet another one. We have dealt extensively with DNA in Section 9. But here the question is about experts in DNA. It is known as 'genetic printing by DNA analysis'. See R v. Gordon (1995 (1) Crl App Rep 290) (CA). However, so far the English Court has

"set its face squarely against supplementary expert evidence on the probabilities involved." (R v. Adams No.1 1996 (2) Crl. App Rep 467 (CA); R v. Adams No.2 1998(1) Crl App Rep 377 (CA) In R v. Dohoney and Adams 1997 (1) Crl App Rep 369 (CA), the Court of Appeal laid down guidelines for dealing with DNA evidence (at pp. 374-375 of that case).

So far as DNA is concerned, an expert can give evidence only in regard to providing the "random occurrence ratio" and if he or she has the necessary data, it may indicate how many people with matching DNA characteristics are likely to be found in (say) UK or in a limited relevant subgroup of which the perpetrator is, in all likelihood, a member. It is inappropriate for an expert to expound a statistical approach to evaluating the likelihood that the accused left the unknown sample (see R v. Dohoney and Adams: 1997 (1) Crl App Rep 369).

DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not 'match', then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1 person in every 100,000: This is described as the 'random occurrence ratio' (Phipson 1999, 15th Ed, para 14.32).

Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law.

In this connection, reference may be usefully made to the Report of the Australian Law Reform Commission, referred to in our discussion under Section 9. That deals with the problems relating to expert evidence on DNA. The law is still developing.

We think that apart from adding the words "footprints, palm impressions and typewriting" in Section 45 as recommended in the 69th Report, we shall make some more additions. We, therefore, propose to recommend addition of the words "trade, technical terms and identity of persons or animals" also in Section 45.

We recommend that Section 45 be amended as follows:

For the portion beginning with the words "When the court has to form an opinion" and ending with the words "Such persons are called experts" the following shall be substituted, namely:-

"When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to the identity of handwriting, or finger impressions or, footprints or, palm impressions or typewriting or usage of trade or technical terms or identity of persons or animals, the opinions, upon that point, of persons specially skilled in such foreign law, science or art, or as to the identity of handwriting, finger impressions, footprints, palm impressions, typewriting, usage of trade, technical terms or identity of persons or animals, as the case may be, are relevant facts. Such persons are called 'experts'.

The sections deal with the subject 'opinions of third persons, when to the person by whom any document was written or signed , the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person , is a relevant fact .

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1 . Nagindra Bala v . Sunil , 1960 Cr LJ 1020 (SC)

2. Puran Chand Ghose , 26 Cr LJ 17 .,

3. Abu Pramanik v . E. , 43 Cr LJ 565 . State (Relhi Admin / Y. Sube Singh , 1985 Cr LJ 1190.

4. State of West Bengal v . Mir Mohammad Omar , AIR 2000 SC 2988 .

5. Ram Swaroop v . State of U.P. , AIR 2000 SC .

Section-47. Opinion as to handwriting, when relevant.-When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation . - A person is said to be quainted with the handwriting of another person when he has seen that person write , or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person , or when , in the ordinary course of business , documents purporting to be written by that person have been habitually submitted to him .

Illustration

The question is , whether a given letter is in the handwriting of A , a merchant in London .

B is a merchant in Calcutta , who has written letters addressed to A and received letters purporting to be written by him . C is B's clerk , whose duty it was to examine and file B's correspondence . D is B's broker , to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon .

The opinions of B , C and D on the question whether the . letter is in the handwriting of A are relevant , though neither B , C and D ever saw A write.

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1 . Anvaruddin v . Shakoor , AIR 1990 SC 1242 (page 1247) .

2. Gharib Das v . State , 1973 All Cr R 193

3. Lachhmi Ram v . State of H. P. , 1971 Sim LJ (HP) 329 .

4. Ins . by Act 21 of 2000 , S. 92 and Sch . II (w.e.f. 17.10.2000) .

After amendment section 47-A.

Opinion as to digital signature when relevant . When the Court has to form an opinion as to the digital signature of any person, the opinion of the Certifying Authority which has issued the Digital Signature Certificate is a relevant fact.

COMMENTARY

Principle . The section deals with the identification of handwriting . Section 45 admits the evidence of the handwriting experts . Under Section 47 the evidence of an ordinary witness who is acquainted with the handwriting of another may give his opinion as to the identity of the handwriting , viz . , its authorship . Thus this section makes the opinion or belief of an ordinary person who is acquainted with the handwriting admissible because all proof of handwriting is in its nature comparison , except when the witness himself writes the document or sees it written ; proof of handwriting is in effect the opinion or belief which a witness entertains upon comparing the writing in the questioned document with an exemplar formed in his mind from some previous knowledge .

Scope . The section indicates one of the modes of proving handwriting . In Mubarak Ali's case , the Supreme Court of India held as follows : " Proof of the authorship of a document like the proof of any other matter , can be provided either by direct or by circumstantial evidence , or by both . Authorship of a document can be proved in any of the following ways :

1 . Direct evidence of a person who has seen that very , document being written or signed by the accused .

2. Opinion of a handwriting expert based on a comparison of the writing or the signature of the document in question with the writing or signature on another document which is proved or admitted to have been written or signed by the accused [Section 45 , illustration (c)] .

3 . Opinion of a person acquainted with the handwriting of the accused by reason of having seen him write , or by reason of having received documents purporting to be written by him in the ordinary course of business (Section 47) .

When a disputed document purports to be a link in a chain of correspondence , its auth orship may also be proved by the internal evidence of its contents , read together with the correspondence preceding and following it , provided the other links in the chain are proved to be genuine . This principle will apply whether the document in question bears or does not bear a signature , and whether it is a letter or a telegram.

