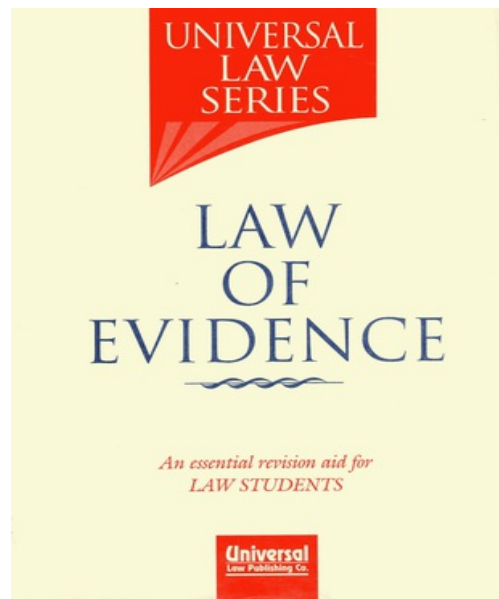
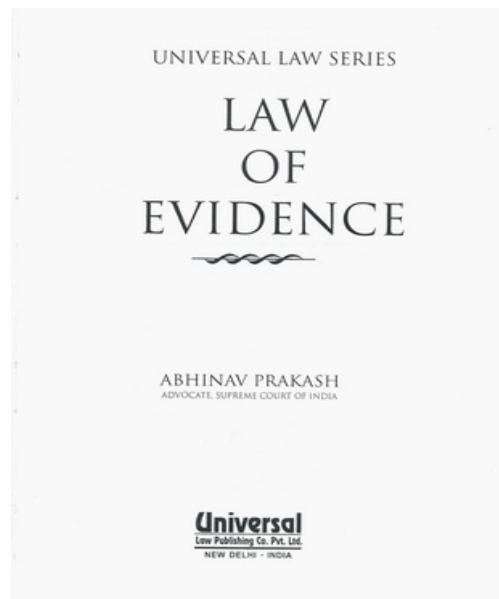


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Authors Details

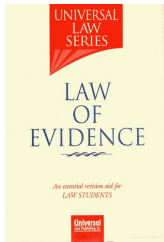
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Contents

Chapter 1

introduction



Q. What do you mean by word 'evidence'?	1
❧ History of Law of Evidence	2
1. Evidence as a branch of law	2
Q. Discuss the history of law of evidence?	2
2. Basis of Rules of Evidence	3
Q. What are basis on which the rules of evidence are framed?	3
3. Leading Rules of Evidence	3
Q. What are the Leading Rules of Evidence?	3
❧ Scheme of the Evidence Act, 1872	4
❧ Relationship between Law of Evidence, Substantive Laws and Procedural Law	5
Q. Is there any relationship between law of evidence, substantive laws and procedural law?	5
❧ Types of Evidence	5
Q. Discuss various types of evidence?	5

Chapter 2

Facts and Relevancy of Facts

❧ Interpretation of Words	13
"Court"	13
"Fact"	13
"Relevant"	13
"Facts in issue"	14
"Document"	14
"Evidence"	15
Oral Evidence	15
Documents Evidence	15
"Proved"	15
"Disproved"	16
"Not Proved"	16
Fact not Proved	16

Prima Facie and Proof	16
Evidence in Civil and Criminal Cases	17
Not Proved	17
"India"	17
❧ Facts In Issue	17
Q. What do you mean by term 'facts in issue'?	17
❧ Elements of 'facts in issue'	17
❧ Facts In Issue	18
Q. What is 'relevancy of facts'?	18
❧ Relevancy of Facts	18
❧ Relevant Fact	19
❧ Document	20
❧ Presumption of Facts	20
❧ "May presume"	20
❧ "Shall presume"	1
❧ "Conclusive proof"	1
❧ Presumptions	21
❧ Presumption	21
❧ Meaning of presumption	21
❧ Evidence may be given of facts in issue and relevant facts	22
❧ Expression 'and of no others': meaning of	23
❧ Logical and legal relevancy of facts	23
❧ Relevancy and Admissibility	23
Q. Distinguish between 'relevancy' and 'admissibility'?	23
❧ Distinction between Admissibility and Relevancy	24
Q. Write short note on 'res gestae'.	24
❧ Res Gestae	25
❧ Meaning of Res Gestae	25
❧ 'Same transaction': meaning of	25
❧ Res Gestae and Admissibility of facts	26
❧ Res gestae and hearsay evidence	27
❧ Criticism of res gestae doctrine	28
❧ Sukhar Case	28

Q. Discuss the law laid down in Sukhar case?	28
• Evidence on Personal Knowledge no Hearsay, no Res Gestae	29
• Occasion, Cause, Effect, etc.	29
Q. Discuss the facts which are the occasion, cause or effect of fact in issue?	29
• Occasion	30
• Cause	30
• Effect	30
• Opportunity	30
• State of things	30
• Motive, preparation and previous or subsequent conduct	31
• Motive	31
Q. What do you mean by term 'motive'?	31
• Preparation	32
Q. Whether preparation itself is crime? Explain	33
• Conduct of parties	33
Q. Whether conduct of parties is relevant?	33
• Abdullah Case	34
Q. What was the law laid down in Abdullah case?	34
• Facts necessary to explain or introduce relevant facts	35
• Identification Test not a Substantive Evidence	36
• Facts supporting or rebutting an inference suggested by a fact in issue or relevant fact	36
• Evidence to prove Conspiracy	38
Q. "A conspiracy is hatched in secrecy and executed in darkness. Naturally, therefore, it is not possible for the prosecutions to connect each isolated act of statement of all accused with the acts and statements of others, unless there is a common bound linking all of these together". Explain with the help of relevant statutory provision and case law?	38
• Meaning of Conspiracy	38
• Essential Elements	39
• Conditions for application of section 10	39
• Conspirators as agents	40
• Distinction between English Law and Indian Law	40

• Badri Rai case	41
• Mirza Akbar Case	41
• When facts not otherwise relevant become relevant	42
• Evidence of tape-recorded Statement	43
Q. 'A' a young girl, receives obscene calls on the telephone. She records the phone call on a tape-recorder in which the caller identifies himself to be 'X'. 'X' is being tried for making obscene calls to 'A'. In the trial the prosecution wants to lead in evidence the recorded call. Can it be led in evidence?	44
• R.M. Malkani Case	44

Chapter 3

Admissions & Confessions

Q. Define admissions? What is their evidentiary value?	46
• Admissions	46
• Reasons for admissibility of admissions	47
Q. What are the reasons for admissibility of admissions?	47
• Admission - an exception to hearsay rule	48
• Requisites of an admission	49
• Party to the proceedings - meaning of	49
• Statements must be made under the following circumstances	50
• Admission - Kinds of	51
• Who can prove admission	51
• Exceptions	52
• Meaning of expression "as against the person who makes them"	53
• Admissions regarding state of mind or body	53
• His representative in interest	53
• Oral admissions as to contents of documents	53
• Admission in Civil Cases	54
• Essential conditions for protection	55
• Evidentiary value	55
• Admission does not create title	55
• Admission is substantive evidence	55
• Case Law	56

• Bishwanath Prasad case	56
• Confession	56
Q. Define confessions. What is their evidentiary value. To what extent confessional statement are relevant for the purpose of conviction?	57
• When confession is not voluntary: conditions	57
• Kinds of Confession	57
Q. Define confessions and their relevancy. What are 'judicial and extra-judicial' confessions?	58
• Confession must be true and trustworthy	58
• Confession is a statement, wherein, guilt is admitted	58
• Confessional statement should be taken as a whole	58
• Inducement, threat or promise	58
• Person in authority	59
• Confession recorded on oath	59
• Burden of proof	59
• Confession to police officer not to be proved	59
• Confessional statement	60
• Admissibility of confessional statement	60
• Reasons for exclusion of confession to police	60
• When confession said to have made to police officer	61
• Who are police officers?	61
• Confessional statement under English Law: Admissibility	62
• Confession while in Custody	62
• Object	62
• Police custody: meaning of	62
• Exceptions	63
• Conditions for the applicability of section 26	63
• Confession and consequential discovery	64
Q. Discuss the relationship between section 26 and section 27 of the Evidence Act. How is 'a fact discovered' different from 'object produced'? Discuss with case laws.	64
• Admissibility of discloser statement by accused	64
• Protection against self-incrimination	65
• Evidentiary value of discovery of weapon	65

• Case laws	65
• Pulukuri Kottaya case	65
• Mohd. Inayatullah case	66
• Confession made after removal of inducement	67
• Confession made under promise of secrecy	67
• Confession of co-accused	68
• Retracted confession	69
• Distinction between Admissible and Confession	69
Q. What is evidentiary value of confession?	70
• Evidentiary value of confession	70
• Case laws	71
• Veera Ibrahim case	71
• Aghnoo Nagesia case	72
• M.C. Verghese case	73
• David Razario case	74
• Jayawant Dattatray case	75

Chapter 4

Dying Declaration

Q. What do you mean by term 'dying declaration'?	76
• Principle	77
• English Law and the Indian Law - Difference	77
• Evidentiary value of a dying declaration	78
• Essential conditions for the applicability of dying declaration	78
Q. What are the essential conditions for the applicability of dying declaration?	78
Q. What is dying declaration? Can a conviction be based solely on the basis of a dying declaration? Can a dying declaration be relied upon without corroboration?	79
• Statement made before a police officer: Whether admissible?	80
• Need for corroboration	81
• Evidentiary value of dying declaration	81
• Circumstances when a dying declaration is meaningless	81
Q. There is no absolute rule of law that dying declaration cannot	82

form the sole basis for conviction? Comment and elaborate what are the tests laid down by the Supreme Court in Khushal Rao case for judging the veracity of dying declaration.

• Case Laws	82
• Khushal Rao Case	82
• Kusa Case	83
• Kishanlal Case	84
• Shariff Case	85
• Rattan Singh Case	86
• P.V. Radhakrishna Case	87
• Patel Hiralal Case	88
• Laxman Case	89

Chapter 5

Expert Evidence and Relevancy of Character

• Opinions of third persons, when relevant	90
Q. What is the importance of expert opinion in a case?	91
• Test	91
• Expert Evidence	92
• Expert Witness	92
• Distinction between an expert and an ordinary witness	92
Q. Tell us the distinction between an expert and an ordinary witness.	92
• Evidentiary Value of Expert opinion	92
Q. Whether any expert opinion has some value in eyes of a court of law to decide a case?	92
• Expert Opinion: Corroboration	94
Q. Whether reliable corroboration is necessary to consider an expert opinion in a case?	94
• Ram Narain Case	94
• Opinion of examiner of electronic evidence when relevant	95
• Facts bearing upon expert opinion	95
• Opinion as to handwriting	96
Q. When opinion as to handwriting becomes relevant?	96
• Competency of non-expert witness	96

❧ Modes of proving handwriting	97
Q. What are the ordinary methods of proving handwriting?	97
❧ Opinion as to electronic signature	97
❧ Opinion as to existence of right or custom	98
❧ Opinion as to usages, tenets	98
❧ Opinion on relationship	99
❧ Character when relevant	99
(A) Relevancy of character in Civil Cases	99
Q. Whether evidence of character is admissible as a relevant fact?	99
(B) Relevancy of Character in Criminal Cases	100

Chapter 6

Proof

❧ Facts which need not be proved (Sections 56-58)	102
Q. What are the facts which need not to be proved?	102
❧ Facts Admitted	104
❧ Admission in civil and criminal cases	105
❧ Modes of proof	105
(i) Oral evidence	105
Q. What are the methods by which facts may be proved in a case?	105
❧ Proof of facts by oral evidence	105
❧ Oral evidence must be direct	106
❧ Hearsay: meaning of	106
Q. "Hearsay evidence does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the competency of some other person." Comment.	106
❧ Exception to the rule of hearsay	106
❧ Hearsay and Circumstantial Evidence	107
❧ Difference between Direct Evidence and Hearsay Evidence	107
Q. Write down the differences between 'direct evidence' and 'hearsay evidence'.	107
(ii) Documentary Evidence	108

❧ Document in computerised system and cheque	108
❧ Primary Evidence (section 62)	108
Q. What do you mean by 'primary evidence'? How it is different from secondary evidence?	109
❧ Secondary Evidence	109
❧ Difference between Primary Evidence and Secondary Evidence	110
❧ Proof by Primary Evidence	111
❧ Admissibility of Documentary Evidence	111
❧ When Secondary Evidence can be given	111
Q. Under what circumstances secondary evidence can be given?	111
❧ Secondary Evidence is admissible	113
❧ Exclusion of oral evidence by documentary evidence	114
Q. Write short note on 'exclusion of oral by documentary evidence'?	114
❧ Exclusion of evidence of oral agreement	116
❧ Principles relating to section 92	117
Q. Discuss the scope of section 92 of the Evidence Act?	118
❧ Exceptions	118
(1) Validity of document (Proviso 1)	118
(2) Matter on which document is silent (Proviso 2)	119
(3) Separate oral agreement as condition precedent (Proviso 3)	120
(4) Rescission or modification (Proviso 4)	120
(5) Usages or Customs (Proviso 5)	120
(6) Relation of language to facts (Proviso 6)	121
❧ Best Evidence Rule	121
❧ Case law	122
❧ Sara Veeraswami Case	122
❧ Roop Kumar Case	123

Chapter 7

Burden of proof and presumption

❧ Burden of Proof	124
Q. What do you understand by burden of proof? On whom does it	124

lies and under what circumstances?

❧ On whom burden of proof lies	125
❧ 'Burden' and 'onus': distinction	125
❧ Burden of proving a particular fact	126
❧ 'Burden of proof' and 'Onus probandi'	126
❧ Proof of fact on which evidence becomes admissible	127
Q. Â 'A' Hindu woman, was married to S in October 1986. 'S' died in June 1990. She then married to another man 'K' in July 1990 and gave birth to a son in September 1990. Can it be lawfully claimed that son is the legitimate son of 'K'.	127
❧ Burden of proving exception in criminal cases	127
❧ Onus of Proof	128
❧ Presumption	128
Q. What do you mean by word 'presumption'?	128
❧ Presumption: meaning of	128
❧ Presumption: Kinds of	128
❧ Proof and Presumptions	129
❧ Presumption relating to documents	130
Q. Write short note on 'presumption of fact' and 'presumption of law'.	131
❧ Presumption as to survivorship or burden of proving death	134
❧ Presumption of Death	135
❧ Presumption of Certain Offences	135
❧ Presumption of Legitimacy	136
❧ Dispute as to paternity of Child	138
❧ Presumption in suicide cases	138
❧ Presumption of existence of certain facts	139
❧ Illustrations - The Court may presume	141
❧ Adverse Inference	142
❧ Sanction to Prosecute	142
❧ Concurrent Finding of Fact	142
❧ Presumption in Rape Cases	142
❧ Case laws	143
❧ Somawanti Case	143

• Goutam Kundu Case	144
Q. A marriage was solemnized between 'X' & 'Y' on 1st January, 1990. After just 2 days of the marriage of 'Y' the wife started living separately. In April a son was born to the wife. 'Y' filed a petition of maintenance for herself and for son. 'X' denies the paternity of the child and alleges adulterous relation of 'Y' to deny the claim of maintenance. 'Y' makes an application praying for order from the court directing the wife to get her DNA/Blood test to deny the Paternity. Decide?	144
• Limbaji Case	145
• Haroom Hazi Case	146
• M.O. Shamsuddin Case	148

Chapter 8

Estoppel

Q. What do you mean by word 'estoppel'?	150
• Estoppel: kinds of	150
• Essential conditions for the Application of section 115	151
Q. Discuss the essential conditions for the applicability of section 115 of the Evidence Act?	151
• Representation - Necessary elements of	151
• Reliance and Detriment	152
• Promissory Estoppel	152
Q. What is promissory estoppel?	153
• Exceptions to the doctrine of estoppel	153
• Case law	154
• R.S. Maddanappa Case	154
• Sanatan Gauda Case	155
Q. 'A' who had appeared in B.A. Examination of the University was declared pass and eligible for a degree. On the basis of the result 'A' appeared in Civil Services Exam, and qualified for the Interview. However, before the results, the University communicated to 'A' that his B.A. result was wrongly declared and that he had failed. A filed a writ petition against the University. Can the University adduce evidence to justify its revision of the result?	155
• Issue	155

• Mahaveer Oil Mills Case	156
• Estoppel by Tenants and Licensee	156
• Estoppel of acceptor of bill of exchange, Bailee and Licensee	157
• Distinction between 'Estoppel' and 'Res judicata'	158
• Distinction between 'Estoppel' and 'Waiver'	158
• Comparison of estoppel with other concepts	159

Chapter 9

Witnesses

• Who may testify	160
Q. Who is a witness? Discuss the various types of witnesses?	160
• Dumb Witnesses	161
• Evidence of Prosecutrix in Rape Case	161
• Interested Witness	162
• Parties to civil suit and their wives or husband etc.	162
• Judges and Magistrate as witness	162
• Privileged Communications	163
• Communication during marriage	163
• Protection when not available (Exceptions)	164
• Unpublished official records	164
Q. In certain case the State has been given privilege not to produce certain documents which relate to the "affairs of the State". Discuss the law relating to it.	165
• Sources of information as to offences	166
• Professional Communications	167
Q. A, a client, says to B, an attorney - "I wish to obtain possession of property by use of forged deed on which I request you to sue."	167
Q. Is the communication made by A barred by law or expressly prohibited by law from disclosure? Decide.	167

Chapter 10

Examination of witness

• Order of producing witness	170
• Judge to decide admissibility of evidence	170

❧ Examination-in-chief	171
❧ Examination-in-chief	171
❧ Cross-examination	172
❧ Re-examination of witness	172
❧ Re-examination	172
❧ Distinction between examination-in-chief, cross-examination and re-examination	173
❧ Order of Examination	173
❧ Cross-examination of person called to produce a document	174
❧ Question by party to his own witness	174
❧ Enmity of witness	175
❧ Question tending to corroboration	176
❧ Former statement as corroboration	176
❧ Refreshing memory	177

Chapter 11

Problems and Solutions on the Indian Evidence Act, 1872

❧ Table of Cases	179
❧ Section Index	185

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Chapter 1

introduction

The "evidence" in lieu of any offence or dispute, is the eye and ear of a court. A proper decision in any case before a court is not possible without knowledge of true facts involved in a dispute. Through the evidence the facts alleged by one party, and denied by the other require the Court to ascertain whose contentions are true and for that purpose, the judge has to weigh the 'evidence' available in support of or contradiction to those contentions. Now the question arises, what does the term 'evidence' mean?