Besides these three mode of proof of authorship of a document other modes are , by examining the writer himself , or under Section 73 by comparison of disputed writing with the writing of the alleged writer , or by the Court comparing the impugned writing with the admitted or proved writing , the Court may also direct any person present in the Court to write words or figures for enabling the Court to compare them with those alleged to have been written by such a person . Article 20 (3) of the Constitution of India forbidding testimonial compulsion is no bar against such proceedure , namely the witness is established to have been acquainted with the writing of the particular person in one of the modes enumerated in this section .

A witness need not state in the first instance how he knows the handwriting , since it is the duty of the opposite side to explore in cross - examination the sources of his knowledge .

The general features of hand - writing like slant , pen pressure , etc. , are not so reliable for establishing identity but the presence or otherwise of peculiar writing habits or idiosyncrasies are features which have decisive importance .

A natural writing serves as a much better standard for compari son than the specimen obtained on request . An opinion of hand writing expert cannot be taken as substantive evidence unless corroborated by some other evidence . An opnion as to hand - writing is hearsay evidence and becomes admissible under this section only if the conditions required by this section are fulfilled . In a criminal case it is quite unsafe to record conviction of an accused merely on the basis of a hand - writing expert . In civil cases also it is not safe for the Court to rest its finding

merely on the opinion of a hand - writing expert , the Court should seek corroboration from other sources .

Rebuttal statement . - The Supreme Court held that it is not necessary to adduce in respect of unrebutted statement in an amended plaint specifically when the amendment was not rebutted by the defendant.lº

Evidence of non - expert against hand - writing expert - Value of. It may not be necessary for the witness to state in examination - in chief as to the mode in which knowledge of hand - writing was acquired , it being open for cross - examination to prove into the matter in cross examinaton.[1]

Both under Section 45 or under Section 47 , the evidence is an opinion . In either case the Court must satisfy itself by such means as are open so that the opinion may be acted upon.[2]

Any person acquainted with . - A person is said to be acquainted with a person's hand - writing when he has seen that person write at any time . The frequency and recentness of the occasion and the attention paid to the matter by the witness will affect the value and not the admissibility of the evidence .

Whether hand - writing includes signature or mark . - A document wholly in the hand - writing of the party is called an autograph or holograph ; where it is in the hand - writing of another person , and is only signed by the party , the signature may be called " onomastic " ; where it is signed by a cross or other symbols " symbolic " . (Best , 12th Edition , Section 232) . The word hand - writing presumably includes both hand - writing in general and signature .

Hence a person who is acquainted with the general style of a person's hand - writing or signature is competent to identify that person's general writing or signature . It is true that the signature of a person possesses a great peculiarity and is very much different from the general style of writing , but this fact would affect the value of the witness's testimony and not his competency . Under this section the words ' signed ' and signature ' should be restricted to their ordinary use and not extended to include the affixing of a mark as provided for in Section 2 , Civil Procedure Code and Section 3 of the Registration Act .

Habitually . The term means usually , generally or according to custom . It does not refer to the frequency of the practice but to the invariability of the practice .

CHAPTER-6

DOCUMENTARY EVIDENCE

Section 65

Cases in which secondary evidence relating to documents may be given . - Secondary evidence may be given of the existence , condition , or contents of a document in the following cases -

(a) when the original is shown or appears to be in the 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 , or

of any person legally bound to produced it , and when , after the notice mentioned in Section 66 , such person does not produce it ;

(b) 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 representative in interest ;

(c) when the original has been destroyed or lost , or when the party offering evidence of its contents cannot , for any other reason not arising from his own default or neglect , produce it in reasonable time ;

(d) when the original is of such a nature as not to be easily movable ;

(e) when the original is a public document within the meaning of Section 74 ;

(f) when the original is a document of a which a certified copy is permitted by this Act , or by any other law in force in [India] to be given in evidence ;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court , and the fact to be proved is the general result of the whole collection .

In cases (a) . (c) and (d) . any secondary evidence of the contents of the document is admissible . In case (b) , the written admission is admissible .

In case (e) or (f) , a certified copy of the document , but no other kind of secondary evidence , is admissible .

In case (g) , evidence may be given as to the general result of the documents by any person who has examined them , and who is skilled in the examination of such documents .

After amendment 65A, 65B

65 - A . Special provisions as to evidence relating to electronic record . - The contents of electronic records may be proved in accordance with the provisions of Section 65 - B .

65 - BAdmissibility of electronic records .- (1) Notwithstanding anything contained in this Act , any information contained in an electronic record which is printed on a paper , stored , recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) 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 proofor production of the bril , as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible .

(2) The conditions referred to in sub - section (1) in respect of a computer output shall be the following , namely --

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer ;

(b) during the said period , information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary or course of the said activities ;

(c) throughout the material part of the said period , the computer was operating properly or , if not , then in any respect of any period in which it was not operating properly or was out of

operation during that part of the period , was not such as to affect the electronic record or the accuracy of its bina , contents ;

(d) the information contained in the electronic record of sadist reproduces or is derived from such information fed yam abroor into the computer in the ordinary course of the said activities .or

(3) Where over any period , the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub - section (2) was regularly performed by computers , whether--

(a) by a combination of computers operating over that brs node period ; or

(b) by different computers operating in succession over that period ; or

(c) by different combinations of computers operating in succession over that periodsection (d) in any other manner involving the successive operation over that period , in whatever order , of one or more computers and one or more combinations of computers ,

all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer ; and references in this section to a computer shall be construed accordingly .

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section , a certificate doing any of the following things , that is to say --

(a) identifying the electronic record containing the statement and describing the manne : in which it was produced

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer ;

(c) dealing with any of the matters to which the conditions mentioned in sub - section (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 sub section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it . (5) For the purposes of this section --

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment ;

(b) whether in the course of activities carried on by any official , information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities , that information , if duly supplied to that computer , shall be taken to be supplied to it in the course of those activities

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human interven tion) by means of any appropriate equipment .

Explanation . For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation , comparison or any other process .

Section 65 is exhaustive . - As Section 63 is exhaustive of the forms of secondary evidence , so Section 65 is exhaustive of the grounds on which secondary evidence may be admitted .

Rule of Estoppel : Secondary evidence admitted without objection . Where secondary evidence of the contents of a deed alleged to have been destroyed is admitted by the Court of the first instance , without objection , but without any foundation being laid for the reception of such evidence , the opposite party is estopped from taking an objection to the admissibility of such evidence in the appellate court . The rule is based on principles analogous , to those of estoppel . If objections were to be taken when the secondary evidence was sought to be introduced , it may be within the power of the party tendering it to correct the irregularity and to prove the original , or to show that secondary evidence is really admissible in the circumstances of the case.[3]

Copy of insurance policy though exhibited but not proved , appellate Court can exclude same . **Permission to lead secondary evidence** . - The trial court , in a case , rejected the application filed under Section 65 of the Evidence Act seeking permission to lead secondary evidence as the application was not supported by any affidavit and also because the avermentscontained in the application were vague . The High Court did not interfere with the order of the trial court . The Supreme Court observed that though no fault can be found with the orders of the trial court and the High Court it appears appropriate to permit the appellant to file a fresh application in the trial court for seeking permission under Section 65 to lead secondary evidence supported by a proper affidavit giving full and necessary details , in the interest of justice .

A document inadmissible for want of registration of stamp , cannot be proved by secondary evidence . - Where a party comes into Court , resting its claim on a written title which the law requires to be registered , he cannot , when he has failed to register and is , in consequence unable to use his title deed , turn round and say " I can prove my title by secondary evidence " . It would be useless to have a compulsory Registration

Act if such a course were open to the suitors ' : (Loch , J.) . The contents of the document which is not stamped or is insufficiently stamped cannot be proved by secondary evidence.[3]

Order of proof . - As a general rule there must be evidence of execution before evidence of contents of a document is offered . However the Court has discretion in the matter under Section

Various types of secondary evidence . - Secondary evidence may consist of a certified copy , true copy , compared copy , a counter part , a memorandum of its purport or oral account as to the contents of the document . All are equally admissible , though all are not entitled to the same degree of weight .

If the original of a notice is not summoned , secondary evidence of that notice is not admissible under this section .

Where the original is alleged to be lost in a particular manner , such loss must be proved by evidence otherwise foundation for leading secondary evidence will not have been made out . "

Orissa High Court appears to have not insisted on strict proof of loss and rigid proof of search in a case . "

Punjab and Haryana High Court in revision set aside the order observing that unless the loss of original is proved the party is precluded from offering secondary evidence when he seeks to offer such evidence on the ground of loss of original . "

Permission to lead secondary evidence . - The Supreme Court observed that the trial court observed that the application seeking permission to lead secondary evidence under Section 65 , of the Evidence Act , was not supported by any affidavit and also that the averments contained in the application were vague . It was on account of these deficiencies that the High Court in revision did not interfere with the order of the trial court .

The Supreme Court added that although no fault can be found with the orders of the trial court or the High Court it appears appropriate in the interest of justice to permit the appellant to file fresh application within four weeks in the trial court for seeking permission under Section 65 of the Evidence Act to lead secondary evidence supported by proper affidavit and giving all necessary details necessary to attract the provisions of Section 65 of the Evidence Act.[1]

Extracts of private account books . - The Supreme Court observed that private extracts of alleged account book are not admissible . The principle evidence relating to alleged payment of rent disappears and the foundation for the alternative plea of tenancy crumbles . This is one reason for vitiating the finding relating to money as it is based on inadmissible evidence . The Supreme Court added that in the present case no account books were produced by the defendant and only extracts were filed two years after filing of written statement and one and a half years after the settlement of issues . The non production of original books for comparison was never explained nor was the person preparing the extracts examined . In terms of Sections 34 of the Evidence Act sanctity is attached to books of accounts if they are original and show on their face that they were kept in the regular course of business and such sanctity cannot be attached to private extracts of alleged account books . Loose sheets of paper or scraps of paper cannot be termed as books for they can be easily detached and replaced.

Method or mode of proof . - The Supreme Court observed that the High Court took objection to the admissibility of a document on the ground that the application moved by the counsel for the State did not strictly conform to the requirement of Section 65 , Evidence Act , 1872. Apart from the correctness or otherwise of this view of the High Court it should have remitted the matter to any one of the courts below for proper consideration of this aspect of the matter without completely foreclosing the rights of the State to properly prove the same , by giving an opportunity to do so . There was no challenge or dispute with reference to the admissibility of the said documents by the plaintiff at the appropriate stage before the trial court or the first Appellate court. Event the grievance before the High Court seems to be not that the document is per se an inadmissable one but about the mode or method of proof only.

Section 67

Proof of signature and handwriting of person alleged to have signed or written document produced . If a document is alleged to be signed or to have been written wholly or in part by any person , the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting .

After amendment section 67A

67 - A . Proof as to digital signature . - Except in the case of a secure digital signature , if the digital signature of any subscriber is alleged to have been affixed to an electronic record the fact that such digital signature is the digital signature of the subscriber must be proved .]