What do you mean by word 'evidence'?

The term 'evidence' is derived from the Latin word 'evident' or 'evidere', which means "to show clearly, to discover clearly, to ascertain, to prove".

"Evidence is either written or unwritten, of allegations in issues between the parties"¹

"Evidence is something, including testimony, documents and tangible objects that tends to prove or disprove the existence of an alleged act."²

"Evidence is something which ascertains the truth of the fact or point in question".³

Evidence under the Indian law means, "all statements which the Court permits or require to be made before it by witnesses, in relation to matters of fact under enquiry. Such statements are called oral evidence, all documents produced for the inspection of Court, are called documentary evidence".⁴ The object of rules of evidence is to help the Courts to ascertain the truth and to avoid the confusion in the minds of judges, which may result from the admission of evidence in excess. Thus, the Indian Evidence Act, 1872 was passed with the main object of preventing indiscipline in the admission of evidence by enacting a correct and uniform rule of practice. The law of evidence is the lex fori which governs the Courts; whether a witness is competent or not; whether a certain fact requires to be proved by writing or not; whether a certain evidence proves a fact or not; that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced and where the Court sits to enforce it; *Brain v. White Raven and Furness Junction Ry.*, (1850) 3 HLC 1 (19).

1. Wharton's Law Lexicon, 15th Edn., p. 617.

2. Black's Law Dictionary, 7th Edn., p. 575.

3. A Dictionary of Law, William C. Anderson, 1889, p. 419.

4. See section 3 of the Indian Evidence Act, 1872.

The word 'evidence' in its relation to law includes all the legal means exclusive of mere arguments which tend to prove or disprove any fact the truth of which is submitted to judicial investigation. This term and the word 'proof' are often used as synonymous, but the latter is applied by accurate logicians rather to the effect of evidence, than to evidence itself.¹ Law of evidence is basically a procedural law, but even so here and there it has overtones of substantive law.

History of law of evidence

1. Evidence as a branch of law.--

Q. Discuss the history of law of evidence?

The early history of law of evidence in India can be traced back in Dharma Shashtra as well as in Muslim and English systems of law. It was always recognized by Dharma Shashtra that the purpose of any trial is the desire to ascertain truth. The early lawmakers recognised that trial often involved suppression of facts and appreciation of falsehood. Therefore, Law of Evidence took every possible precaution, consistent with times to secure the discovery of truth.

The Indian law of evidence had attained by the time of the ancient Dharma Shastra, a considerable degree of perfection and embedding many modern concepts.

The modern law of evidence, like many branches of our legal system, owes its inception to English Common Law. Till the beginning of the 18th century most of the rules remained contained in rulings and dicta. A sort of uncertainty was prevailing which was not only in the field of law of evidence but also in the other fields of law. The first book on evidence was written by Chief Court Baron, Gibert which was published in 1756 after thirty years of his death. Along with the reforms in English Law, in India too, after 1833 various legal reforms were introduced. Between 1835 and 1853, a series of Acts² were passed by the Indian legislature which introduced some stray reforms in Indian law of evidence. Finally, after a lot of twists and turns a draft prepared by Sir James Stiphen was introduced in the Council in Governor-General in India in 1871 and was duly enacted in 1872 which is the present Indian Evidence Act.

The Evidence Act extends to whole of India, except the State of Jammu and Kashmir. Such Act also have some other limitations like, it applies to all judicial proceedings in or before any court including the Courts Martial, other than Courts Martial under Army Act, Naval Discipline Act and Air Force Act.

1. Tylore on Evidence I (11th Edn.).

2. Act X of 1835; Act XIX of 1837; Act IX of 1840; Act VII of 1844; Act XV of 1852; Act XIX of 1853; Acts II and X of 1855.

Most importantly such, Evidence Act, does not apply to AFFIDAVITS presented to any Court or officer and it also does not apply to arbitral proceeding.

2. Basis of Rules of Evidence.--

Following two fundamental axis can be said to be the basis on which the rules of evidence are framed:

Q. What are basis on which the rules of evidence are framed?

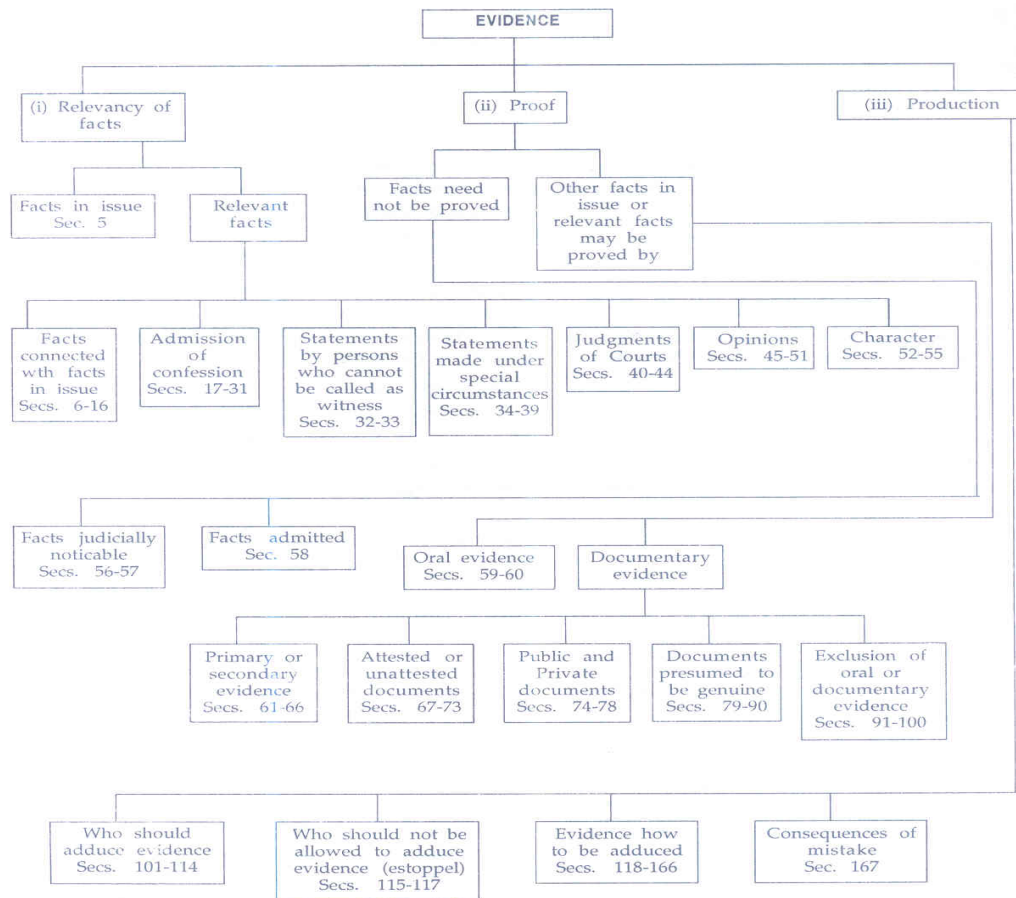
- (i) No facts other than those having some connection with the matter in controversy should be looked into by the court however interesting it may be; and
- (ii) All facts having rational probative value i.e., which helps the Court to come to a conclusion upon the existence or non-existence of the matter in controversy, are admissible in evidence, unless excluded by some rule of paramount importance.

3. Leading Rules of Evidence.--

What are the Leading Rules of Evidence?

- (i) The sole object and end of evidence is to ascertain the truth of several disputed facts and points in issue and no evidence ought to be admitted which is not relevant to the issues; Hales v. Kerr, (1908) 2 KB 601; Butterley Co. v. New Hucknall Colliery Co., (1909) 1 Ch 37.
- (ii) The point in issue is to be proved by the party who asserts the affirmative according to maxim "affirmanti non neganti incumbit probatio."
- (iii) The evidence must be sufficient to prove the substance of the issue
- (iv) The best evidence must be given of which the nature of the thing is capable.
- (v) Hearsay evidence of a fact is not admissible with some slight exceptions.
- (vi) No person is bound to incriminate himself.

SCHEME OF THE EVIDENCE ACT, 1872



Relationship between Law of Evidence, substantive laws and procedural law

Q. Is there any relationship between law of evidence, substantive laws and procedural law?

Law as a system of rules has been divided into Substantive and Procedural Law, depending on its nature and purpose. Substantive law defines rights, duties, obligations and liabilities. For example, Law of Contract, Hindu Marriage Act, 1955, Indian Succession Act, Indian Penal Code.

The laws which prescribe the mode by which the application of the substantive law is regulated are known as procedural laws, e.g., Cr. P.C. is an excellent example of procedural law dealing with procedures for seizure, arrest, search; etc. The procedural laws can be further divided into two parts; firstly, there are rules dealing with various procedures to be followed in a court of law; Secondly, there are rules dealing with the mode of the proof of the existence or otherwise of rights, duties and liabilities e.g., Evidence Act.

The rules of law of evidence for Civil and Criminal Cases are, in general, the same for example the method of proving that a particular person is dead in respect of Civil Case (person executing the Will, died or not on a particular date) or of Criminal Case (a person charged with murder). But there are certain sections of Evidence Act, which apply only to Civil Cases (sections 115-117 dealing with estoppel) and some only to the Criminal Case (sections 24-30 dealing with confessions). The burden of proof is on the prosecution in criminal cases and on the plaintiff in civil matters. There is a marked difference as to the effect of evidence in civil & criminal matters. In criminal proceedings, law presumes the accused as innocent unless and until he is proved guilty. In civil cases, principles of res ipsa loquitur is followed.

Types of Evidence.--

Q. Discuss various types of evidence?

The evidence, is classified into the following types:

(1) Direct Evidence:

Direct evidence is the evidence directly about the real point in issue. It is the testimony of the witnesses as to principal fact to be proved, e.g., the evidence of a person who says that he saw the commissions of the act which constitutes the alleged crime. It also includes the production of an original document. Direct evidence is generally of a superior cogency.

The presumptive proof when the fact itself is proved by direct testimony, Powel on Evidence, 20th Edn., p. 109.

(2) Circumstantial Evidence:

Justice Fletcher Moulton once had, in respect of circumstantial evidence, observed "proof does not mean rigid mathematical formula since, that is impossible.

Again Lord Justice Coleridge observed, the circumstantial evidence is like a grassamer thread, light and as unsubstantial as the air itself and may vanish with the merest of touches". He had further observed that such evidence may be strong in parts but it may also leave great gaps and rents through which the accused may escape."

(3) Rules of Circumstantial Evidence

(i) The facts alleged as the basis of any legal inference from circumstantial evidence must be clearly proved beyond any reasonable doubt. If conviction rests solely on circumstantial evidence, it must create a network from which there is no escape for the accused. The facts evolving out of such circumstantial evidence must be such as not to admit of any inference except that of guilt of the accused; Raghav Prapanna Tripathi v. State of Uttar Pradesh, MANU/SC/0127/1962 : AIR 1963 SC 74: (1963) 1 Cr LJ 70: (1963) 3 SCR 239.

(ii) All the link in the chain of evidence must be proved beyond reasonable doubt and they exclude the evidence of guilt of any other person than the accused; State of Uttar Pradesh v. Ravindra Prakash Mittal, 1992 Cr LJ 3693: MANU/SC/0402/1992 : AIR 1992 SC 2045: 1992 AIR SCW 2417: 1992 (2) Cr CJ 85: 1992 (2) Crimes 664: 1992 (2) Cur Cr R 71: JT 1992 (3) SC 114: (1992) 3 SCC 300: 1992 (2) SCJ 549: (1992) 2 SCR 815: 1992 Scc (Cri) 642 (SC).

(iii) The inculpatory facts must be incompatible with the innocence of the accused and is incapable of explanation upon any other reasonable hypothesis except his guilt; Musheer Khan v. State of Madhya Pradesh, AIR 2010 SC 762.

Further it relates to various circumstances which are associated with the real point in issue in such a way to help the court in coming to a conclusion about the existence or non-existence of facts in issue. Thus, circumstantial evidence does not prove the point in question directly, but establishes it only by inference. Thus, if there is no eye-witness to a murder, the fact that A had the motive to murder B or A has been seen running away with a blood-stained knife from B's room where B was found dead immediately after B's cries were heard would be circumstantial evidence as against A. If the evidence relates to a relevant fact, it is indirect or circumstantial.

(iv) Proof of circumstantial evidence:-

Four things are essential to prove guilt by circumstantial evidence:

(a) that the circumstances from which guilt is established must be fully proved;

(b) that all the facts must be consistent with the hypothesis of guilt of accused;

(c) that the circumstances must be of conclusive nature and tendency;

(d) that the circumstances should, to a moral certainty, actually exclude every hypothesis except the one proposed to be proved; *State of Uttar Pradesh v. Ravindra Prakash Mittal*, 1992 Cr LJ 3693: MANU/SC/0402/1992 : AIR 1992 SC 2045: 1992 AIR SCW 2417: 1992 (2) Cr CJ 85: 1992 (2) Crimes 664: 1992 (2) Cur Cr R 71: JT 1992 (3) SC 114: (1992) 3 SCC 300: 1992 (2) SCJ 549: (1992) 2 SCR 815: 1992 Scc (Cri) 642.

(v) Value of Circumstantial Evidence:-

Ordinarily, circumstantial evidence cannot be regarded as satisfactory as direct evidence. The chain of circumstances may lead to particular inferences and the relation to true facts may be more apparent than real. Hence, such evidence must be used with caution. Where the circumstantial evidence only showed that the accused and deceased were seen together the previous night, it was held to be not sufficient; *Prem Thakur v. State of Punjab*, MANU/SC/0097/1982 : AIR 1983 SC 61: 1983 Cr LJ 155: 1983 UJ (SC) 3: (1982) 3 SCC 462: 1982 Cr LR (SC) 499: 1983 SCC (Cri) 88: (1983) 1 Crimes 141: 1983 (1) SCJ 221: (1983) 1 SCR 822.

(4) Real Evidence:

Real evidence means the evidence of which any object belonging to class of things is the source, persons also being included. Evidence supplied by observations of involuntary changes of countenance and deportment comes under the head of real evidence.¹

In *Laxman Naik v. State of Orissa*, MANU/SC/0264/1995 : AIR 1995 SC 1387: 1995 Cr LJ 2692 (SC): 1995 AIR SCW 2057: 1994 (1) Crimes 806: JT 1994 (2) SC 39: (1994) 3 SCC 381: (1994) 2 SCR 94: 1994 Scc (Cri) 656: 1994 (1) UJ (SC) 645; the conviction and sentence of death sustained on the basis of circumstantial evidence showing an unbroken and complete chain of events leading to the rape and murder of a seven year old daughter of the brother of the accused.

(5) Expert Evidence:

The law of evidence is designed to ensure that, the Court, considers only that evidence which enables it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear testimony of the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the Court's knowledge. Thus cases where the science involved is highly specialised and perhaps even esoteric, the central role of expert cannot be disputed.

Rules of Expert Evidence

1. Expert must be within a recognized field of expertise.
2. The evidence must be based on reliable principles.
3. Expert must be qualified in that discipline; *Ramesh Chandra Agrawal v. Regency Hospital Ltd.*, MANU/SC/1641/2009 : AIR 2010 SC 806 (See also *Errors, Medicine and the Law* by Alan Merry and Alexander McCall Smith, 2001 Edn., p. 178, published by Cambridge University Press, London.

It means as by models etc., see *Best on Evidence* 10th Edn., p. 2.

(6) Hearsay Evidence:

It may be called indirect, second-hand or derivative evidence. It is a statement made to the Court by a

witness who has not seen the happening of the transaction or facts, but heard that something had happened. Thus, it means that which a witness does not say of his own knowledge but says that another has said or signified to him. The courts do not normally take such evidence much seriously.

1. Best on Evidence

The evidence of person who does not see the occurrence or accused persons, but learns from the eye-witnesses about such occurrence and sends information to the police station, his evidence about such information though is hearsay if corroborates with the substantive evidence of eye witnesses then, it is admissible; Muktiar Singh v. State of Punjab, MANU/SC/0047/2009 : AIR 2009 SC 1854: 2009 Cr LJ 1744: 2009 AIR SCW 1475: 2009 (64) All Cr C 694: 2009 (74) All Ind Cas 22: 2009 (1) Cal LJ 304: 2009 (1) Chand Cr C 286: 2009 (2) Cur Cr R 239: 2009 (2) Mad LJ (Cri) 956: (2009) 1 Scale 655.

(7) Primary Oral Evidence:

Primary Oral Evidence means that a statement made in a Court by a witness, who has personally seen or heard or gathered by his senses. It is called direct evidence as opposed to hearsay.¹

In case of primary evidence, if the petitioner does not produce original copy then no primary evidence can be stipulated to prove the guilty of accused; All India Anna Dravida Munnetra Kazhagam v. L.K. Tripathi, MANU/SC/0509/2009 : AIR 2009 SC 1314: 2009 AIR SCW 2424: 2009 (2) Cur Cr R 659: 2009 (5) Mad LJ 782: 2009 (2) Rec Cr R 658: MANU/SC/0509/2009 : (2009) 5 SCC 417: (2009) 4 Scale 547: 2009 (2) Scc (Cri) 673.