Mode of proof of signature or writing . The execution of every document produced in evidence must be proved , unless it is admitted under Section 58 , or presumed under Section 90 or some other provisions of law . A document does not prove itself ; nor is an unproved signature , on a document proof of its having been written by the person whose signature it purports to bear .

Presence or suspicious circumstances concerning execution of will amounts to invalidity of will.

The following are the modes of proving a signature or a writing recognized by the Act :

(1) By calling the person who signed or wrote the document . "

(2) By calling a person in whose presence the document was signed or written . "

(3) By calling a handwriting expert . (Section 45) .

(4) By calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written . (Section 47) .

(5) By comparing in Court the disputed signature or writing with some admitted signature or writing . (Section 73) .

(6) By proof of an admission by the person who is alleged to have signed or written the document that he signed or wrote it.[1]

(7) By the statement of a deceased professional scribe , made in the ordinary course of business , that the signature on the document is that of a particular person.[2]

(8) A signature is proved to have been made if it is shown to have been made at the request of a person by some other person , e.g. , by the scribe who signed on behalf of the executant.[3]

(9) By other circumstantial evidence .

(10) Proof as to digital signature of the subscriber must be given (Section 67 - A) .

In the case of Mubarak Ali Ahmed v . State of Bombay , it is held that proof by internal evidence afforded by the contents of a document may be of considerable value when the disputed document purports to be a link in the chain of correspondence , some links which are proved to the satisfaction of the Court . Where execution is challenged , Court is entitled to weigh evidence .

An illiterate's letter is an instance of the impossibility of obtaining handwriting testimony .

Signed . - The word ' signing ' means the writing of the name of a person so that it may convey a distinct idea to somebody else that what the writing indicates is a particular individual whose signature or sign it purports to be . A mark is a mere symbol , and does not convey any idea to the person who notices it . This section has not provided for the case of marks and seals . Proof of signature includes proof of a mark or a thumb - impression .

The Orissa High Court held , that a person who is literate can also execute a document by putting thumb impression . "

Execution of documents . - Though this section does not use the word ' execution ' , there can be no doubt that it is intended to lay down generally the mode of proof of execution of documents . This is clear from the language of Sections 68 to 71 in which the word ' execution is used . ' Execution ' means ' signed ' , (Section 2 , Stamp Act) . The ordinary meaning of ' executing ' a ' document ' is signing a document as a consenting party thereto . Where the document is required by law to be attested , ' execution ' designates the whole operation including both the signature by the executant and the attestation thereof by the subscribing witnesses . "

1.GosRElti Vahuji v .proofidharan Lal Poddar , AIR 1984 Cal 297 .

2.Mira Bai v . Jai Singh , 1971 Raj LW 319 AIR 1971 Raj 303 .

3.P.C. Purushothama Reddiar v . S. Perumal , AIR 1972 SC 608 (613) .

4.Brahmanand Misra v . Sind Works , Padhi , AIR 1984 Ori 116 A NOC .

5.Muhammad v . Mastan Ser , P.L.D. 1961 Dacca 71 .

6.Bindraban v . Atma Ram , AIR 1984 Del 305 , NOC .

Proof of Execution of Document . - Handwriting of a person who had written the document need not be proved.[3]

Pronote . - Pronote executed in Hindi signed by executant at several places . Witnesses testifying to its signing by executant in their presence . Execution of document is proved . Sealing is not generally speaking necessary in dia and Pakistan , but the execution of a document must still means something more than the mere signing by the parties . It must certainly include delivery and it also includes signing before witnesses where witnesses are necessary . If the plea taken is that the executant has not signed a document and that the document is a forgery , the party seeking to prove the execution of the document need not adduce evidence to show that the party who signed the document knew the contents of the document .

Application by plaintiff purchaser at appellate stage for permission to bring register and expert report to compare thumb mark of seller on entry of sale deed relied upon by plaintiff . Original sale deed not filed . No justification for filing such application specially when there is no material before appellate Court for comparison of thumb mark .

When applied to a document ' execution ' means the last act or r series of acts which complete it . It may be defined as the formal execution . Execution of a Will includes attestation .

May a document be considered to be proved merely on proof of signature of an attesting witness . - If a document is required by law to be attested , the signature of the attesting witnesses and of the executant have both to be proved (Sections 68 , 69) . Even in the case of a document required by law to be attested , proof of executi with in addition to the proof of attestation is necessary . (Section 69) . There is no reason why proof of execution , as distinguished from mere proof of the signature of the attesting witnesses , should not be necessary when the document is not requited by law to be attested . Where the attendance of the attesting witnesses is executed under the proviso to Section 68 , the Act requires other proofs of execution . This also shows that the Act does not treat the proof of attestation , as tantamount to the proof of execution of a document .

Mere identification of a signature on a document does not necessarily amount to proof of execution of the document by the person whose signature is thus proved.[1]

When a document is exhibited without any objection by the opposite party , its contents are also admitted in evidence , though they may not be conclusive.2 A document before being exhibited must be proved in accordance with Section 67.

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1. . Monomotho Nath Mukerjee v . Puran Chand Nahatta , 1925 Cal 703.
2. . Jaikarndas v . Pratap Singh , 1940 Cal 189 .
3. . Smt . Noor Jahan Begum v . Abrar Ahmad Khan , (HC) ALR 1982 (8) 149 .
4. . Babban (Deceased by L. Rs .) v . Shiv Nath , AIR 1986 Alld 185 .

Section 73

Comparison of signature , writing or seal with others admitted or proved . In order to ascertain whether a signa ture , writing , or seal is that of the person by whom it purports to have been written or made , any signature , writing , or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved , although that signature , writing , or seal has not been produced or proved for any other purpose .