(8) Secondary Evidence:

Secondary evidence means that which can be given in absence of the primary evidence. Where a copy of the document or recollection of the witness who has read the original document are tendered in evidence they will be called secondary evidence of the document.²

Where the original has been destroyed or lost, and when party has made diligent search for it and exhausted all sources and means available for its production then the secondary evidence is admissible; Sattamma v. Ch. Bhikshapati Goud, MANU/AP/0360/2010 : AIR 2010 AP 166.

(9) Oral Evidence:

Oral evidence is the evidence, which is confined to words spoken by mouth or gestures. Oral evidence, when reliable, is sufficient without documentary evidence to prove a fact or title. Where a fact which can be proved by oral evidence, it is not necessary that the statement of the witness should be oral. Thus, a dumb person may be testified by signs or by writing. The facts, can also be proved by oral evidence.

"Oral evidence" includes not only the one adduced by examining the witnesses, on behalf of such party, but also the cross-examination of witness by the opposite party, in relation to it; Nandam Mohanamma v. Markonda Narasimha Rao, MANU/AP/0447/2005 : AIR 2006 AP 8: 2006 AIHC 662: 2006 (1) ALJ (NOC) 145: 2005 (5) Andh LD 296: 2006 (1) Rent LR 510.

1. Section 60 of the Indian Evidence Act, 1872.

2. Section 65 of the Indian Evidence Act, 1872.

(10) Documentary Evidence:

Documentary evidence deals with evidence produced in the form of a document in order to prove a

disputed fact. The subject-matter of documentary evidence can be divided into three parts:

- (i) how the contents of a document are to be proved
- (ii) how the document is to be proved to be genuine
- (iii) how far and in what cases the oral evidence is excluded by documentary evidence

The meaning of the document or of a particular part of it is to be sought for, in the document itself. That is undoubtedly, the primary rule of construction to which sections 90 to 94 of the Indian Evidence Act, give statutory recognition and effect with certain exceptions contained in sections 95 to 98 of this Act. Of course to "document" means the "document" read as a whole and not piecemeal; *Delhi Development Authority v. Durga Chand Kaushish*, MANU/SC/0329/1973 : AIR 1973 SC 2609: 1973 Ren CR 708: (1973) 2 SCC 825: (1973) 2 SCWR 642.

(11) Positive and Negative Evidence:

Positive evidence tends to prove the existence of a fact whereas by a negative evidence non-existence of a fact is proved. But it should be borne in mind that negative evidence is ordinarily no good evidence; *Rahim Khan v. Khurshid Ahmed*, MANU/SC/0274/1974 : AIR 1975 SC 290: (1975) 2 SCC 660: 1975 (2) SCJ 178.

(12) Substantive and Non-substantive Evidence:

Substantive evidence is that on which reliance can be placed for the decision of a case. Non-substantive evidence is that which either corroborates the substantive evidence to increase its credibility or which contradicts a substantive evidence to discredit it.

(13) Prima Facie and Conclusive Evidence:

This decision is from the point of view of cogency and weight or effect of evidence. Prima facie evidence is that which is accepted as reliable one and as such establishes or proves a fact in the absence of contradictory evidence.

Conclusive Evidence is use of facts involving the application of a rule of law which is termed as conclusive presumption, e.g., copy of the Official Gazette containing an order adjudging a debtor as an insolvent is conclusive evidence of the order having been made and of its date. The expression conclusive proof in section 4 is used in the same sense; *Somawanti v. State of Punjab*, AIR 1963 SC 151: (1963) 1 SCA 548: 1963 (2) SCJ 85: (1963) 2 Mad LJ (SC) 18: (1963) 2 Andh WR (SC) 18: (1963) 33 Comp Cas 745: (1963) 2 SCR 774.

Medical evidence pointing to alternative possible is not accepted as conclusive evidence; *Chhotanney v. State of Uttar Pradesh*, MANU/SC/0246/2009 : AIR 2009 SC 2013: 2009 AIR SCW 1680: 2009 (3) ALJ 106: 2009 (64) All Cr C 920: 2009 (75) All Ind Cas 58: 2009 (2) Crimes 139: 2009 (43) OCR 54: (2009) 3 Scale 171.

When one fact is declared by Evidence Act, to be conclusive proof another, the Court, on proof of one fact, regard the other as proved and does not allow evidence to be given for the purpose of disproving it; *Kamti Devi v. Posh Ram*, MANU/SC/0335/2001 : (2001) 5 SCC 311: AIR 2001 SC 2226: 2001 AIR SCW 2100: 2001 (3) Civ LJ 523: JT 2001 (1) SC (Supp) 87: 2001 (4) SCJ 147: 2001 (6) SRJ 345: (2001) 4 Scale 195: 2001 Scc (Cri) 892: 2001 (4) Supreme 78.

(14) Pre-appointed and Casual Evidence:

Pre-appointed or Pre-constituted evidence is that which is procured in anticipation of its use. It may be voluntary or prescribed by law. The absence of pre-appointed evidence would effect its cogency. On the other hand, casual evidence is an evidence which is not pre-appointed.

(15) Scientific Evidence:

The case of *Daubart v. Merryll Dow Pharmaceutical Inc.*, 113 Sct 2786 (1993) formulated the conditions for admissibility of scientific evidence. viz:

1. Whether the principles or techniques has been or can be reliably tested?
2. Whether it has been subject to peer review or publication.
3. It's known or potential rate of error.
4. Whether there are recognized standards that control the procedure of implementation of the technique?
5. Whether it is generally accepted by the community?
6. Whether the technique has been introduced or conducted independently of the Litigation?

The Supreme Court in *Ranjitsing Brahmajeetsingh Sharma v. State of Maharashtra*, MANU/SC/0268/2005 : AIR 2005 SC 2277: 2005 Cr LJ 2533: 2005 AIR SCW 2215: 2005 (2) Crimes 168: 2005 (2) Cur Cri R 92: JT 2005 (4) SC 123: (2005) 5 SCC 294: 2005 (3) SCJ 697: 2005 (3) SLT 545: (2005) 3 Scale 774: 2005 Scc (Cri) 1057: 2005 (3) Supreme 679, observed that the admissibility of a scientific test would depend upon its authenticity. Whether the brain mapping test is so developed that the report would have a probative value so as to enable a Court to place reliance thereupon, is a matter which would require further consideration, if and when the materials in support thereof are placed before the Court.

(16) Digital Evidence:

In case of *Commissioner of Customs, New Delhi v. M/s C-Net Communication India Pvt. Ltd.*, AIR 2007 SC (Supp) 957, the Supreme Court held that "digital electronics" would mean that a decoder is a multiple input, multiple out-put and logic circuit that converts coded inputs into coded out-puts.

Further it was held that "a decoder" is a device which does the reverse of an encoder, undoing the encoding to that the original information can be retrieved.

In case of *State of Maharashtra v. Som Nath Thapa*, MANU/SC/0451/1996 : AIR 1996 SC 1744: 1996 Cr LJ 2448: 1996 AIR SCW 1977: 1996 (2) Crimes 64: JT 1996 (4) SC 615: (1996) 4 SCC 659: 1996 Scc (Cri) 820, Advocate of accused Mr. Shri Shirodhkar submitted that the investigating agency wanted to rope Thapa any how which was apparent from the fact that it took recourse to even manufacturing of evidence as telephone number of Dawood Ibrahim was fed in the Digital Diary found at the residence of appellant on search being made.

From such contentions Supreme Court observed that investigation at times is either sluggish or over-zealous and it might over short also.

Besides, the United Nations Commission on International Trade Law (UNCITRAL) in 1996 included electronic record as to be accepted as evidence.

The Information Technology Act, 2000 which is based on the foot steps of UNCITRAL introduced electronic record as evidence. Likewise Indian Evidence Act, 1872, Banker's Books Evidence Act, 1891, Indian Penal Code and RBI Act, 1934 were amended to cope with the system and admissibility of digital evidence.

(17) Electronic Evidence:

The evidence can also be in the form of electronic record produced in court. The evidence, even in criminal matters, can also be, by way of electronic records. This would include video-conferencing; *State of Maharashtra v. Praful B. Desai*, MANU/SC/0268/2003 : AIR 2003 SC 2053: 2003 Cr LJ 2033:

2003 AIR SCW 1885: 2003 (2) Crimes 237: JT 2003 (3) SC 382: (2003) 4 SCC 601: (2003) 3 SCR 244: 2003 (2) SLT 824: (2003) 3 Scale 554: 2003 Scc (Cri) 815: 2003 (3) Supreme 19: 2003 (2) UJ (SC) 769; Jagjit Singh v. State of Haryana, AIR 2007 SC 590: 2007 AIR SCW 158: 2007 (5) All MR 16 (NOC): MANU/SC/5473/2006 : (2006) 11 SCC 1: (2006) 13 Scale 335.

(18) Tape Record Evidence: V.V Giri Case:

The tape itself is a primary and direct evidence, admissible as to what has been said and picked up by the recorder. A previous statement, made by a witness and recorded on tape can be used not only to corroborate the evidence given by the witness in Court but also to contradict, the evidence given before the court, as well as to test the veracity of the witness and also to impeach his impartiality; N. Sri Rama Reddy v. V.V. Giri, MANU/SC/0333/1970 : AIR 1971 SC 1162: 1970 Ker LT 390: 1970 SCD 646: 1970 UJ (SC) 604: (1971) 1 SCA 394: 1971 (1) SCJ 483: (1971) 1 SCR 399; All India Anna Dravida Munnetra Kazhagam v. L.K. Tripathi, MANU/SC/0509/2009 : AIR 2009 SC 1314: 2009 AIR SCW 2424: 2009 (2) Cur Cr R 659: 2009 (5) Mad LJ 782: 2009 (2) Rec Cr R 658: MANU/SC/0509/2009 : (2009) 5 SCC 417: (2009) 4 Scale 547: 2009 (2) Scc (Cri) 673

Tapes are more susceptible to tampering. The standard of proof about its authenticity has to be more stringent as compared to other documentary evidence; Tukaram S. Dighole v. Manikrao Shivaji Kokate, MANU/SC/0086/2010 : AIR 2010 SC 965.

(19) Evidence of Dog:

The tracker dog evidence is not likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli, because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious violation or deliberate choice. Dogs are intelligent animals with many thought processes similar to thought processes of human beings and wherever there are thought processes there is always the risk to error, deception and even self-deception. In the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight¹; Abdul Razak Murtaza Dafadar v. State of Maharashtra, AIR 1970 SC 283: 1969 (2) SCJ 870: 1969 Mad LJ (Cri) 862: 1970 Cr LJ 373: (1970) 1 SCA 535: (1970) 1 SCR 551: 1970 MPLJ 932: 1970 Mah LJ 747; See also American Juris, Vol. 29, 2nd Edn., para 378.

(20) Outer Evidence:

It is a peculiar type of evidence which is necessary to establish that a particular acquisition is not for public purpose and for providing the value of property and other matters that may be involved in a particular principle adopted for a particular offence or purpose.

1. American Juris, 2nd Edn., Vol. 29, p. 429, para 378

Chapter 2

Facts and Relevancy of Facts

Law of evidence revolves round the facts of the case. Therefore, a definition of the term 'facts', was felt to be necessary and is included

in section 3 of the Act.

Interpretation of Words

3. Interpretation clause.--

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

"Court".--

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

"Fact".--

"Fact" means and includes-

- (1) any thing, 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.

The word 'facts' means some concrete or material fact to which the information directly relates; *Earabhadrapa v. State of Karnataka*, AIR 1983 SC 446.

'Fact' means something actually exists, as aspects of reality, *Black's Law Dictionary*, 7th Edn., p. 610.

"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.

"Relevant" means applying to a matter in question, affording something to the purpose; especially of evidence as meaning supporting the contention of a party to a suit.

Black's Law Dictionary, 7th Edn., P. 1293 defines as "Logically connected and tending to prove or disprove a matter in issue having appreciable probative value. That is, rationally tending to persuade people of probability or possibility of some alleged fact.

"Facts in issue".--

The expression "facts in issue" means and includes-any fact from which, either by itself or in connection with other

facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.-Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

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.

"Facts" may either "facts in issue" which are the principal matters in dispute or relevant facts which are evidentiary and which directly or by inference prove or disprove the facts in issue".

"Document".--

"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

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.

The meaning of document or of a particular part of it is to be sought for in the document itself. That is, undoubtedly, the primary rule of construction to which sections 90 to 94 of the Indian Evidence Act, give statutory recognition and effect, with certain exceptions contained in sections 95 to 98 of the said Act. Of course the document reads as a whole and not piecemeal; Delhi Development Authority v. Durga Chand Kaushish, MANU/SC/0329/1973 : AIR 1973 SC 2609: 1973 Ren CR 708: (1973) 2 SCC 825: (1973) 2 SCWR 642.

"Evidence".-

"Evidence" means and includes-

Oral Evidence.--

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry,

Somawanti v. State of Punjab, MANU/SC/0034/1962 : AIR 1963 SC 151: (1963) 1 SCA 548: 1963 (2) SCJ 85: (1963) 2 Mad LJ (SC) 18: (1963) 2 Andh WR (SC) 18: (1963) 33 Comp Cas 745: (1963) 2 SCR 774.

Documents Evidence.--

(2) all documents including electronic records produced for the inspection of the Court,

Somawanti v. State of Punjab, MANU/SC/0034/1962 : AIR 1963 SC 151: (1963) 1 SCA 548: 1963 (2) SCJ 85: (1963) 2 Mad LJ (SC) 18: (1963) 2 Andh WR (SC) 18: (1963) 33 Com Cas 745: (1963) 2 SCR 774.

Evidence means "any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objections, etc., for the purpose inducing belief in the minds of the Court or jury as to their contention; Victoria Xavier v. Greater Cochin Development Authority, AIR 1993 Ker 95: ILR 1992 (2) Ker 603: 1992 (1) Ker LJ 609: 1992 (1) Ker LT 613: 1994 LACC 347, Black's Law Dictionary 5th Edn., (quoted).

"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.

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. Further what is required is production of such materials on which the Court can reasonably act to reach the supposition that a fact exists.

The proof of the fact depends upon degree of probability of its having existed. The standard required for reaching the separation is that of a prudent man acting in any important matter concerning him; Hawkins v. Powells, (1911) 1 KB 988.

Further the proof does not mean proof of rigid mathematical demonstration, because that is impossible, it must mean such evidence as would induce a reasonable man to come to a particular conclusion; M. Narasimha Rao v. State of Andhra Pradesh, AIR 2001 SC 318.

In M. Narsingha Rao v. State of Andhra Pradesh, AIR 2001 SC 318; the Supreme Court held that a fact is said to be proved, when after considering the matter before it the Court either believe it to exist or considers its existence so probable that a prudent man ought, under circumstances of particular case, to act upon supposition that it exists. This is the definition of the word 'proved' in the Evidence Act. What is required is production of such materials on which the Court reasonably act to reach the supposition that the fact exist. Proof of facts depends upon degree of possibility of having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him.

"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.

What is required is material on which the Court can reasonably act for reaching the supposition that a certain fact exists. The proof of fact depends upon the degree of probability of it having existed. The standard required for reaching the supposition is that of a prudent man acting on any important matter concerning him; Lokeman Shah v. State of West Bengal, MANU/SC/0245/2001 : AIR 2001 SC 1760: 2001 Cr LJ 2196: 2001 AIR SCW 1646: 2001 (2) Crimes 212: JT 2001 (4) SC 520: (2001) 5 SCC 235: (2001) 3 SCALE 297: 2001 SCC (Cri) 829: 2001 (3) Supreme 305: 2001 (2) UC 33.

"Not Proved".-A fact is said not to be proved when it is neither proved nor disproved.

Not Proved.--It indicates state of mind between two states of minds ""proved" and "disproved", when one is unable to decide how the matter precisely stands. It negates both proof and disproof"; Emperor v. Shafi Ahmad, (1929) 31 Bom LR 515.

Fact not Proved.--

A fact which is not proved does not necessarily mean it is a false one. Section 3 of the Evidence Act gives definitions of various words and expressions. The expression "proved" is followed by definition "disproved".

A fact is said to be "not proved" when it is neither proved or disproved. This is followed by the definition of "disproved". A fact is said "non proved" when it is neither proved nor disproved.

A fact which is "not proved" may be true or false. A doubt lingers about its truth, merely because it is not proved, one may jump to conclusion that it is disproved. A fact is disproved normally by the person who claims that an alleged fact is not true.

Prima Facie and Proof.--

A prime facie case is not the same thing as "proof" which is nothing but belief according to the conditions laid down in the Evidence Act. It is a fallacy to say that because a Magistrate has found a prima facie case to issue process, therefore, he believes the case to be true in the sense that the case is proved. But depends upon the credibility of witness, and their evidence, cannot be rejected.

Evidence in Civil and Criminal Cases.--

There is no difference between the general rules of evidence in Civil and Criminal cases, and the definition "proved" in section 3 of the Evidence Act, does not draw a distinction between Civil and Criminal Cases. Nor this definition insist on perfect proof because absolute certainly amounting to demonstration is rarely to be had in the affairs of life. Nevertheless, the standard of measuring proof prescribed by definition is that of a person of prudence and practical good sense.

The same evidence, which may be sufficient to regard a fact, as proved in Civil suit, may be considered insufficient for a conviction in a criminal action. While in former, a mere preponderance of probability may constitute an adequate basis of decision, in the latter a far higher degree of assurance and judicial certitude is requisite phenomenon for conviction.

Not Proved.--

Phrase Not proved means neither the fact is proved with certainty nor the fact is believed to exist. The phrase Not Proved is between the phrase proved and disproved. And the phrase not proved is the result of careful scrutiny of the person of ordinary prudence that the fact neither exists with certainty nor its non-existence is proved with certainty. It is the provisions between existence and non-existence of the fact in the mind of a man of ordinary prudence; *Vijaya Singh v. State of Uttar Pradesh*, AIR 1990 SC 1450.

"India".--

"India" means the territory of India excluding the State of Jammu and Kashmir.]

the expressions "Certifying Authority", "electronic signature", "Electronic Signature Certificate", "electronic form", "electronic records", "information", "secure electronic record", "secure electronic signature" and "subscriber" shall have the meanings respectively assigned to them in the Information Technology Act, 2000 [and also as per amendment made by the Information Technology (Amendment) Act, 2008 (10 of 2009)].

Facts in issue

Q. What do you mean by term 'facts in issue'?

The evidence of any particular case has to be confined to the facts of the case. The first duty of any Court of law, therefore, is to ascertain the area of controversy between the parties. The 'facts' which are in dispute are 'facts in issue'. Section 3 of the Evidence Act, 1872, while defining "facts in issue" only adds that, in addition to being in controversy, the fact should be such that the question of liability should depend upon it.

Elements of 'facts in issue'.--

The requirement that a fact in dispute will be regarded as a fact in issue only if the fact is such that by itself or in connection with other facts is disputed. Therefore, it can have two elements:

- (i) the fact should be in dispute between the parties; and
- (ii) the fact should touch the question of rights or liabilities.

In criminal matters, the allegations in the charge-sheet constitute the facts in issue.¹ In civil matters the process of ascertaining 'facts in issue' is known as framing of issues.²

Facts in issue is nothing but the facts which are in dispute. Evidence becomes necessary only in reference to facts which are in controversy or dispute between the parties. Further, the fact should be such that the question of liability should depend upon it. The following illustration makes clear the point:-

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

Therefore, facts in issue are those facts which a plaintiff must prove in order to get an adjudication in his favour on which a defendant may prove to defeat the suit. Facts in issue will depend upon the provisions of the substantive law applicable to the offence.

Whatever be the facts in issue, their existence has to be proved to the satisfaction of the Court before the Court can be called upon to pronounce a judgment on the basis of those facts.

Facts In Issue.--

The distinction between the facts in issue and relevant facts is of fundamental importance and must be thoroughly comprehended in order to understand and appreciate the Scheme of the Evidence Act.

A substantive law defines the rights and liabilities of parties in the form of certain abstract propositions or formulae and the object of every suit or other judicial proceedings is to ascertain whether the, rights claimed, or the Liabilities sought to be enforced by one person against another does or does not exist. A party to a litigation seeking to enforce a right or liabilities against his opponent, in order to obtain a verdict in his favour by a tribunal has to establish all such facts as to constitute the rights or liabilities. These "necessary constituents" are "facts-in-issue".³

Q. What is 'relevancy of facts'?

Relevancy of facts

Facts which are themselves not in issue may help in proving facts in issue. They are used as foundation for inferences respecting facts in issue. According to Stiphen the word 'relevant' means that, "Any two facts to which it is applied are so related that according to the common course of events one either taken by itself or in connection with some other facts proves or renders probable the past, present or future existence or non-existence of the other".

1. Chapter XIX of Cr. P.C., 1973.

2. Order XIV, RR. 1-7 of C.P.C., 1908.

3. Sir James Fitzjames Stephen, Introduction to Framing of Evidence Act, p. 12, Fipson Evidence, 7th Edn., p. 110.

Relevant Fact.--

A 'Relevant fact' is also known by its Latin name 'factum probans' i.e., a fact that proves.

The "relevancy" and "admissibility" are often used as synonyms but their legal implication are distinct and different. The

fact which are relevant may not be admissible, for example communication made by spouses during marriage or between an Advocate and his client though relevant, are not admissible, so also facts which are admissible may not be relevant for example, question permitted to be put in cross-examination to test the veracity or impeach the credit of witnesses though not relevant are admissible; Ram Behari v. State of Bihar, MANU/SC/0302/1998 : AIR 1998 SC 1850.

"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.

Therefore, relevancy under the Evidence Act, does not depend upon mere logic but it should be 'legally relevant' and should be fitted in any of the following provisions, viz.,

- (i) facts logically connected with the facts in issue (sections 5-16),
- (ii) admissions and confessions (sections 17-31),
- (iii) statements by non-witnesses (sections 32-33),
- (iv) statements under special circumstances (sections 34-37),
- (v) judgment in other cases (sections 40-44),
- (vi) opinions of third persons (sections 45-51),
- (vii) evidence as to character (sections 52-55).

The word 'relevant' is not defined under the Evidence Act, rather, it provides for the relationship which indicates 'when one fact becomes relevant to another'. Normally, facts relevant to an issue are those facts which are necessary for proof or disproof of a fact in issue. Thus, relevant facts (or evidentiary facts) or factum probans are those, which are capable of affording a reasonable presumption as to either the facts in issue or the principal matters in dispute. The word 'relevant' has been held to be 'admissible'; Lakhmi v. Haider, 3 CWN 268. Relevant facts are not themselves in issue, that are foundations of inferences regarding them. For example, "when X is accused of the murder of Y", the 'relevant facts' are - X had a motive and opportunity to kill Y, he had made preparations by buying a knife, etc., or after the murder he was seen running with blood-stained knife in hand.

Therefore, relevancy indicates such relationship with the facts in issue as convinces or has a tendency to convince the judge to the existence or otherwise of the facts in issue. The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one taken by itself or in connection with other facts proves or renders probable the existence or non-existence of the other. It should be noted that circumstantial evidence is evidence that relates to facts, other than those in issue, which by human experience, have been found to be so associated with the fact in issue that the latter may be reasonably inferred therefrom.

Though questions put in cross-examination are not always determinative in finding an accused guilty, they are certainly relevant; Jesu Asir Singh v. State, MANU/SC/7830/2007 : AIR 2007 SC 3015: 2007 Cr LJ 4310: 2007 AIR SCW 5472: 2007 (57) All Ind Cas 12: 2007 (3) Chand Cr C 111: 2007 (3) Crimes 333: 2007 (4) JCC 2629: 2007 (4) Rec Cr R 38: (2007) 10 SCALE 110.

Document.--

'Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of these means, intended to be used, or which may be used for the purpose of recording that matter.¹

It should be noted that the word 'document' includes photographs, tape recordings, letters, printings, books, inscriptions, carvings, outline maps, xeroxed materials, microfilms, carbon copies, cartoons, caricatures, murals, symbols, insignias or any other substance on which communications, words, thoughts, ideas, plans may be recorded.

Thus, interpreted, the section would include even 'codes', tattoo marks' voice or sound patterns recorded in any form and on any material would form an evidence? Even tape-recordings of speeches and conservations are 'documents' and therefore admissible before the courts of law; In Pratap Singh v. State of Punjab, AIR 1964 SC 74; N. Sri Rama Reddy v. V.V. Giri, AIR 1971 SC 1162: 1970 Ker LT 390: 1970 SCD 646: 1970 UJ (SC) 604: (1971) 1 SCA 394: 1971 (1) SCJ 483: (1971) 1 SCR 399; Yusufalli v. State of Maharashtra, AIR 1967 SC 76; R.M. Malkani v. State of Maharashtra, MANU/SC/0204/1972 : AIR 1973 SC 157: 1973 Cr LJ 228: 1973 Mah LJ 92: 1973 MPLJ 224: MANU/SC/0204/1972 : (1973) 1 SCC 471: 1973 SCC (Cri) 389: (1973) 2 SCWR 776; Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, MANU/SC/0277/1975 : AIR 1975 SC 1788: (1976) 2 SCC 17: 1975 Supp SCR 281 their Lordships of the Supreme Court held that tape-recording of speeches and conversations are 'documents' and therefore admissible.

"Document" means records, writings, precepts, instructions or directions and means a document read as a whole and not peacemeal; Administrator of the Specified Undertaking of the Unit Trust of India v. Garware Polyester Ltd., MANU/SC/0375/2005 : AIR 2005 SC 2520: 2005 AIR SCW 2798: 2005 CLC 668: JT 2005 (5) SC 300: (2005) 10 SCC 682: 2005 (4) SCJ 258: 2005 (4) SLT 442: 2005 (6) SRJ 413: (2005) 5 SCALE 54: 2005 (4) Supreme 359.

Presumption of Facts.--

4. "May presume".-Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

1. See section 3 of the Evidence Act.

"Shall presume".-Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof".-When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

Evidence Act, declares a fact as final and conclusive, its impact is crucial because no party can then give evidence for the purpose of disproving that fact. This is substance of section 4 which defines three kinds of presumption; Calcutta Municipal Corpr. v. Pawan Kamar, MANU/SC/0011/1999 : AIR 1999 SC 738.

PRESUMPTIONS

Presumption
of facts
or
Natural
Presumption

Presumption
of law
or
Artificial
Presumption

Rebuttable
Presumption
of law
(shall Presume)

Irrebuttable
Presumption
of law
(Conclusive proof)

These presumptions are of three types:

'May presume'.-- 'shall presume' and 'conclusive proof', - 'may presume' leaves it to the discretion of the Court to make the

presumption as per the circumstance of the case, "shall presume" leaves no option with the Court not to make the presumption. The Court is bound to take the fact as proved until evidence is given to disprove it. In this sense such presumption is also rebuttable. "Conclusive prove" gives an artificial probative effect by the law to certain facts. No evidence is allowed to be produced with a view to the combating that effect. In this sense, this is irrebutable presumption.

Presumption

Meaning of presumption.--

The presumption is a legal or factual assumption drawn from the existence of certain facts. The presumption raised under a statute has only an evidentiary value. The presumption drawn in respect of one fact may be an evidence even for the purpose of drawing presumption under another; *M. S. Narayana Menon alias Mani v. State of Kerala*, MANU/SC/2881/2006 : (2006) 6 SCC 39; AIR 2006 SC 3366; 2006 Cr LJ 4607; 2006 AIR SCW 4652; 2006 (3) Crimes 117; 2006 (35) OCR 43; 2006 (8) SRJ 275; (2006) 6 SCALE 393; 2006 SCC (Cri) 30; 2006 (5) Supreme 547; 2006 (2) UC 1289.

Evidence may be given of facts in issue and relevant facts

Section 5 of the Act, provides that:

5. Evidence may be given of facts in issue and relevant facts.-Evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

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

Illustrations

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

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

A's beating B with the club;

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

A's intention to cause B's death.

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

This section declares that in a suit or proceeding evidence may be given of the existence or non-existence of:

(i) facts in issue; and

(ii) of such other facts as are declared to be relevant in sections 6 to 55.

The facts-in-issue are those facts which are necessary to prove or disprove, to establish or refute a case. The facts-in-issue are normally clear from the pleadings and are a matter for the judges to determine. The facts-in-issue must normally be proved by evidence.¹

The facts-in-issue are distinguishable from collateral facts "which affects the proofs of facts in issue."²

A fact-in-issue is a necessary ingredient of materialism because from such fact, either by itself or in connection with other facts, the existence or non-existence of a right or liability necessarily follows.

A relevant fact on the other parlance, is not a necessary ingredient of a right or liability, but is one that merely

renders probable the existence or non-existence of any ingredient fact of a right or Liability. A fact-in-issue is called the principal fact and the relevant fact is called the "evidentiary fact".

1. Halsbury's Law of England, Vol. 17, 4th Edn., para 30.

2. Heydoris Evidence Cases and Materials.

Expression 'and of no others': meaning of.--

Section 5 by using the expression 'and of no other' excludes everything which is not declared relevant under any of the sections 6 to 55; R. v. Poncho, ILR 7 Cal 671. All evidence tendered must be shown to be admissible under some of the following sections of the Chapter. A party trying to adduce a particular evidence has to show that the evidence desired to be adduced is relevant under one or more of the sections 6 to 55; Dwijesh v. Naresh, MANU/WB/0056/1945 : AIR 1945 Cal 492.

Logical and legal relevancy of facts.--

Sometimes in order to prove the existence or non-existence of the facts in issue, certain other facts may be given in evidence, called relevant or evidentiary facts.

A fact is said to be logically relevant to another when it contains such a casual relation with the other as to render probable the existence or non-existence of the latter. All facts which are logically relevant are not necessarily legally relevant. One fact is said to be legally relevant to another only when the one is connected with the other in any of the ways referred to in sections 6 to 55 of the Act. Whatever is legally relevant is normally logically relevant. However, only legally relevant facts are considered as relevant facts. A confession made to a police officer may appear to be logically relevant but it is not legally relevant, for section 25 declares that it cannot be used as evidence against the person making it; E. v. Bhagwandas Tulsidas, 47 Bom LR 997.

Relevancy and Admissibility.--

The terms relevancy and admissibility are not identical. They have different meanings. Relevancy refers to facts which are logically probative i.e., which afford material for the conclusion that a particular fact in issue exists or does not exist. Admissibility, on the other hand refers to facts which the Court will permit to be given in evidence. Under the English Law, the former is called logical relevancy and the later is called legal relevancy. All facts which are logically relevant need not be legally relevant or admissible but all facts which are admissible must necessarily be logically relevant. Under the Indian Evidence Act, the question of relevancy has been dealt with under sections 5 to 55 and that of admissibility under section 56 onwards.

The practice which can be a better substitute is whenever an objection is raised during evidence taking stage regarding admissibility of any material or item of oral evidence, the Trial Court can make a note of such obligations subject to such objections being decided at the last stage in the final judgment; Bipin Shantilal Panchal v. State of Gujarat, AIR 2001 SC 1158: 2001 Cr LJ 1254: 2001 AIR SCW 841: 2001 (1) Crimes 288: JT 2001 (3) SC 120: (2001) 3 SCC 1: 2001 (1) SCJ 460: 2001 (3) SRJ 437: (2001) 2 SCALE 167: 2001 SCC (Cri) 417: 2001 (2) Supreme 65: 2001 (1) UJ (SC) 573.

The rules of relevancy declares certain facts relevant, rule admissibility lay down as to whether a certain form of evidence about relevant fact, may be allowed or excluded under the circumstances of a case. What is the material (fact) which may be produced before a court in a case is a first question. Relevancy means what facts may be proved before any court of law. Thus under the Evidence Act, the terms "Relevant" or "the facts that may be proved" are synonyms.

The admissibility is means and the method of proving the relevant facts.

In Ram Bihar Yadav v. State of Bihar, MANU/SC/0302/1998 : AIR 1998 SC 1850: 1998 Cr LJ 2515: 1998 AIR SCW 1647: 1998 (2) Crimes 254: JT 1998 (3) SC 290: (1998) 4 SCC 517: 1998 (2) SCJ 253: (1998) 2 SCR 1097: (1998) 3 SCALE

200: 1998 SCC (Cri) 1085: 1998 (4) Supreme 178; the Supreme Court speaking through Mohd. Quadari J., said that, more than often the expression relevancy and admissibility are used as synonyms but their legal implications are different because more often than not facts which are relevant may not be admissible for example the communication made by spouse during marriage, the communication between an advocate and his client, though for example, questions permitted to be cross-examined to test the veracity or to impeach credit of witness though not relevant are admissible.

Q. Distinguish between 'relevancy' and 'admissibility'?

Distinction between Admissibility and Relevancy.--

Admissibility	Relevancy
1. Admissibility is not based on logic but on strict rules of law.	1. Relevancy is based on logic and probability.
2. The rules of admissibility is described after section 56 of the Evidence Act, 1872.	2. The rules of relevancy is described from sections 5 to 55.
3. The rule of admissibility declares whether certain type of relevant is relevant.	3. The rules of relevancy declares what evidence are admissible or are to be excluded.
4. Admissibility is means and of modes for admissibility of relevant evidence.	4. Under the Evidence Act, the rules of relevancy means where evidence are admissible.
5. The facts which are admissible are necessarily relevant.	5. The facts which are relevant and not necessarily admissible.
6. In admissibility court has no discretion.	6. In relevancy, the Court has discretionary power.
7. Statements are not admissible in evidence.	7. However, statements are relevant in evidence.

Q. Write short note on 'res gestae'.

Res Gestae

The Latin word 'res' means 'thing' 'gestae' means alone or over and the expression 'res gestae' literally means "thing done, transaction or essential circumstances surrounding the subject is complete". Under Indian Evidence Act, 1872, section 6 is based on this doctrine, wherein, it has been mentioned that, wherever a 'transaction' such as a contract as a crime, is a fact in issue, then evidence can be given of every fact which forms part of the same transaction. It reads as under:

6. Relevancy of facts forming part of same transaction.-

Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the Government of India] by taking part in an armed insurrection in which property is destroyed, troops are attacked, and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is

contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Res Gestae

Meaning of Res Gestae.--

The items of evidence are sometimes said to be part of the Res gestae, owing to the nature and strength of their connection with the matter in issue and as such are admissible. Res Gestae is an expression mainly of utility in the criminal law concerning the contemporaneity of statements to residents but, insofar as contemporaneous statements are relevant and accompany and explain matters in issue, they will be admissible.¹

'Same transaction': meaning of.--

The term 'same transaction' has not been defined in the Evidence Act. It signifies that a series of activities are linked together to present a continuous story. A definition of the word is given by Stephen who says,

"A transaction is a group of facts, connected together to be referred to by a single legal name, a crime, a contract, a wrong or any other subject of enquiry which may be in issue." From its very nature the word 'transaction' is difficult to define. It should be interpreted neither in any strict nor in technical way but in its ordinary etymological meaning of "an affair" or "a carrying through."

The rule of efficient test for determining whether a fact forms part of the same transaction or another "depends upon whether they are so related to one another in point of purpose, or as cause and effect, or as probable and subsidiary acts as to constitute one continuous action." Proximity of time is not so essential for the continuity of action and purpose. On the one hand, the mere proximity of time between several acts will not necessarily constitute them parts of the same transaction, on the other hand, the mere fact that there are intervals of time between the various acts will not necessarily import want of continuity. To ascertain whether a series of acts are parts of the same transaction, it is essential to see whether they are linked together to present a continuous whole. Section 6 lays down that facts, which form part of the same transaction are relevant.