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person .

[This section applies also , with any necessary modifica tions , to finger - impressions .]

<u>After amendment section 73A,73B</u>

"**73A. Proof as to verification of digital signature** In order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may direct

(a) that person or the Controller or the Certifying Authority to produce the Digital Signature Certificate;

(b) any other person to apply the public key listed in the Digital Signature Certificate and verify the digital signature purported to have been affixed by that person.

Explanation.For the purpose of this section, "Controller" means the Controller appointed under sub-section (1) of section 18 of the Information and Communication Technology Act, 2006 (Act No. 39 of 2006).

"**73B. Comparison of physical or forensic evidence with others, admitted or proved**.(1) In order to ascertain whether a sample of blood, semen, hair, DNA sample, any other biological substance, limbs or any part of limb, finger impression, palm impression or iris impression or foot impression belongs to or is created by that person from whom it purports to have been collected, the Court may order that it be compared with any sample which is admitted or proved to the satisfaction of the Court to have come from or been made by the person, although that sample of blood, semen, hair, DNA sample, biological substance,

limbs or any part of limb, finger impression, palm impression, iris impression, foot impression or any other substance has not been produced or proved for any other purpose.

(2) If there is any claim that the sample of blood, semen, hair, DNA sample, any other biological substance, limbs or any part of limb, finger impression, palm impression, iris impression, foot impression belongs to or is created by any person, the Court may direct that person to be present in Court for the purpose of enabling the Court to make that comparison.

(3) In relation to proving the authenticity of physical or forensic evidence, nothing in sections 60 and 165 of this Act, should prevent the Court from seeking its production in Court as an exhibit, along with any other necessary evidence concerning its identification.”

Disputed writing can be compared only with an admitted or proved writing . - The section does not sanction the comparison of any two documents , but requires that the writing with which the disputed writing is to be compared must be admitted or proved to be the writing of the alleged writer of the disputed writing .

Comparison may be made by the Judge , the jury or an expert. The first paragraph of the section does not specifically state by whom the comparison may be made , though the second paragraph dealing with a relative subject expressly provides by way of contrast that in that particular connection the Court may make the comparison . The comparison may be made by the Court , the jury or a competent witness called for the purpose .

Value of comparison by Court . - In Kishore Chandra Singh Deo v . Babu Ganesh Prasad , the Supreme Court of India held , that comparison by the Court of a disputed signature or writing proved to be of the person concerned is , at best an indecisive test . If there is a positive evidence that the letter was written by a particular person the conclusion of the Court based on comparison must yield place to such positive evidence , in case of difference between the two . In case the Court feels doubt as to expert's opinion about handwriting , court can examine and compare the same itself . The Privy Council has observed that it is not always safe to take a decision on the correct determination of the genuineness , of a signature by mere comparison with the admitted signatures , especially without the aid in evidence of microscopic enlargements or any expert evidence . Thus the comparison of signatures is a mode of ascertaining the truth which ought to be used with great care and caution .

Comparison of disputed and admitted signatures . - The Supreme Court observed that under Section 73 or the Evidence Act , 1872 , the Court is entitled to compare disputed and admitted signatures and handwriting for coming to a conclusion but the rule of prudence and caution requires that in the first place expert's opinion should be obtained for assistance and if such opinion is not available then the Judge presiding over the Court must disclose in the judgment his knowledge on the subject of comparison of handwriting or should mention whether that he has taken aid from some authoritative text - book . The Court should also mention whether the result of its comparison finds support from some evidence adduced or direct evidence . by the parties may be in the shape of oral or documentary evidence In the present case on the basis of comparison of handwriting on chit with the handwriting on the postcard allegedly sent by the defendant to the plaintiff , the trial Court came to a conclusion that the handwriting on the chit was that of the defendant . TSec

Supreme .

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1. Khijriuddin v . E , 53 Cal 372 ; see also AIR 1989 Gau 42 .
2. Inder Singh v . Sukhminder Singh , (1986) 2 CCC 608 (611) (Punj) .
3. Kesarbai v . Jethabai Jivan , 1928 PC 277 .
4. Arjun Chandra Bhadra v . Kailash Chandra Das , 1923 Cal 149 .
5. Dattatraya v . Ranganath , 1971 SCD 366 AIR 1971 SC 2548 (2549) .
6. Mohit Koiry (Deceased) v . Smt . Dhanraji , 1987 ALJ 1380 .

CHAPTER-7

PRESUMPTION AS TO DOCUMENTS

Section 81

Presumption as to Gazettes , newspapers , private Acts of Parliament and other documents . - The Court shall presume the genuineness of every document purporting to the London Gazette or " [any Official Gazette , or the Government Gazette] of any colony , dependency or possession of the British Crown , or to be a newspaper or journal , or to be a copy of a private Act of Parliament [of the United Kingdom] printed by the Queen's Printer and of every document purporting to be a document directed by any law to be kept by any person if such document is kept substantially in the form required by law and is produced from proper custody .

After amendment section 81A

Presumption as to Gazettes in digital forms. The Court shall presume the genuineness of every digital record purporting to be the Official
Gazette, or purporting to be digital record directed by any law to be kept by any person, if such digital record is kept substantially in the form required by law and is produced from proper custody.
Explanation.Digital records are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they naturally be; but no custody is improper if it is proved to have had a legitimate origin, or

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1. the circumstances of the particular case are such as to render such an origin probable.''
1. Nika Rani v . State of H. P. , AIR 1972 SC 2077 1972 Cr LJ 1317 : (1972) 2 SCC 80 .
2. See new Criminal Procedure Code , 1973 .
3. Kustu Baisu v . State of Maharashtra , 1986 Cr LJ 662 .
4. Bhagwa n Singh v . State of Punjab , 1953 Cr LJ 1131 (SC) .