1. Halsbury's Laws of England, Vol. 17, 4th Edn., p. 8.

Res Gestae and Admissibility of facts

Res Gestae has come to be a rule of exception to the hearsay evidence. A fact or a statement of fact or opinion, which is so closely associated in time, place and circumstances with some act or event, which is in issue, that it can be said to form a part of the same transaction as the act or event in issue, is itself admissible in evidence. The justification given for the reception of such evidence is that the light that it sheds upon the act or event in issue is such that in its absence, the transaction in question may not be fully or truly understood and may even appear to be meaningless, inexplicable or unintelligible; Kapoor Singh Rana v. State of Delhi, 1 (2006) CCR 558 (DB).

Res Gestae of any case properly consists of that portion of actual world's happenings out of the right or liability, complained or asserted in the proceeding, necessarily arises. That has been used in two senses. In the restricted sense it means world's happening out of which the right or liability in question arises. In the wider sense, it covers all the probative facts by which Res Gestae are reproduced to the tribunal where the direct evidence of witness or perception of court are unattainable.

Statements may also accompany physical happenings e.g., an accident, happened in a public place, a number of by-standers will make mutual conversation about the incident. The question is to what extent such statements can be regarded as parts of the transaction. Some important guidelines in this regard are:-

(i) Spontaneous and simultaneous utterance is a part of the transaction, e.g., what a person states during an occurrence in respect of the occurrence itself.

(ii) Statement must be contemporaneous with the fact, i.e., statement made either "during or immediately before or after its occurrence", and of such a nature that the events speak for themselves (and not what the people say when talking about the event). The words must be at least de recenti.

(iii) If the statement is made after the act is over for reflection and deliberation (fabrication); and/or it is mere narration of past events, then it is not relevant.

(iv) The statement must be a statement of fact and not an opinion.

The following illustrations/cases, will help clear the point:-

(i) X, while running in the street, crying that Y has stabbed him, is a relevant fact. Similarly, the statement of a raped woman 'crying for help', is a relevant fact.

(ii) Statements made during the investigations of a crime are not relevant facts.

(iii) Where shortly after a murder, the person suspected of it explained the absence of the deceased by saying that he had left the village, the Court held the statement to be a part of the transaction and thus relevant; *Basanti v. State of Himachal Pradesh*, MANU/SC/0285/1987 : (1987) 3 SCC 227: AIR 1987 SC 1572: 1987 Cr LJ 1869: 1987 (1) Supreme 542: JT 1987 (2) SC 281: 1987 SCC (Cri) 483: 1987 Cr LR (SC) 302: 1987 All Cr C 442.

(iv) A man was prosecuted for the murder of his wife. His defence was that the shot went off accidentally. There was evidence to the effect that the deceased telephoned to say: "Get me the police please". Before the operator could connect the police, the caller, who spoke in distress, gave her address and the call suddenly ended. Thereafter, the police came to the house and found the body of a dead woman. Her call and the words she spoke were held to be relevant as a part of the transaction which brought about her death; *Rattan v. The Queen*, (1971) 3 WLR 9301.

(v) Newspaper Reporting

Whether or not a newspaper report can be relied upon by the High Court would obviously depend upon the nature of jurisdiction being exercised by the High Court.

If the question is of admissibility of newspaper report in any appeal, obviously the Evidence Act, being applicable, the High Court is required to go by the provisions of the Evidence Act; *All India Anna Dravida Munnetra Kazhagam v. State Election Commissioner*, AIR 2007 (NOC) Mad 1801; *S.P. Anand v. Registrar General, Madhya Pradesh High Court*, MANU/MP/0405/2008 : AIR 2009 MP 1: 2008 (3) Jab LJ 361: 2008 (4) MPHT 279: 2008 (3) MPLJ 596: 2008 (4) Rec Civ R 780: 2008 (4) SCT 352.

(vi) Inference of guilty

In order to justify the inference of guilty, the circumstances from which such an inference is sought to be drawn, must be incompatible with the innocence of accused; *Vasa Chandrasekhar Rao v. Ponna Satyanarayana*, AIR 2000 SC 2138: 2000 Cr LJ 3175: 2000 AIR SCW 2200: 2000 (2) Crimes 328: JT 2000 (6) SC 465: (2000) 6 SCC 286: 2000 (6) SRJ 314: (2000) 4 SCALE 635: 2000 SCC (Cri) 1104: 2000 (4) Supreme 173.

Res gestae and hearsay evidence.--

Hearsay evidence means the statement of a person who has not seen the happening of the transaction, but has heard of it from outside. But such evidence can be given if it is a part of the transaction. For example, in *R. v. Foster*, 172 ER 1261: (1834) 6 C&C 325; the witness has only seen a speeding vehicle, but not the accident. He was allowed to give evidence of what the deceased said, although it was only a derived knowledge, it being a part of res gestae. Thus, the doctrine of res gestae constitutes an exception to the principle of hearsay; *Kashmira Singh v. State*, AIR 1965 J&K 37: 1964 Kash LJ 267: (1965) 1 Cr LJ 554.

Section 6 of the Act, is an exception to the hearsay evidence rule and admits of certain carefully safeguarded and

limited exceptions and makes the statement Admissible when such statements are proved to form a part of the res gestae; Javed Alam v. State, (2009) 8 SCALE 68.

Criticism of res gestae doctrine.--

The doctrine of res gestae is applicable to 'hearsay' evidence also, which is not considered a good piece of evidence. Similarly, collateral facts are res inter alios actae, (i.e., transactions between others, for example, statements made behind the accused's back and to be used as evidence against him. According to Professor Stone, "no evidential problem is so shrouded in doubt and confusion". The rule is not only useless but also harmful. It is useless because every part of it is covered by some other rule, for example, declarations as to the state or mind or health. It is harmful because it caused confusion about the limitations of other rules. The precise limits of res gestae are not themselves not easy to define. Facts differ so greatly that no fixed principle can be laid down as to the matters that will form parts of a transaction. Because of its confusing nature, the phrase res gestae has not been included in the Indian Evidence Act. And it is left to the judges to find the necessary and treat a fact as relevant.

Sukhar Case.--

Q. Discuss the law laid down in Sukhar case?

In Sukhar v. State of Uttar Pradesh, VIII (1999) SLT 270; the brief facts of the case was, the appellant was charged for the offence under section 307, IPC for causing injury to Nakkal on 17-4-1978 at 7.30 a.m. near the Chak in village Tejalhera in the district of Muzaffarnagar. On the basis of material available on record through the prosecution witness, the Additional Sessions Judge convicted him for the offence under section 307 and sentenced him to rigorous imprisonment of five years. On an appeal the High Court of Allahabad upheld the conviction and sentence of the appellant and dismissed the appeal. This Court having granted leave, the present appeal is before the Apex Court. This entire case inter alia revolved round the scope of section 6 of the Evidence Act.

The Supreme Court observed that, section 6 of the Evidence Act is an exception to the general rule hereunder the hearsay evidence become admissible. But for bringing such hearsay evidence within the provisions of section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore as forming part of res gestae must have been made contemporaneously with the acts or immediately thereafter.

The Supreme Court referred the observations of Gentela Vijayavardhan Rao v. State of Andhra Pradesh, MANU/SC/0719/1996 : AIR 1996 SC 2791: 1996 Cr LJ 4151: 1996 AIR SCW 3555: 1996 (3) Crimes 197: JT 1996 (7) SC 491: (1996) 6 SCC 241: 1996 (3) SCJ 247: 1996 SCC (Cri) 1290; where considering the law embodied in section 6 of the Evidence Act, it was observed:

"This principle of law embodied in section 6 of the Evidence Act, is usually known as the rule of res gestae recognised in English Law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" it becomes relevant by itself. This rule is roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement of fact admissible under section 6 of the Evidence Act, is on account of the spontaneity and immediacy of such statement or fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae."

The Supreme Court also referred to the ratio of Rattan Singh v. State of Himachal Pradesh, MANU/SC/0177/1997 : AIR 1997 SC 768: 1997 Cr LJ 833: 1997 AIR SCW 587: 1996 (4) Crimes 282: 1997 (13) OCR 57: MANU/SC/0177/1997 : (1997) 4 SCC 161: 1996 (4) SCJ 628: 1997 SCC (Cri) 525; and came to the conclusion that the statement of the witness evicting that the injured told him that his nephew has fired at him, would become admissible under section 6 of the Evidence Act. Thus, the Supreme Court rejected the contention of the appellant. The appeal was allowed by the

Supreme Court.

Evidence on Personal Knowledge no Hearsay, no Res Gestae.--

The evidence on personal knowledge cannot be framed and cannot be hearsay; S.R. Ramaraj v. Special Court, MANU/SC/0600/2003 : AIR 2003 SC 3039: 2003 Cr LJ 3863: 2003 AIR SCW 3962: 2003 (4) Crimes 83: MANU/SC/0600/2003 : (2003) 7 SCC 175: 2003 (5) SLT 52: 2003 (9) SRJ 333: (2003) 6 SCALE 508: 2003 (6) Supreme 508: 2004 (1) UJ (SC) 207.

Occasion, cause, effect, etc.

Q. Discuss the facts which are the occasion, cause or effect of fact in issue?

Section 7 of the Evidence Act, deals with the facts which are the occasion, cause or effect of facts in issue. This section reads as under:

7. Facts which are the occasion, cause or effect of facts in issue.-Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations

(a) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

Under section 7 the relevancy of facts is to be determined by human experience. What has been the effect of a particular cause and what has been a constant cause of a particular effect in the past will be the same in future.

Occasion.--

Evidence can always be given of the set of circumstances which constituted the occasion for the happening of the principal fact.¹ The fact that the deceased girl was alone in her cottage at the time of murder is relevant as it constituted the occasion for the murder.

Cause.--

"Cause" often explains the reason why a particular act was done. It helps the court to connect the person with the act. The act in question must have been done by the person who had the cause for it e.g., the fact that accused was in love with deceased's wife. The word "cause" is broader than the word "motive". Where, for example, soon after an election the winning candidate is murdered, the election and somebody's defeat at it is the cause of the murder and beyond that cause there may be no motive in it. When an act is done and particular person is alleged to have done it, his physical presence is required.²

Effect.--

Every act leaves behind certain effects which not only record the happening of the act, but also throw light upon the nature of the act. One of the important facts which connects a person with the act in question is the footprints on

the scene of the crime and the finger impressions.³ Similarly, where a person is poisoned the symptoms produced by the poison are relevant, being the effects of the facts in issue. Possession of stolen articles by a person, immediately after theft, is also an effect. Unexplained scratches on the face or the person of the accused are also the effects of the facts in issue.

Opportunity.--

Often a person has to carve out for himself an opportunity to do the act in question. This may involve a break from the normal routine of his life. Evidence of opportunity thus becomes important as it shows that the act must have been done by the person who had the opportunity to do it. For example, the fact that accused left his fellow workers at about the time of the murder under the pretence of going to a Smith's shop was relevant as this gave the accused his opportunity.⁴ No need can be done without an opportunity.⁵

State of things.--

The fact which constitute the state of things under which or in the background of which the principal facts happened are relevant e.g. the state of relations between the parties, the state of the health of the deceased and his habits. For example, where the accused was prosecuted for shooting down his wife and he took the defense of accident, the fact that the accused was unhappy with his wife was carrying an affair with another man was held to be relevant

1. See illustration (a).

2. Wagmore Evidence, section 131.

3. See illustration (b).

4. See illustration (c) also gives an instance of opportunity.

5. Russel on Crime, 11th Edn., p. 4282.

as it constituted the state of things in which the principal fact, namely, the shooting down, happened. It is necessary to know the state of things in which it occurred.¹

Motive, preparation and previous or subsequent conduct

Section 8 of the Indian Evidence Act, provides that:

8. Motive, preparation and previous or subsequent conduct.-Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.-The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Section 8 makes those facts relevant which are connected in any of the following ways:

(i) if they show or constitute motive.

(ii) if they show or constitute preparation of any fact in issue or relevant fact.

(iii) if they constitute the conduct of any party to suit or proceedings or of an agent of any such party.

Motive.--

What do you mean by term 'motive'?

Under the Evidence Act, any fact is relevant which shows or constitutes a motive.²

Motive implies an emotion or desire operating on the will and causing it to act.³ It signifies the reason for the conduct.⁴ Motive is an emotion, a State of mind, but it is often confused with events tending to excite, to emotion, the outward facts, which may be the stimulus and the causes of the emotion. Motive, in the correct sense is the emotion supposed to have led to the act. It is generally proved by two sorts of circumstantial evidence, namely: (1) conduct of the person, and (2) by events about that person which could excite that emotion. Conduct is effect and expression of that inward emotion.

1. Cunningham p. 201.

2. The Principles of the Law in British India 1902 Edn., p. 176.

3. As per Webster's Dictionary.

4. Winfield: Law of Tort.

To establish liability whether civil or criminal, motive is generally irrelevant but an enquiry into motive is often of great importance, particularly in cases of circumstantial evidence; Queen v. Sorob Roy, 5 WR (Cr) 28; Queen v. Bahar Ali Khan, 15 WR (Cr) 46.

In case of Chunni Lal v. State of Uttar Pradesh, MANU/SC/0422/2010 : AIR 2010 SC 2467, Supreme Court held that motive of taking step to seek revenge and taking for property of deceased was sufficient to convict the accused.

In State of Madhya Pradesh v. Dhirendra Kumar, MANU/SC/1029/1997 : AIR 1997 SC 318: 1997 AIR SCW 74: 1996 (4) Crimes 195: JT 1996 (10) SC 93: 1997 (1) Jab LJ 215: 1997 (1) Raj LW 38: MANU/SC/1029/1997 : (1997) 1 SCC 93: 1997 SCC (Cri) 54; one Munnibai was killed. Respondent Dhirendra Kumar had an evil eye on her. Respondent was tenant in the house of father-in-law of deceased (Munnibai). Munnibai reported the matter to her mother-in-law who in turn told to her husband; who told Dhirendra to vacate the house. This may be taken as motive of murder.

The murder of an old widow possessed of wealth, the fact that the accused was to inherit her fortunes on her death was held to be relevant as it showed that the accused had a motive to dispose her of. Where certain lands were inherited by the deceased along with his brother but the accused got them transferred into their names and criminal and revenue cases were pending between them at the time when the deceased was killed, it was held that these facts constituted a sufficient evidence of motive; Awdesh v. State of Uttar Pradesh, MANU/SC/0077/1995 : AIR 1995 SC 375: JT 1994 (7) SC 694: (1995) 1 SCC 200: 1994 AIR SCW 4572: 1994 (3) Crimes 283: 1995 (2) Cur Cr R 16: 1994 SCC (Cri) 1676.

It may be noted that evidence of motive is not sufficient by itself to lead to conviction; nor absence of it to discredit other evidence. When there is a clear evidence that a person has committed an offence, the motive becomes irrelevant. In Yunis alias Kariya etc. v. State of Madhya Pradesh, MANU/SC/1116/2002 : AIR 2003 SC 539: 2003 Cr LJ 817: 2002 AIR SCW 5169: 2003 (2) Crimes 281: MANU/SC/1116/2002 : (2003) 1 SCC 425: 2002 (7) SLT 303: 2003 (2) SRJ 73: (2002) 9 SCALE 245: 2003 SCC (Cri) 341: 2003 (2) Supreme 899; it was held by the Supreme Court that ocular evidence (eye witness) is very clear and continuing. Role of accused person in time stands established. Failure to prove motive for the crime has no consequence.

By proving the 'motive' the prosecution can rely upon the conduct of accused; State of Madhya Pradesh v. Bhim Mohd., 2002 Cr LJ 1906.

Motive for doing a criminal act is difficult area of the prosecution; Ranganayaki v. State by Inspector of Police, MANU/SC/0889/2004 : AIR 2005 SC 418: 2004 AIR SCW 6613: 2004 (4) Crimes 179: 2004 (4) Cur Cr R 208: JT 2004 (9) SC 464: 2004 (29) OCR 804: (2004) 12 SCC 521: 2004 (6) SLT 417: (2004) 8 SCALE 734: 2004 (7) Supreme 350.

Preparation.--

Q. Whether preparation itself is crime? Explain

In criminal cases, preparation itself is no crime unless coupled with intention, attempt and completed act. Section 8 of the Act, provides that acts of preparation are relevant. It says that facts which show or constitute preparation for any fact in issue or relevant fact are relevant. Evidence tending to show that the accused made preparation to commit a crime, is always admissible. Preparation only evidences a design or plan to do a certain things as planned.

In a case based on circumstantial evidence, the motive assumes great significance in as much as its existence is an enlightening factor in a process of presumptive reasoning, *Sukhrum v. State of Maharashtra*, MANU/SC/3346/2007 : (2007) 7 SCC 502: AIR 2007 SC 3050: 2007 Cr LJ 4327: 2007 AIR SCW 5520: 2007 (3) Crimes 354: (2007) 10 SCALE 60: 2007 (3) SCC (Cri) 426: 2007 (5) Supreme 926; *State of Punjab v. Suda*, MANU/SC/0103/2003 : AIR 2003 SC 1471.

It is always not carried out but it is more or less likely to be carried out. The existence of the plan is always used in daily life as the basis of inferences to the act planned. In a case of burglary, the four accused held a meeting to arrange for the crime; a bar of iron and pair of pincers were alone necessary; and these the accused brought; these facts were admitted to show preparation. The probative force, both of preparation and the previous attempts manifestly rests on the presumption that an intention to commit the offence was framed in the mind of accused which persisted until the power and opportunity were found to carry it into execution. The preparation on the part of the accused may be, to accomplish the crime, to prevent discovery of crime or it may be to aid the escape of the criminal and avert suspicion; *Appu alias Ayyanar Padayachi v. State*, MANU/TN/0177/1971 : AIR 1971 Mad 194: 1970 Mad LW (Cri) 239: (1971) 2 Mad LJ 53: 1971 Mad LJ (Cri) 432: 1971 Cr LJ 615.

In order that a person may be convicted of an attempt to commit a crime, he must be shown first to have had an intention to commit the offence, and secondly to have done an act which constitutes the actus reus of a criminal attempt; *Malkiat Singh v. State of Punjab*, 1970 Cr LJ 750: MANU/SC/0534/1969 : AIR 1970 SC 713: 1970 (1) SCJ 473: (1989) 2 SCR 663: 1970 MLJ (Cri) 246 (SC).

Conduct of parties.--

The second paragraph of section 8 makes relevant the conduct of the following persons relevant:

- (i) Parties to the suit or proceedings.
- (ii) Agents of such parties.
- (iii) Any person against whom an offence is subject of inquiry.

Q. Whether conduct of parties is relevant?

The conduct of a man is particularly important to the law of evidence, for his guilt or the state of mind is often reflected by his conduct. Guilty mind begets guilty conduct. Under section 8, the conduct of the following parties is relevant-parties to the suit/proceeding or of their agent (plaintiff and defendant in a civil suit, and accused in a criminal proceeding), any person an offence against whom is the subject of any proceeding (injured person).

It is important to note that, the conduct is admissible only if the following conditions are satisfied:

- (i) it must be in reference to the suit or proceeding or in reference to any fact in issue therein or relevant thereto.
- (ii) it must directly influence or be influenced by any fact in issue or relevant fact; *Hadu v. State of Orissa*, MANU/OR/0067/1950 : AIR 1951 Ori 53; *R. v. Abdullah*, (1885) ILR 7 All 385.

The close association of accused is very important piece of evidence. The evidence of phone calls made by various accused to one another is very relevant and admissible piece of evidence; *Shidharth Vashist @ Manu Sharma v. State*

(NCT of Delhi), MANU/SC/0268/2010 : AIR 2010 SC 2352.

Abdullah Case.--

Q. What was the law laid down in Abdullah case?

In *Queen-Empress v. Abdullah*, (1885) 7 All 385 (FB); one Abdullah was charged with murder of one Dulari, a prostitute, by cutting her throat with a razor. She was questioned by her mother, Kotwal, Deputy Magistrate and Surgeon, etc. about the incident. She was unable to speak. When Magistrate mentioned the name Abdullah after speaking great many names, she made an affirmative sign by nodding her head. It was held by a majority of three judges as against one that section 8 was not applicable, but that the evidence was relevant under section 32 as a dying declaration. Mahmood, J., held that the conduct in question was relevant under section 8, but not under section 32.

Petheram, Chief Justice, with whom two judges agreed, proceeded on the hypothesis that to attract section 8 the conduct must be influenced directly by the facts and not by the interposition of words spoken by third persons. In his view the "conduct" must be relevant first and then any statement influencing that conduct becomes relevant. In this case, the signs of head was a conduct which indicated nothing and were, therefore, irrelevant and any statement influencing an irrelevant conduct would be irrelevant.

Mahmood, J., however, did not agree with this reasoning and held that, nodding the head or waiving the hand is not a word. He, therefore, set aside section 32(1) which according to him, could only apply to "a statement written or verbal".

Statements as conduct.-

Conduct may in certain cases includes statements; *Emperor v. Nanua*, MANU/UP/0042/1940 : AIR 1941 All 145 (149). However, Explanation 1 to section 8 clearly state that statements will not be treated as conduct, unless they accompany and explain acts other than statements. The Explanation points to a case where actions and statements are mixed together in such a way that those actions and statements can be proved as a whole; *Queen-Empress v. Abdullah*, (1885) 7 All 385 (FB). In *Prakash Chand v. State of Delhi*, 1979 Cr LJ 329; the accused was charged with the offence of bribery. It was deposed by the witness. Evidence to the effect that at the time of raid by the police officer and trap witness, on the question "whether you have accepted bribe" the fact that the accused was stunned and did not reply, he was confused and began to apologise, or that he began to tremble were held relevant.

Presence of Motive.-

The Supreme Court in case of *Balram Singh v. State of Punjab*, MANU/SC/0393/2003 : AIR 2003 SC 2213: 2003 AIR SCW 2656: 2003 (3) Crimes 43: JT 2003 (4) SC 569: (2003) 11 SCC 286: 2003 (3) SLT 601: (2003) 4 SCALE 561: 2004 SCC (Cri) 149: 2003 (3) Supreme 749, by analysing the motive of accused held that the incident occurred because of altercation between two families few days before the incident. Two persons were seriously injured out of, one person succumbed to the injuries. If evidence of such is accepted, the question of the presence of motive does not arise.

Facts necessary to explain or introduce relevant facts

Section 9 of the Act, provides for the facts necessary to explain or introduce relevant facts as under:

9. Facts necessary to explain or introduce relevant facts.-

Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations

(a) The question is, whether a given document is the Will of A.

The state of A's property and of his family at the date of the alleged Will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section 8, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A.C., on leaving A's service, says to A-"I am leaving you because B has made me a better offer". This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it-"A says you are to hide this". B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

Under section 9 the following facts are relevant:-

- (1) Fact which are necessary to explain a fact in issue or relevant fact.
- (2) Facts which are necessary to introduce a fact in issue or relevant fact.
- (3) Facts which support an inference suggested by a fact in issue or relevant fact.
- (4) Facts which rebut an inference suggested by a fact in issue or relevant fact.
- (5) Facts which establish the identity of anything or person whose identity is relevant.
- (6) Facts which fix the time or place at which the facts in issue or relevant fact happened.
- (7) Facts which show the relation of parties by whom any such fact was transacted.

It should be borne in mind that these seven categories of facts are not admissible generally. They are relevant only in so far as they are necessary for the purpose indicated in each category.

Introductory facts.-

It would be practically impossible, in conducting suit or proceedings to jump directly on the main fact. A judge seeks for some introductory matter, just as one hearing the main incident of a story would like to know the

circumstances leading up to it and the result that follow it. Facts which are introductory of a relevant fact are often of a great help in understanding the real nature of the transaction, and in supplying the missing link.

In *Hunt v. Swyney*, 33 PAC 854; an action was brought by one Hunt executor of the will of one ship, against defendant Swyney to compel him, to convey certain lands alleged to have been held in trust for plaintiff's testator and setting out the facts relied on Mrs. Sharp, the widow, intervened claiming that the defendant held that land in trust for her and claiming rent and profits, setting out that the defendant, who was her husband's law clerk, has bought the land referred to with her money and for her, Mrs. Sharp, when in witness's box was asked, "During the year 1881 from December 1st, down to and including the month October, 1882 was Mr. Swyney the defendant in this action, your agent in rents for you." Objection was raised that it was inadmissible. The objection was ruled out on the ground that it was introductory.

Identification Test not a Substantive Evidence.--

In *Musheer Khan @ Badshah Khan v. State of Madhya Pradesh*, MANU/SC/0065/2010 : AIR 2010 SC 762, the Supreme Court held that the identification test is not substantive evidence is meant for purpose of helping investigating agency with an assurance that their progress with investigation into offence is proceeding on right lines.

Thus, the identity of a thing or person is necessary to prove the presence of relevant facts.

Facts supporting or rebutting an inference suggested by a fact in issue or relevant fact.--

This part of the section overlaps section 11 of the Act. The facts which are relevant as supporting inference under section 9 may be relevant as making existence or non-existence of facts in issue or relevant facts highly probable under clause (2) of section 11, and facts which are relevant under section 9 as rebutting an inference may be relevant as inconsistent facts under clause (1) of section 11. There are certain classes of the facts which are neither relevant as facts in issue nor as relevant facts. But they either support the inference suggested by the fact in issue or relevant fact or they contradict the facts in issue or relevant facts and for the purpose they are relevant. E.g., X is accused of committing robbery. Just after the committal of the offence, X runs away to Bombay. At the trial of X for robbery the fact that he ran away just after the occurrence is a fact giving inference that he had some concern with the offence. If X adduces evidence to prove that he had a very urgent piece of work at Bombay and in that connection he went there it will rebut the inference drawn from the fact that he ran away to Bombay.

Fact which establish the identity of a person.-"This section does not deal with testimonial identity. Circumstantial evidence of identity are dealt within this section." So when a party's identity with ascertained person is in issue, it may be proved or disproved not only by direct testimony or opinion but by similarity or dissimilarity of personal characteristics, (e.g., height, age, size, hair, complexion, voice, handwriting, manner, dress, distinctive marks, faculties, peculiarities, thumb-impression, footprints), as well as residence, occupation, family relationship, education, travel, religion, knowledge of particular people, place or facts and other details of personal history.

Facts showing relations of parties.-Facts showing relationship of parties by whom such facts was transacted are relevant. Where a document is alleged to have been made under undue influence the relationship between the maker of the document and the person alleged to have influenced is a relevant fact under this section; *Boyse v. Roosborough*, 6 HLC 42.

Test Identification Parade.-The identification parades are not primarily meant for the Court. They are meant for investigation purposes. The object of conducting a test identification parade is two fold:

1. It is to enable the witnesses to satisfy themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of crime.
2. It is to satisfy the investigating authorities that the suspect is the real person whom, the witnesses had seen in connection with the said occurrence; *Mulla v. State of Uttar Pradesh*, MANU/SC/0091/2010 : AIR 2010 SC 942.

The purpose of TIP is to test and strengthen trustworthiness of substantive evidence of witness in Court. The evidence with regard to test Identification parade is used for corroboration; Ram Baba v. State of Uttar Pradesh, AIR 2010 SC 2143.

Identification Test.-

The identification test is not substantive evidence. Such tests are meant for purpose of helping investigating agency with an assurance that their progress with investigation into offence is proceeding on right lines; Musheer Khan v. State of Madhya Pradesh, MANU/SC/0065/2010 : AIR 2010 SC 762.

Evidence to prove Conspiracy

Q. "A conspiracy is hatched in secrecy and executed in darkness. Naturally, therefore, it is not possible for the prosecutions to connect each isolated act of statement of all accused with the acts and statements of others, unless there is a common bound linking all of these together". Explain with the help of relevant statutory provision and case law?

Section 10 of the Evidence Act, relates to conspiracy which applies to both civil and criminal conspiracies. Section 10 reads as under:

10. Things said or done by conspirator in reference to common design.-Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Government of India.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Kabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

Meaning of Conspiracy.--

In *Mulcahy v. R. Willes, J.*, laid down a conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.' So long as such a design rests in intention only it is no indictable. When two agree to carry into effect, the very plot is an act in itself.'

Thus conspiracy consists in a combination or an agreement. It has three essential elements (a) two or more persons, (b) agreement, (c) unlawful purpose or criminal object.

In civil cases, the principal is bound by the acts of his agent. In criminal cases, a person cannot ordinarily be held responsible for the acts of others unless they have been instigated by him or done with his consent. In other words, ordinarily there cannot be vicarious criminal liability. This section provides that in prosecutions for conspiracy when consent and connections between conspirators is reasonably believed to exist, whatever is said, done or written by each conspirator in reference to their common intention is admissible as evidence against others. The rule is founded on the identity of interest and commonality of the purpose existing between the parties. Section 10 is thus based on the principle of agency. When consent has once been proved, the doctrine applies that each party is an agent for all others and acts done by on pursuance of the common design are admissible against the fellow conspirators.

Section 10 is an exception to rule that one cannot be criminally responsible for the acts and statements of others.

Essential Elements.--

To prove conspiracy the following elements must be proved:

(A) In Criminal Conspiracy to commit an offence-

- (i) there must be an agreement between two or more persons; and
- (ii) that agreement must be to commit an offence under the Indian Penal Code or any special or local Act.

(B) In Criminal Conspiracy other than to Commit an offence-

- (i) there must be an agreement between two or more persons;
- (ii) the agreement must be to do some illegal act or legal act by illegal means; and
- (iii) that some overt act¹ was committed in pursuance of such agreement.

(C) In Civil Conspiracy-

- (i) that there was an agreement between two or more persons;
- (ii) that the agreement was to effect some unlawful purpose or a lawful purpose by unlawful means;
- (iii) that some overt act¹ was done in pursuance of the agreement; and
- (iv) that the overt act resulted in damage to the plaintiff.

Thus 'damage' is essential condition for establishing civil conspiracy.

Proof of conspiracy.-

Conspiracy is generally hatched in secrecy and executed in darkness and hence section 10 is deliberately enacted so as to make the acts and words of a conspirator admissible against the whole body of conspirators. Direct evidence of conspiracy by its very nature being rare, it is proved more often than not by inferential or circumstantial evidence like the conduct of the parties including their acts, words and writings.

Conditions for application of section 10.--

(1) Reasonable grounds to believe the existence of conspiracy:-

Before the section 10 can be applied it must be established by independent evidence that there is reasonable ground to believe that two or more persons conspired to commit an offence or an actionable wrong; Balmokand v. Emperor, AIR 1915 Lah 16; Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra, AIR 1965 SC 682: (1964) 2 SCR 378: 1964 (2) SCJ 771: (1965) 1 Cr LJ 608. Reasonable ground to believe mean that there must be prima facie evidence in support of the existence of conspiracy between two or more accused; Balmokand v. Emperor, AIR 1915 Lah 16; Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra, AIR 1965 SC 682: (1964) 2 SCR 378: 1964 (2) SCJ 771: (1965) 1 Cr LJ 608.

(2) There must be some act or statement of the conspiracy:-

Section 10 allows evidence to be given of anything said, done or written by any of the conspirators; S.H. Jhabwala v. Emperor, MANU/UP/0371/1933 : AIR 1933 All 690. Anything said means any statement, speech or declaration; S.H. Jhabwala v. Emperor, MANU/UP/0371/1933 : AIR 1933 All 690. Anything done means some act done and not merely intention or knowledge of the person; S.H. Jhabwala v. Emperor, MANU/UP/0371/1933 : AIR 1933 All 690. Anything written includes (i) manuscript whether signed or unsigned by the person, and (ii) matter transcribed by a typist on a typewriter or printed; Bhagwan Swarup Lal Bishan Lal v. State of

Maharashtra, AIR 1965 SC 682: (1964) 2 SCR 378: 1964 (2) SCJ 771: (1965) 1 Cr LJ 608.

(3) Things said, done or written in reference to common intention:-

it must be borne in mind that the thing said, done or written by one person will be admissible against him and others in a conspiracy case only when that thing is said, done or written in reference to the common intention of the conspiracy. Anything written by a conspirator will not be admissible against him or other if it is not done in reference to the common intention of the conspiracy; Tribhuvan Nath v. State of Maharashtra, AIR 1973 SC 450: 1972 Cr LJ 1277: 1972 SCD 571: (1972) 3 SCC 511: 1972 SCC (Cri) 604.

1. The overt acts may be acts-

- signifying conspiratorial agreement, or
- acts preparatory to offence, or
- acts constituting the offence itself.

The word 'intention' implies that the act intended is in the future and the section makes relevant statements by a conspirator with reference to the future. The words "in reference to their common intention" mean in reference to what at the time of statement was intended in the future. Narrative coming from the conspirators as to their past acts cannot be said to have a reference to their common intention.

Conspirators as agents.--

The Supreme Court observed that the only condition for application of the rule in section 10 of the Evidence Act, is that there must be reasonable ground to believe that two or more persons have conspired together to commit an offence. State of Tamil Nadu v. Nalini, MANU/SC/0945/1999 : (1999) 5 SCC 253: 1999 SCC (Cri) 691: AIR 1999 SC 2640: 1999 Cr LJ 3124: 1999 AIR SCW 1889: 1999 (2) Crimes 59: JT 1999 (4) SC 106: 1999 (2) SCJ 451: 1999 (6) SRJ 25; Sardar Sardul Singh Caveeshar v. State of Maharashtra, AIR 1965 SC 682: (1965) 1 Cr LJ 608: (1964) 2 SCR 378: 1964 (2) SCJ 771. The basic principle which underlines section 10 is the theory of agency and hence every conspirator is an agent of his associate in carrying out the object of the conspiracy. State of Gujarat v. Mohammed Atik, MANU/SC/0267/1998 : (1998) 4 SCC 351: 1998 SCC (Cri) 936: AIR 1998 SC 1686: 1998 Cr LJ 2251: 1998 AIR SCW 1453: 1998 (2) Crimes 92: JT 1998 (3) SC 60: (1998) 2 SCR 664: (1998) 2 SCALE 633: 1998 (3) Supreme 488. Section 10 permits "anything said, done, or written by any one of such persons in reference of their common intention" to be recorded as a relevant fact against each of the persons believed to have so conspired.

Distinction between English Law and Indian Law.--

The provisions of section 10 are wider than those of the English Law in two respects:

(a) Under the English Law, an act must have been done or declaration made in execution or in furtherance of the common objects while under section 10, to establish the admissibility of the act or declaration it is sufficient to show that it is as reference to the common intention as the section 10 uses the words 'in reference to'.

(b) Under the English Law the act of conspirator must have been done or declaration made before the persons against whom it is sought to be given in evidence, ceased to be a member of the conspiracy; in Indian Law the act or declaration would be admitted even though it was made after the person against whom it is sought to be given in evidence, terminated his connection with the conspiracy.

Badri Rai Case.--

In Badri Rai v. State of Bihar, MANU/SC/0047/1958 : AIR 1958 SC 953: 1958 Cr LJ 1434: 1959 Mad LJ (Cri) 25: 1958 All LJ 909: 1959 SCJ 117: 1959 SCA 315: MANU/SC/0047/1958 : 1959 SCR 1141; Ramji and Badri were prosecuted for conspiracy for bribing a police officer. An inspector of police was on his way to the police station. Both Ramji and Badri

approached him and requested that they would duly reward him if he could hush up the case relating to stolen ornaments, etc. recovered from Ramji's house and which was under investigation. The inspector told them to come to the police station. The inspector reported the matter to his senior officer. Badri also came to the police station and offered him a packet of currency notes. He told the inspector that Ramji had sent the money as a consideration for hushing up the case against him. The inspector seized the money and drew up the F.I.R.