5. Mehr Gul v . State , PLD 1962 Pesh 91

section 85

Presumption as to powers - of attorney : The Court shall presume that every document purporting to be a power of - attorney , and to have been executed before , and authenticated by , a notary public , or any Court , Judge , Magistrate , Bangladesh Consul or Vice - Consul , or representative of the Government , was so executed and authenticated .

After amendment section 85A,85B,85C

Section 85A

Presumption as to agreements in digital forms. The Court shall presume that every digital record purporting to be an agreement containing the digital signatures of the parties was so concluded by affixing the digital signature of the parties.

Section 85B

Presumption as to digital record and digital signatures.

(1) In any proceedings involving a secure digital record, the Court shall presume unless contrary is proved, that the secure digital record has not been altered since the point of time to which the secure status relates.

(2) In any proceedings, involving secure digital signature, the Court shall presume unless the contrary is proved that

(a) the secure digital signature is affixed by subscriber with the intention of signing or approving the digital record;

(b) except in the case of a secure digital record or a secure digital signature, nothing in this section shall create any presumption relating to authenticity and integrity of the digital record or any digital signature.

Section 85C

Presumption as to Digital Signature Certificates.The Court shall presume, unless contrary is proved, that the information listed in a Digital Signature Certificate is correct, except for information specified as subscriber information which has not been verified, if the certificate was accepted by the

subscriber."

COMMENTARY

Principle . This section raises a presumption as regards a power of - attorney .

Power - of - attorney . - Includes any instrument empowering a specified person to act for and in the name of the person executing it . (Indian Stamp Act , Section 2 , sub - section 21) . A power - of - attorney purporting to have been executed before , and authenticated by , any of the persons mentioned in this section must be presumed to have been so executed and authenticated . If the document does not purport to have been executed before , and authenticated by , any of the pe ons mentioned in the section there would of course be no presumption as to its execution and authentication . But the provisions of Section 85 are not exhaustive and other modes of proving the execution of a power - of - attorney are not excluded.[2]A statement in a power - of - attorney would not prove itself , it has to be proved like any other statement made by a person .

Authentication . This section enacts a presumption of due execution and authentication in favour of powers - of - attorney executed before , and authenticated by the person therein mentioned . Authentication contemplated by this section does not merely mean attestation . It means that the person authenticating it has assured himself of the identity of the person who has signed the instrumert as well as the fact of execution . A power - of - attorney bearing the authentication of a Notary Public or an authority mentioned in this section is taken as sufficient evidence of the execution of the instrument by the person who appears to be the executant on the face of it.

When a Notary Public attests a power - of - attorney on the very date of execution the requirements of Section 85 are fulfilled .

Notary public . - A notary public is an officer who takes notes of anything which may concern the public ; he attests deeds , or writings to make them authentic in another country but is principally employed in mercantile affairs to make protests of bills of exchange etc. , (Wharton's Law Lexicon , 14th Edition , 697) . Under Section 138 of the Negotiable Instruments Act , 1881 , the Central Government is authorised to appoint notaries public within any local area . A notary public has by the Law of Nations credit everywhere . Under Section 57 (6) read with Section 7 the Court shall take judicial notice of the seals of notaries public .

The power - of - attorney executed before a Notary Public in - California and complying with the laws of that State and authenticated as required by that law , must be considered duly authenticated in accordance with the laws in India . Such a power - of - attorney is valid and effective both under Section 85 of the Evidence Act and Section 33 of the Registration Act .

Documents authenticated , before Notary Public functioning in other countries (Pakistan) must be presumed to have been duly authenticated within Section 85 of the Evidence Act .

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1. In the goods of Primrose , 16 Cal . 776
2. Performing Right Society Ltd. v . Indian Morning Post Restaurant , 41 Bom LR 530 .

Section 88

Presumption as to telegraphic messages . - The Court may presume that a message , forwarded from a telegraph office to the person to whom such message purports to be addressed , corresponds with a message delivered for transmission at the office from which the message purports to be sent ; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission .

After amendment section- 88A

Presumption as to digital communication.The Court may presume that a digital communication forwarded by the originator through a digital communication or message server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer or fed into other forms of digital device for transmission; but the Court shall not make any presumption as to the persons by whom such message was sent.
Explanation.For the purposes of this section, the expressions "addressee" and "originator" shall have the same meanings respectively assigned to them in clauses (22) and (24) of section 2 of the Information and Communication Technology Act, 2006 (Act No. 39 of 2006)

COMMENTARY

Principle . The section provides for a presumption as to telegraphic messages (see Section 16) . It is based on the assumption that official acts have been regularly performed and the common course of business followed in particular cases . See Illustrations (e) and (f) to Section 114 .

Scope and extent of the presumption . - This section allows the Court to treat telegraphic messages received as if they were the originals sent . If a telegraphic message is proved to have been delivered to the addressee from the office of the destination there is . under Section 88 , a presumption that it corresponds with the
A messages delivered for transmission at the office of origin admissibletion allows the Courts to treat telegraphic messages received as if they were the originals sent.[1]

The Supreme Court of India in Kishore Chandra Singh Deo v . Babu Ganesh Prasad , has held that Section 88 enacts that the Court may presume that a telegraphic message delivered to the addressee corresponds to the message delivered at the office of transmission . The section raises no presumption as to the person by whom the telegram was sent . Thus the presumption under Section 88 is only as to the accuracy of the transmission , and the authorship of the telegram has to be proved by evidence like any other fact . If there is no evidence as to who sent the telegram the message must be held to be ' not proved ' . In Mobarak Ali Ahmed v . State of Bombay , the Supreme Court held that under Section 88 there is no presumption as to the person who delivered such message for transmission and that presumption does not extend to the authorship of the telegram . The proof of authorship may be circustantial in that the contents of the message received in the context of the chain of correspondence may well furnish proof of authorship at the despatcher's end.