The only question before the Supreme Court was whether the offer of money and the accompanying statement made by Badri were relevant against Ramji? The Court held that when both accused approached the inspector and requested him to hush up the case, that clearly showed that they had conspired to bribe a police officer. That being so, anything said or done by any of them in reference to their conspiracy to bribe was relevant against the other also. The statement and the offer of bribe had clear reference to their common intention and were therefore, relevant against both. Thus, a statement made along with the offence is part of the same transaction and is hence admissible.

Mirza Akbar Case.--

In *Mirza Akbar v. Emperor*, MANU/PR/0037/1940 : AIR 1940 PC 176; the allegation of the Prosecution was that W, the wife of MR. X, and her paramour B, conspired to murder X. It is further alleged that W and B hired C for committing the murder of X. C was caught red-handed in murdering X. B, who reached the spot pleaded that C is innocent (absence of motive). W, B and C were prosecuted for murder and conspiracy to murder.

The principle evidence or the conspiracy between W and her lover B, consisted of certain letters, in which they expressed deep love towards each other and referred to 'money' and 'means' (most probably in connection with X's murder). W also made statements before the Magistrate after she had been arrested on the charge of conspiracy. Her letters and her statements were admitted in evidence against B as being the things said and written by a conspirator in reference to their common intention. B preferred an appeal to the Privy Council against the relevancy of this evidence.

It was held that the letters were relevant under section 10 as their terms were only consistent with a conspiracy between W and B to procure the death X, and they were written at a time when the conspiracy was going on and for the purpose of attaining their object. But the statement to the Magistrate was held to be not relevant under section 10 as it was made after the object of the conspiracy had already been attained and had come to an end.

The court observed: "The words 'common intention' signify a common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention. But it would be very different matter to hold that any narrative/statement/confession made to a third party after the common intention or conspiracy was no longer operating and had ceased to exist, is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference.

When facts not otherwise relevant become relevant

The facts which are not otherwise relevant, i.e., which do not fall within sections 6 to 10 and 12 to 16 may become relevant under section 11, if they are inconsistent with any fact in issue or relevant fact or by themselves or in connection with other facts make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. According to section 11:

11. When facts not otherwise relevant become relevant.-

Facts not otherwise relevant are relevant-

- (1) if they are inconsistent with any fact in issue or relevant fact;
- (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(a) The question is, whether A committed a crime at Calcutta on a certain day. The fact that, on that day, A was at Lahore is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D, every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D, is relevant.

Inconsistent facts:-

Section 11(1) is based on the principle of inconsistency, while section 11(2) is based on that of probability. In the first clause the inconsistency or contradiction is complete while in the second it is not so. Thus, Illustration (a) is an instance of perfect alibi.¹ As A was present in Lahore, it is impossible that he could have committed the crime in Calcutta. While Illustration (b) is an instance of imperfect alibi, for that A was at some distance, it was not altogether impossible for him to have committed the offence. It affords a weak defense, based on probability and hence it is not a conclusive alibi. The theory of alibi is that the fact of presence elsewhere is essentially inconsistent with presence at the place and time alleged and therefore with personal participation in the act.

1. Alibi is a latin word for 'elsewhere'.

The usual theory of essential inconsistency is that a certain fact cannot co-exist with the doing of the act in question and therefore, if that fact is true of a person of whom the act is alleged, it is impossible that he should have done the act.¹

Highly probable or improbable:-

These words point out that the connection between the facts and issue and collateral facts sought to be proved must be so mediate as to render the co-existence of the two highly probable; State of Rajasthan v. Mahavir alias Mahavir Prasad, MANU/SC/0475/1998 : (1999) 1 SCC 199: AIR 1998 SC 3041: 1998 Cr LJ 4064: 1998 AIR SCW 2900: JT 1998 (5) SC 274: 1998 (2) SCJ 664: (1998) 4 SCALE 365: 1998 SCC (Cri) 819: 1998 (6) Supreme 223.

Instance of Probability:-

Where the accused was charged for possession of arms and for conspiracy to commit a dacoity, the fact that one of the accused was seen showing a revolver to another with whom he was alleged to be conspiring is relevant under section 11; Saroj Kumar v. Emperor, MANU/WB/0011/1932 : AIR 1932 Cal 474.

Where the question was whether a certain lease was intended to be perpetual, the fact that a number of other leases granted at about the same time, under similar circumstances were intended to be perpetual was held admissible under this section to show that the lease in dispute was also perpetual.

Instances of improbability:-

In a murder case three eye-witnesses deposed that the accused shot the victim from 25 feet, while attempting to escape. The medical evidence showed that the circular wound of entry of the bullet on the back of the deceased had burnt inverted margins and that such an injury could be caused only from a distance of less than a yard. It was held that the medical evidence rendered the eye-witness account highly improbable and the accused was acquitted, as his guilt was not proved beyond reasonable doubt; Santa Singh v. State of Punjab,

MANU/SC/0167/1976 : AIR 1956 SC 526: 1956 Cr LJ 930.

Burden of Proof:-

It is basic law in the criminal case in which the accused is alleged to have inflicted physical injury to another person, the burden is on prosecution to prove that the accused was present at the scene and has participated in the crime; Binay Kumar Singh v. State of Bihar, MANU/SC/0088/1997 : AIR 1997 SC 322: 1997 Cr LJ 362: 1997 AIR SCW 78: JT 1996 (10) SC 79: 1997 (12) OCR 374: MANU/SC/0088/1997 : (1997) 1 SCC 283: 1997 Scc (Cri) 333.

In Kalu Mirza v. Emperor, ILR 37 Cal 91 : 11 Cr LJ 23; Binay Kumar Singh v. State of Bihar, MANU/SC/0088/1997 : AIR 1997 SC 322: 1997 Cr LJ 362: 1997 AIR SCW 78: JT 1996 (10) SC 79: 1997 (12) OCR 374: MANU/SC/0088/1997 : (1997) 1 SCC 283: 1997 SCC (Cri) 333 where the question was whether a person was habitual cheat, the fact that he belonged to an organisation which was formed for the purpose of habitually cheating people was held to be relevant, and it was open to the prosecution to prove against each person that the members of the gang did cheat people.

Evidence of tape-recorded Statement.--

Relevancy and admissibility:-

The tools of modern technology like tape records, makes the probability of truth highly certain. It is a general rule of evidence that all such evidence is admitted which helps the Court in arriving at the truth.

1. Vide illustration (a) of section 11

Thus, tape-recordings can be used as evidence in court to corroborate the statements of a person who deposes that he had carried on a conversation with a particular person. A previous statement of a person which has been tape-recorded can also be used to test the veracity of a witness and to impeach his impartiality.

Q. 'A' a young girl, receives obscene calls on the telephone. She records the phone call on a tape-recorder in which the caller identifies himself to be 'X'. 'X' is being tried for making obscene calls to 'A'. In the trial the prosecution wants to lead in evidence the recorded call. Can it be led in evidence?

Tape-recorded conversation:-

Tape-recorded conversation is relevant under sections 6, 7 and 8 of the Evidence Act, it is res gestae. It is also comparable to a photograph of relevant incident. Tape-recorded conversation is therefore a relevant fact and is admissible under section 7 of the Evidence Act. The

tape-recorded conversation is relevant provided first the conversation is relevant to matter in issue, secondly, there is identification of voice and thirdly, the accuracy of tape-recorded conversation is proved by eliminating the possibility of erasing the tape-recorded. There should be no possibility of tampering of statement.

In Mahabir Prasad Verma v. Dr. Surinder Kaur, MANU/SC/0217/1982 : AIR 1982 SC 1043: (1982) 2 SCC 258: (1982) 1 Rent LR 591: 1982 UJ (SC) 394: (1982) 1 Ren CR 615: 1982 (1) SCJ 362: (1982) 2 Ren CJ 205: 1982 East LR 309; the Supreme Court held that tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation. In the absence of any such evidence, the tape cannot be used as evidence in itself.

In case of Tukaram S. Dhigole v. Manikrao Shivaji Kokate, MANU/SC/0086/2010 : AIR 2010 SC 965 Court held that tape record of speeches is document.

R.M. Malkani Case.--

In *R.M. Malkani v. State of Maharashtra*, MANU/SC/0204/1972 : AIR 1973 SC 157: 1973 Cr LJ 228: 1973 Mah LJ 92: 1973 MPLJ 224: MANU/SC/0204/1972 : (1973) 1 SCC 471: 1973 SCC (Cri) 389: (1973) 2 SCWR 776; the prosecution case was based solely on the tape-recorded conversation, which clearly proved the appellant's intention to obtain a bribe. The appellant's contention was that such conversation cannot be admitted under the provisions of Indian Evidence Act, moreover as it was 'unlawful'. The Supreme Court held such conversation to be relevant.

The Supreme Court laid down the law relating to tape-recorded conversation as:-

- (1) Tape-recorded conversation is admissible in evidence provided the conversation is relevant to the matter in issue, the voice can be properly identified, and the possibility of erasing parts of the tape is eliminated.
- (2) When the tape-recording is a contemporaneous record of such conversation (i.e., made simultaneously with the facts in issue of relevant facts), it is a relevant fact under section 6. It is *res gestae*. Since it is like a photograph of a relevant incident, it is also admissible under section 7. Such recording is also a 'document' under section 3. The recording is also admissible under sections 8, 9, 10 or 11.
- (3) As to evidentiary value the Court has said that such evidence must be received with caution. Thus, tape-recording must be genuine and free from tampering or mutilation; the Court should be otherwise satisfied of its accuracy.
- (4) Even if the tape-recording is obtained unlawfully, it will be admissible in evidence, as "detection by deception" is a form of police procedure.

The Court relied upon the decision of this Court in *Magraj Patodia v. R.K. Birla*, (1970) 2 SCC 889: AIR 1971 SC 1295: 1970 UJ (SC) 905: (1971) 2 SCR 118; and held that even if a document is procured by improper or illegal means, there is no bar to its admissibility provided its relevance and genuineness are proved.

In other cases like, in *R. Venkatesan v. State*, 1980 Cr LJ 41; the Madras High Court considered the evidentiary value of a tape-recorded conversation. In that case, the conversation was not audible throughout, and was broken at a very crucial place. The accused alleged that the same has been tampered with. The accuracy of the recording was not proved and the voices were also not properly identified. In the circumstances, the Court concluded that it would not be safe to rely on the tape-recorded conversation as corroborating the evidence of the prosecution witness.

As regards admissibility of tape-recordings, the Bombay High Court in *Chandrakant Ratilal Mehta v. State of Maharashtra*, 1993 Cr LJ 2863: 1993 (3) Bom CR 99; has observed: "The law is quite clear the tape-recorded evidence if it is to be acceptable, must be sealed at the earliest point of time, and not opened except under orders of the Court".

In *Ram Singh v. Col. Ram Singh*, (1985) Supp SCC 611: MANU/SC/0176/1985 : AIR 1986 SC 3: 1985 Suppl (2) SCR 399; the Supreme Court has tightened the rule as to relevancy of tape of this extent that it must be shown that after the recording the tape was kept in proper custody. In that case, the Deputy Commissioner had left the tape with the stenographer. That was held to be sufficient to destroy the authenticity of the tape. The Supreme Court has further suggested that how the cassette came into existence is an important consideration. The Court rejected tape recorded evidence of an election speech because the tape was prepared by a police officer and he was not able to explain why he had done so. The candidate had denied that the tape was in his voice; *Quammaral Islam v. S.K. Kanta*, MANU/SC/0417/1994 : AIR 1994 SC 1733: 1994 AIR SCW 1598: 1994 Bom CJ 746: 1994 (2) Civ LJ 83: JT 1994 (1) SC 452: (1994) 1 SCR 210: 1994 (3) SCC (Supp) 5.

In *Yusufalli Esmail Nagree v. State of Maharashtra*, MANU/SC/0092/1967 : AIR 1968 SC 147: (1967) 70 Bom LR 76 (SC); the Supreme Court observed: "If a statement is relevant an accurate tape-record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and voice must be properly identified. One of the features of the magnetic tape-recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The court must be satisfied beyond reasonable doubt that the record has not been tampered with."

In case of Akbar Sheikh v. State of West Bengal, MANU/SC/0746/2009 : (2009) 7 SCC 415, the accused took a specific plea of alibi defence, the Court observed that the burden of proof of such alibi lied on accused. But in fact the plea of alibi had not been established. Hence the Supreme Court relying on the face of record of the whole case held that as the accused could not establish his plea of alibi no case had been made out to interfere with the judgment of the Trial Court and High Court.

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Chapter 3

Admissions & Confessions

Sections 17 to 31 of the Indian Evidence Act, 1872 deal with what is called as 'admissions and confessions'. However, the Act treats 'confessions' as merely a kind of 'admissions'. This way one can say that the admissions in the Criminal cases is 'confessions'. Here, admission is a statement, oral or documentary or contained in electronic form.

admission

in civil cases & miscellaneous sec. 17-23 & 31

in civil cases & miscellaneous sec. 24-30

Admissions

Admission plays a very important part in judicial proceedings. If one party proves that the other party had admitted his case, the work of court becomes easier.

Section 17 of the Act defines 'admission' in the following manner:

Define admissions? What is their evidentiary value?

17. Admission defined.-

An admission is a statement, oral or documentary or contained in electronic form, 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.

Therefore, according to this section is a statement oral or documentary which suggest any inference, to any fact in issue or relevant fact in issue.

Sections 18 to 20 enumerate various categories of person, whose admissions will be relevant. Sections 18 to 20 reads as under:

18. Admission by party to proceeding or his agent.-

Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

by suitor in representative character.-

Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by-

(1) party interested in subject-matter.-

persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

(2) person from whom interest derived.-

persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.

19. Admissions by persons whose position must be proved as against party to suit.-

Statements made by persons whose position or liability, it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

20. Admissions by persons expressly referred to by party to suit.-

Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration

The question is, whether a horse sold by A to B is sound.

A says to B- "Go and ask C. C knows all about it". C's statement is an admission.

Reasons for admissibility of admissions

What are the reasons for admissibility of admissions?

Generally, an admission means voluntary acknowledgment of the existence or truth of a particular fact, but in the Evidence Act, the term has not been used in the wider sense. It deals with the admissions by statements only oral or written or contained in an electronic form. Silence is also an admission by conduct provided that, if it is natural to expect a reply or denial.¹

1. See illustration (g) to section 8.

An admission is a relevant evidence. Admissions are admitted because the conduct of a party to a proceeding, in respect of the matter in dispute, is a fact relevant to the issue. Several reasons have been suggested for receiving admissions in evidence:

(i) Admissions a waiver of proof:-

Every fact has to be proved which is fact-in-issue or relevant fact by the parties. But, a party has admitted a fact, it dispenses with the necessity of proving that fact against him. It operates as a waiver of proof. But it cannot be regarded as conclusive. The Court may, in its discretion, require the facts admitted to be proved otherwise than by such admission. However, admission constitutes a weak kind of evidence, and the Court may reject an admission wholly or partly or require any further proof. Waiver of proof, thus, cannot be an exclusive reason for the relevancy of an admission.

(ii) Admission as statement against interest:-

Admission means 'conceding something against' the person making the admission. This is a general rule (exceptions are in section 21) that admission should be self-harming. It is highly improbable that a person will voluntarily make a false statement against his own interest. However, section 17 does not require that a statement should be a self-harming statement, the definition also includes self-serving statements.

(iii) Admission as evidence of contradictory statements:-

Another reason that a party accounts for the relevancy of an admission is that there is a contradiction between the party's statement and his case. This kind of contradiction discredits his case. However, a party can prove all his opponent's statements about the facts of the case and it is not necessary that they should be inconsistent with his case.

(iv) Admissions as evidence of truth:-

The most widely accepted reason that accounts for the relevancy of admission is that whatever statements

a party makes about the fact of case, whether they be for or against his interest, should be relevant as representation or reflecting the truth against him. Whatever a party says in evidence against himself..... what a party himself admits to be true may be presumed to be so.

Admission - an exception to hearsay rule

Admission constitute an exception to hearsay rule. This is so because an admission, though a hearsay, is nevertheless the best evidence. What is said by a party to the suit is not open to the objection 'that a party is going to offer worse evidence than the nature of the case admits' (the supposition on which rule of best evidence is found).

Thus, if A sues B on a loan, which B denies and make a statement to C, a third person, that he had taken the loan, B's statement is an admission and C may gave evidence of it although C was not present at time of the loan and had only heard B admitting the fact of the loan.

Requisites of an admission

Following are the requisites of an admission:

- (i) it must be a statement(s) 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.¹ (section 18).
 - (b) Agent authorised by such party,¹ (section 18).
 - (c) Party's representatives, i.e., party suing or sued in a representative character making an admission.¹
 - (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.¹
 - (e) Persons from whom the parties to the suit have derived their interest or title to the subject-matter of the suit.¹
 - (f) Person whose position or liability is necessary to prove against a party to a suit. This is case of admission by strangers to the suit if they occupy such a position or are subject to such a liability.²
 - (g) Referee, i.e., person to whom a party to the suit has expressly referred for information or opinion.³ This is also a case of admission by a stranger.

Party to the proceedings - meaning of

The word 'proceeding' in section 18 refers to proceedings in which the matter stated by the parties in the issue.

- (1) Parties to the proceedings in the Evidence Act, can be divided into two types:

Parties to the proceedings

- (i) Parties in (ii) Parties in

criminal cases civil suits

- (i) Parties in criminal cases:

In criminal cases the accused is the party, his admissions are, therefore, receivable subject to the exclusionary rules; contained in sections 24 to 26.