In absence of evidence that the message had been delivered by a telegraph office to the addressee , the telegram cannot be said to have been proved .

Presumption as to the delivery . - If a letter is properly addressed , posted and not afterwards returned , there is under Section 114 (e) and (f) a presumption of its having been delivered in due course , and this presumption will be extended to postal telegrams , now that the inland telegraphs form part of the Government postal system ' (Roscoe , N. P. Evidence , 43).

Presumption as to the date and hour of the message . - In the case of letters the post - marks are evidence of the dates and places mentioned , and the same rule would seem to be applicable to telegraphic messages (Halsbury , Volume 13 , para 762) .

Mode of proof of a telegraphic message . The original of a telegram is the one sent , not the one delivered , and this must produced from the post office or else proof of its destruction given when a copy will be admissible.

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1. by Act 21 of 2000 , S. 92 and Sch . II (w.e.f. 17.10.2000) .

2. Arjun Chandra Bhadra v . Kailash Chandra Das , 1923 Cal 149 .

3. Dattatraya v . Ranganath , 1971 SCD 366 AIR 1971 SC 2548 (2549) .

4. Mohit Koiry (Deceased) v . Smt . Dhanraji , 1987 ALJ 1380 .

Section -89

Presumption as to due execution , etc. , of documents not produced . - The Court shall presume that every document , called for and not produced after notice to produce , was attested , stamped and executed in the manner required by law .

After amendment section - 89A

Presumption as to physical or forensic evidence. The Court maypresume unless contrary is proved that the physical or forensic evidence belongs
to or is created by that person from whom it purports to have been collected."

Section - 90

Presumption as to documents thirty years old. Where any document , purporting or proved to be thirty years old , is produced from any custody which the Court in the particular case considers proper , the Court may presume that the signature and every other part of such document , which purports to be in the handwriting of any particular person , is in that person's handwriting , and , in the case of a document executed or attested , that it was duly executed and attested by the persons by whom it purports to be executed and attested .

Explanation . - Documents are said to be in proper custody if they are in the place in which , and under the care of the person with whom , they would naturally be ; but no custody is improper if it is proved to have had a legitimate origin , or the circumstances of the particular case are such as to render such an origin probable .
This Explanation applies also to Section 81 .

Illustrations

(a) A has been in possession of landed property for a long time . He produces from his custody deeds relating to the land showing his titles to it . The , custody is proper .
(b) A produces deeds relating to landed property of which he is the mortgagee . The mortgagor is in possession . The custody is proper .
(c) A , a connection of B , produces deeds relating to lands in B's possession , which were deposited with him by B for safe custody . The custody is proper .

After amendment section -90A

Presumption as to digital records five years old.Where any digitalrecord, purporting or proved to be five years old, is produced from any custody
which the Court in the particular case considers proper, the Court may presume that the digital signature which purports to be the digital signature of any particular person was so affixed by him or any person authorized by him in this behalf.

Explanation.Digital records are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable.'

CHAPTER-8

OF THE EXIMINATION OF WITNESSES

Section-146

Questions lawful in examination : When a witness is cross examined , he may , in addition to the questions hereinbefore referred to , be asked any questions which tend - (1) to test his veracity , (2) to discover who he is and what is his position in life , or (3) to shake his credit , by injuring his character , although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture .

After amendment section- 146

Questions lawful in cross-examination

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend –

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture2[:

Provided that in a prosecution for an offence of rape or attempt to rape, no question under clause (3) can be asked in the cross-examination as to general immoral character or previous sexual behaviour of the victim:

Provided further that such question can only be asked with the permission of the Court, if it appears to the Court necessary for the ends of justice.]

Section -155

Impeaching credit of witness . - The credit of a witness may be impeached in the following ways by the adverse party , or , with the consent of the Court , by the party who calls him :

1. by the evidence of persons who testify that they , from their knowledge of the witness , believe him to be unworthy of credit ;
2. by proof that the witness has been bribed , or has [accepted] the offer of a bribe , or has received any other corrupt inducement to give his evidence ;
3. by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;
4. when a man is prosecuted for rape or an attempt to ravish , it may be shown that the prosecutrix was of generally immoral character .

Explanation . - A witness declaring another witness to be unworthy of credit may not , upon his examination - in - chief , give reasons for his belief , but he may be asked his reasons in cross - examination , and the answers which he gives cannot be , contradicted , though , if they are false , he may afterwards be charged with giving false evidence .

Illustrations

(a) A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B.
Evidence is offered to show that , on a previous occasion , he said that he had not delivered goods to B.
The evidence is admissible .

(b) A is indicted for the murder of B.
C says that B , when dying , declared that A had given B the wound of which he died .
Evidence is offered to show that , on a previous occasion , C said that the wound was not given by A or in his presence .
The evidence is admissible .

After amendment section -155

Impeaching credit of witness

The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:-

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

Explanation.–A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations

(a) A sues B for the price of goods sold and delivered to B. C says that A delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(b) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence. The evidence is admissible.

COMMENTARY

Impeachment of the credit of a witness by extrinsic evidence. Credit of witness may be impeached in two ways : Firstly by cross examining him (Sections , 145 , 146) , and secondly by leading evidence to impeach the credit of the witness (Section 155) . But these processes are subject to certain limitations , e.g. , for questions that may be forbidden in cross - examination see Sections 148 to 152 , while for the restrictions on leading of evidence to impeach the credit , of a witness see section 153. This section is in a sense supplementary to Sections 145 and 146. These two sections define the province of questions which may be asked in cross - examination with the object of impeaching the credit of a witness ; the present section enumerates the facts which may independently be given in evidence with the same object . The witness whose credit is sought to be impeached may not admit in cross - examination facts which affect hiS trustworthi nese . In such a case the present section comes into , operation and enables the impeaching party to give in evidence , according to the circumstances of the particular case , all or any of the matters mentioned in this section .

There is a distinction between the facts as to which a witness may be questioned in cross - examination with a view to impeaching his credit and the facts which may independently be given in evidence with the same object . Whereas a witness may be questioned in cross examination as to , all or any of the facts which may , be proved against him under Section 155 , ' the converse of this proposition is not tru inasmuch as all matters on which a witness may be questioned cross - examination are not provable by independent evidence under Section 155. This appears to be clear on comparing the provisions of Sections 145 and 146 with the

various clauses of Section 155. As Patterson , J. , remarked , there is a distinction between asking questions of a witness in the box as to statements he may have formerly made and calling witnesses to say in contradiction to him that he made such statements . The real significance of the rules that involve a distinction between cross - examination and extrinsic testimony is seen if we note that the rules come about , not by enlarging the use of the former , but by cutting off the use of the latter . It is not that the law of impeachment loves cross - examination more ; but that it loves extrinsic testimony less " .[2]

Discrepancies in evidence of a witness . - The Supreme Court observed that the Courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the creditability of his version that the court is justified in jettisoning his evidence . But too serious a view to be adopted on mere variation falling in the narration of an incident either as between the evidence of two witnesses or as between two statements of the same witness is unrealistic approach for judicial scrutiny . Mere inconsistency in evidence is not sufficient to impair the creditability of the witness . No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of inconsistent former statement . But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness . In the instant case the evidence of the conductor and driv er of the bus evinces credibility . They are the most natural witnesses for the murder which took place inside the bus . The minor variations from their former statements did not amount to discredit the core of their evidence . The strained reasoning of the trial Court for side stepping their evidence is too fragile for judicial countenance and their testimony cannot be rejected.[3]

Cross - examination should be directed to the fact which is intended to be given in evidence to impeach the witness . - Where a fact is intended to be given in evidence under Section 155 of the Evidence Act for the purpose of impeaching the credit of a witness , and the fact is within the knowledge of the witness , it is necessary that the attention of the witness should be drawn to that fact in cross examination

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1. Jagdeo Singh v . E .. 1 P 758 1923 P 62 71 IC 117 : 24 Cr LJ 69 .
2. Ibid .
3. Q.E. v Zar Husen . 20 A 155 .
4. Subs by Act 18 of 1872 , S. 11 , for had .

CONCLUSION:

Conclusion

Evidence is an imperative part of every case, whether it is a criminal case or a civil suit as it validates a fact. The facts can be used in evidence for deciding as well as proving the disputed facts. Evidence attaches weight to the facts quoted as evidence. Thus various types of evidence can be used for proving and disproving facts. Moreover, evidence helps in curbing down the time dedicated to a particular case. Thus, it can be concluded that the evidence is for judicial behaviour like the reasoning for logic.

It is admissible if it relates to the facts in issue, or to circumstances that make those facts probable or improbable, and has been properly obtained. The prosecution is only required to introduce evidence that proves each element of the offence.

Evidence that cannot be contradicted by any other evidence. It is so strong as to overbear any other evidence to the contrary. The evidence is of such a nature that it compels a fact-finder to come to a certain conclusion

Scales of conclusion in forensic interpretation play an important role in the interface between scientific work at a forensic laboratory and different bodies of the jurisdictional system of a country. Of particular importance is the use of a unified scale that allows interpretation of different kinds of evidence in one common framework. The logical approach to forensic interpretation comprises the use of the likelihood ratio as a measure of evidentiary strength. While fully understood by forensic scientists, the likelihood ratio may be hard to interpret for a person not trained in natural sciences or mathematics. Translation of likelihood ratios to an ordinal scale including verbal counterparts of the levels is therefore a necessary procedure for communicating evidence values to the police and in the courtroom. In this paper, we present a method to develop an ordinal scale for the value of evidence that can be applied to any type of forensic findings. The method is built on probabilistic reasoning about the interpretation of findings and the number of scale levels chosen is a compromise between a pragmatic limit and mathematically well-defined distances between levels.

Any evidence offered by a party at trial is subject to certain Rules of Evidence, which dictate whether or not the evidence may be considered by the decision maker. The Rules of Evidence establish admissibility rules for evidence in court. Each of the coutrs has its own jurisdiction to take evidence, although for the most part these shadow fairly closely the rules. Most legal disputes which get to court involve a dispute about the facts. Some involve a dispute about both law and the facts; a fairly small minority are about the law and nothing else. The facts that are disputed are determined by the substantive law (Contract, Tort, Crime, Company Law, Insolvency Law etc.) and the reactions of the parties to allegations. For instance, on a charge of murder the prosecution must prove that the victim was killed by the defendant who at the time had that mental state specified by the Criminal Law for murder. The facts in issue will be the actions and the mental state of the defendant. If the defendant raises a defence of provocation, then the facts in issue will include the actions of the victim. The court reconstructs events from the evidence presented by the parties to the court .

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