- (ii) Parties to civil suits:

All plaintiffs and defendants are parties to the suits. A statement made by the party in a former suit between the same or different party is admissible. The proceeding may be civil or criminal. When several persons are jointly interested in the

1. See section 18 of the Evidence Act.
2. See section 19 of the Evidence Act.
3. See section 20 of the Evidence Act

subject-matter of the suit, the general rule is that the admissions of any one of these persons are receivable against himself and others, provided that the admissions relate to the subject-matter in dispute.

(2) Admission by agents:

The admission of an agent are admissible because the principle is bound by the acts of his agent done in the course of business and within the scope of his authority; *Sri Chand Gupta v. Gulzar Singh*, MANU/SC/0022/1992 : AIR 1992 SC 123: (1992) 1 SCC 143: 1991 AIR SCW 2813: 1992 (1) All India Reports 353: 1992 (19) AILR 242: 1992 (46) DLT 6: JT 1991 (6) SC 532: 1992 (1) UJ (SC) 90. Agents includes pleaders, counsel or solicitor and manager of Hindu Joint family. Admissions made by co-defendants and partners are also admissible.

(3) Parties suing or sued in a representative character:

When a party sues or is sued in a representative capacity, e.g., as a trustee, executor or administrator or the like, his representative capacity is distinct from his ordinary capacity, and only admissions made in the former capacity are receivable whereas statements made before he acquired the representative character are inadmissible.

(4) Admissions by persons who have any proprietary or pecuniary interest:

They must be made during the continuance of such interest. An admission made by one of the several parties in front of others-jointly interested will not bind others.

(5) Admissions by persons from whom the parties to the suit have derived their interest:

A tenant derives a title from the landlord. Such admissions are relevant if made during the continuance of the interest of the person making the statement. Admission of one person is also evidence against others in respect of privity between them.

Here 'Privity 'means mutual or successive relationship to the same right of property.

Statements must be made under the following circumstances

- (a) Admission by a representative of a party, if made while holding such representative character.¹
- (b) Admission by person jointly interested, if made during the continuance of such interest.¹
- (c) Admission by person, from whom the parties to the suit have derived interest or title, if made during the continuance of such interest.²
- (d) Admission by stranger to the suit; when their statements would be relevant in a suit brought by or against them.²
- (e) Admission by a referee in a reference to matter in dispute.³

1. As per section 18 of the Evidence Act.

2. As per section 19 of the Evidence Act.

3. As per section 20 of the Evidence Act.

Admission - Kinds of

Admissions are of two kinds viz., formal or informal, they may be considered as being on the record as actual if they are either in the pleadings or in answer to interrogatories or implied from the pleadings by non-traversal. Secondly, as between parties by agreement or notice.

admission

Formal Informal

(Formal admissions are made (Informal admissions are often made deliberately with the purpose casually and in ignorance of the of dispensing with proof.) possibility of their use in a subsequent litigation.)

Who can prove admission

While section 17 of the Act, defines admissions and sections 18 to 20 enumerate various categories of persons, whose admissions will be relevant. Section 21 is an exception to the general rule that admissions must be proved against the maker and not for his benefit. Section 21 reads:

21. Proof of admissions against persons making them, and by or on their behalf.-Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:-

- (1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.
- (2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.
- (3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(a) The question between A and B is, whether a certain deed is or is not forged, A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the Captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of

conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that the person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

Section 21 makes admissions relevant and provable. The rule of law with respect to self-regarding evidence is that when in the self-serving form it is not in general receivable, but that in self-harming form, it is, with few exceptions, receivable and is usually considered proof of a very satisfactory kind. As a general rule, man shall not be allowed to make evidence for himself. But on the other hand universal experience testifies that, as men consult their own interest and seek their own advantage whatever they say or admit against their interest or advantage may with tolerable safety to be taken to be, true as against them, at least, until the contrary appears. Not only would it be manifestly unsafe to allow a person to make admissions in his own favour which should affect his adversary but, also evidence has, if any, but a very slight and remote probative force.

Exceptions

Section 21 contains following three exceptions:

- (1) An admission is relevant and may be proved against the author of it and his representative in interest.¹
- (2) Generally an admission cannot be proved by or on behalf of the maker, or by his representative in interest.¹
- (3) Admissions can be proved by the maker or on his behalf or by his representative only under the three following circumstances:
 - (a) When it is of such a nature that if the person making it were dead, it would be relevant as between third persons under section 32.²
 - (b) When it consists of a statement of the existence of any state of mind or body made at or about the time when such state of mind

1. See illustration (a) to the section 21.

2. See illustrations (b) and (c) to the section 21 of the Evidence Act.

or body exist and is accompanied by conduct rendering its falsehood improbable.¹

(c) When it is relevant otherwise than as an admission.¹

In Illustrations (b) to (e) to section 21 of the Act, there is some ground of probability that statement is true.

Meaning of expression "as against the person who makes them"

This expression means as against the person by or on whose behalf they are made. Thus, an admission is made by a referee or by the agent of the party or by a person jointly interested with a party, the admission is provable, as against the party on whose behalf it is made. The rule as regards statements made by a person is that they may be proved only when they are against him; otherwise a party may manufacture any amount of evidence in his own favour.

Admissions regarding state of mind or body

Clause (2) of section 21 states that an admission may be proved by or on behalf of the person making it if it contains statements as to existence of a state of mind or body provided that:-

- (i) Such state of body or mind is in issue or relevant for determination of fact in issue;
- (ii) the statement is made at or about the time when such state of mind or body existed; and
- (iii) statement was accompanied by conduct making its falsehood improbable.

Clause (2) of section 21 has no illustrations. However, illustrations (k), (l) and (m) of section 14 may be consulted on

this point.

His representative in interest

This expression includes all persons who are in privity with the maker of the admission or the person in whose behalf the admission was made.² The purchaser at any ordinary execution sale in his privity, with and is the representative in interest of the judgment-debtor so as to be bound by the latter's admission.

Oral admissions as to contents of documents

Section 22 of the Act, reiterates the rule laid down in section 64 of the Act, wherein, it requires that a document must be proved by primary evidence, i.e., by production of document itself³ except in cases thereafter mentioned, i.e., where secondary evidence is allowed. Section 22 provides that:

22. When oral admissions as to contents of documents are relevant.-

Oral admissions as to the contents of a document are not

1. See illustrations (d) and (e) to the section 21 of the Evidence Act.

2. See section 47 of the Code of Civil Procedure.

3. See section 62 of the Act, which says that primary evidence means the document itself produced for the inspection of the Court.

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.

Under section 22, the contents of documents like true copies, attested, certified, xerox, duplicate copies can be produced alongwith an oral evidence. Under section 22 it has been laid down that when there has been a document, nobody can be allowed to prove oral admission about the contents of that document e.g., X executed a deed of mortgage in favour of Y. Y files a suit for the possession of the property mortgaged on the basis of that mortgage. During the trial X denied the execution of the mortgage. Now in this case Y cannot prove by oral evidence that he had before some persons admitted that he had mortgaged the property to him. Y can prove the execution of the mortgage and can get possession of the property only when he files that deed of mortgage in the court and proves it.

There are two exceptions to this rule:

(1) When a person is entitled to give secondary evidence of the contents of some documents he will be entitled to rely on oral admission;

(2) Under section 65 secondary evidence of the contents of a document can be given when the original is lost or when it is in possession of the opposite party and so on. Thus, we see that under section 22 a party can prove oral admission of the contents of the document when he proves that the document has been lost, destroyed or that it is in possession of the opposite party.

Oral evidence of admission can also be given when a document is produced and its genuineness is disputed.

However, oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question.¹

Admission in Civil Cases

Generally, for the purpose of compromise, negotiations take place out of the court between the parties to buy peace. During the process of negotiation parties make many statements. If such statements are allowed to be proved in the Court, it will be impossible for the parties to negotiate for any compromise. Section 23 provides protection for the negotiation, which is applicable in civil cases only. Section 23 reads as under:

23. Admissions in civil cases, when relevant.-

In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed

together that evidence of it should not be given.

1. See section 22A of the Evidence Act (Ins. by the Information Technology Act, 2000).

Explanation.-

Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

Section 23 lays down that in civil cases if a person admits the liability upon an express condition that evidence of such admission should not be given or if it is made in such circumstances that the Court can infer that there was some sort of agreement that the admissions will not be proved in evidence in a case, such admission will not be relevant and will not be allowed to be proved.

Essential conditions for protection

Following are the essential ingredients in order to gain protection under section 23:

- (i) There must be a civil dispute between the parties.
- (ii) There must be negotiations between the parties or their agents with a view to compromise.
- (iii) That negotiation must take place out of Court.
- (iv) For this purpose, there must be express condition or circumstances from which the Court can infer that the parties had negotiated.

Evidentiary value

From what has been said above, it is not to be inferred that admission of a party is of no or little evidentiary value. When the admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken, untrue, there is nothing to prevent the Court from deciding the case in accordance with it. Admissions are very strong piece of evidence against the party making it unless they are proved to be false. Admission by a party in plaint may be used against him in other suits. But such admission cannot be regarded as conclusive and the party can show it to be wrong; *Basant Singh v. Janki Singh*, MANU/SC/0284/1966 : AIR 1967 SC 341: 1967 BLJR 27: 1967 All LJ 1: (1967) 1 SCWR 125: 1967 (1) SCJ 476: 1967 SCD 399: (1967) 1 SCR 1.

Admission does not create title

No title can pass from one person to another by mere admission; *Ambika Prasad Thakur v. Ram Ekbal Rai*, AIR 1966 SC 605:

(1966) 1 SCA 35: 1966 BLJR 147: 1966 SCD 485:(1966) 1 SCR 758.

Admission is substantive evidence

Admission is a substantive evidence though they are not conclusive proof of matter. If the admissions are not explained by the person by whom it was made it is a very strong piece of evidence against the matter. The admissions are not to be put to the matter for contradiction if he appears as a witness if they are not ambiguous.

It is true that evidentiary admissions are no conclusive proof of the facts admitted and be explained or shown to be wrong, but they do raise an estoppel and shift the burden of proof to the person making them or his representative-in-interest unless shown or explained to be wrong, they are efficacious proof of the facts admitted; *Avadh Kishore Dass v. Ram Gopal*, MANU/SC/0003/1978 : AIR 1979 SC 861: 1979 UJ (SC) 251: (1979) 4 SCC 790.

Case Law

Bishwanath Prasad case

In *Biswanath Prasad v. Dwarka Prasad*, MANU/SC/0006/1973 : (1974) 1 SCC 78:

MANU/SC/0006/1973 : AIR 1974 SC 117: 1974 SCD 134: 1974 (1) SCJ 564: (1974) 2 SCR 124; the question was whether certain belonged to the defendant and certain others were liable to partition. The opposite party had made statements in dispositions in an earlier suit that they belonged to the defendant. Similar admissions occurred in the written statement filed by the plaintiff and his father in that suit. It was contended on behalf of the plaintiff, relying on section 145 of Evidence Act, that if a witness is to be contradicted by his own earlier

statement, the statement must be put to him so that he may have an opportunity to explain it and this was not done in the present case. Thus, the admission made in an earlier suit cannot be used against the plaintiff.

The Supreme Court observed that there is a cardinal distinction between a party who is the author of a prior statement and a witness who is examined and is sought to be discredited by the use of his prior statement. In the former case, admission by a party is a substantive evidence if it fulfils the requirements of section 21, in the latter case a prior statement is used to discredit the credibility of witness and does not become substantive evidence. In the former, there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore* (of its own force). In the latter case, the Court cannot be invited to disbelieve a witness on the strength of the prior contradictory statement unless it has been put to him, as required by section 145.

Admissions are substantive evidence by themselves, though they are not conclusive proof of the matters admitted. Admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness-box or not and whether he was confronted with these statements in case he made a statement contrary to these admissions (vide *Bharat Singh v. Mst. Bhagirathi*, MANU/SC/0362/1965 : AIR 1966 SC 405; 1966 SCD 153; (1966) 1 SCWR 222; 1966 (2) SCJ 53; (1966) 1 SCR 606).

The Court further said that admissions are usually telling against the maker unless reasonably explained, and no acceptable ground to extricate the appellants from the effect of their own earlier statements has been made out. The Court, thus, held that an admission in an earlier suit is a relevant evidence against the plaintiff.

Confession

Define confessions. What is their evidentiary value. To what extent confessional statement are relevant for the purpose of conviction?

Generally speaking, an admission by the accused in a criminal case admitting his guilt is known as confession; *Sahoo v. State of Uttar Pradesh*, AIR 1966 SC 40:

(1965) 2 SCA 292; 1965 SCD 809; (1965) 2 SCWR 484; 1966 Cr LJ 68; 1966 MPLJ 533; 1966 (2) SCJ 172; (1965) 3 SCR 86. The word 'confession' has, however, not been defined in the Indian Evidence Act. Stephen in his *Digest of Law of Evidence* defined confession as "A confession is an admission made at any time by a person charged with crime stating or suggesting the inference that he has committed the crime".¹ So, there was no proper definition which could be authoritative. This position was clarified by

1. Stephen: *A Digest of the Law of Evidence*, A. 21 at p. 29.

Lord Atkin, J., in *Pakalo Narain Swami v. King Emperor*, MANU/PR/0001/1939 : AIR 1939 PC 47; as he observed that, in the Indian Evidence Act, it would be inconsistent with the natural use of language to construe the word "confession" as a statement by an accused "suggesting that he committed" the crime. In his view "a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence". From the aforesaid definitions, a statement of an accused will amount to a confession if it fulfils any of the following two conditions:

- (1) If he states that he committed the crime he is charged with, or
- (2) If he makes a statement by which he does not clearly admit the guilt, yet from the statement some inference may be drawn that he might have committed the crime.

The word 'confession' appears for the first time in section 24 of the Indian Evidence Act. This section says that:

24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.-A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

When confession is not voluntary: conditions

A confession should be free and voluntary. Following are the conditions where confession is not considered as voluntary:

- (i) Where the confession is result of inducement, threat or promise;
- (ii) That inducement, threat or promise should proceed from a person in authority;
- (iii) Confession should relate to charge in question; and
- (iv) It should hold out some worldly benefit or disadvantage.

Kinds of Confession

Define confessions and their relevancy. What are 'judicial and extra-judicial' confessions?

confession

(i) Judicial confession

(It can be made to the court itself or to a Magistrate in the due course of legal proceedings under section 164 of Criminal Procedure Code, 1973.)¹

(ii) Extra-judicial confession

(It can be made to any body outside the Court. It is a weak type of evidence.)

1. Under section 164, Cr. P.C., 1973 the Magistrate concern is duty bound to see that the accused is not under the influence of the investigating agency.

Confession must be true and trustworthy

Where a confession is made by a person before a report was made to the police and before he was accused of an offence by others. The confession must be regarded as one made by an accused within the meaning of this section. A confession, if voluntary and truthfully made is an, "efficacious proof of guilt". It is an important piece of evidence and therefore, it would be necessary to examine whether or not the confession made by the appellant was voluntary, true and trustworthy; Shivappa v. State of Karnataka, MANU/SC/0189/1995 : AIR 1995 SC 980: 1995 AIR SCW 956: (1995) 2 SCC 76.

Confession is a statement, wherein, guilt is admitted

In Pakalo Narain Swami v. King Emperor, MANU/PR/0001/1939 : AIR 1939 PC 47; Lord Atkin J., observed that, it is improper to construe confession as a statement by an accused suggesting the inference that he committed the crime. A confession must either admit in terms the offence, or at any rate substantially all the facts which constituted the offence. An admission of a gravely incriminating fact even an inclusively incriminating fact, is not in itself a confession, for example, an admission that the accused is the owner of and was in recent possession of the knife/revolver which caused death with no explanation of any other man's possession.

Confessional statement should be taken as a whole

The statement of the accused was partly guilty and partly remarks. It did not amount to a confession but merely an explanation. It must be taken into the consideration either as a whole or not at all. The confession must be either accepted as a whole or rejected as a whole; Palvinder Kaur v. State of Punjab (I), MANU/SC/0038/1952 : AIR 1952 SC 354: 1952 Cr LJ 154: 1952 SCJ 545: 1953 SCR 94: 1953 SCA 226: 1953 Mad WN 418: ILR 1953 Punj 107; Nishi Kant Jha v. State of Bihar, MANU/SC/0060/1968 : AIR 1969 SC 422: 1969 2 SCR 1033: ILR 48 Pat 9.

Inducement, threat or promise

A confession should be free and voluntary. A positive proof of the fact that there was any inducement, threat or promise is not necessary. On the evidence and the circumstances in a particular case, it should appear to the Court that there was a threat, inducement or promise, though this fact may not be strictly proved, Pyare Lal Bhargava v. State of Rajashtan, MANU/SC/0152/1962 : AIR 1963 SC 1094: 1963 All LJ 459: 1963 BLJR 407: 1963 SCD 341: (1963) 2 Cr LJ 178: 1963 SUPP 1 SCR 689. Anything from a barest suspicion to positive evidence would be enough to discard a confession. Further, in deciding whether a particular confession attracts section 24, the question has to be considered from the point of view of the confessing accused as to how the inducement, etc. proceeding from a person in authority would operate on his mind. The criteria is the reasonable belief of the accused that, by confessing, he

would get an advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

In *Bhagbaticharan v. Emperor*, (1893) 60 Cal 719; the accused, a post-office clerk, under suspicion, fell at his departmental inspector's feet begging to be saved if he disclosed everything, and the inspector replied that he would try his utmost to save him if he told the truth. The confession was held to be inadmissible, as there was an inducement by the inspector.

Person in authority

The inducement, threat or promise should proceed from a person in authority, i.e., one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him. Thus, it refers to Government Officials, Magistrates, their clerks, police constables, wardens and others in custody of prisoners, prosecutors, attorneys, etc.¹ A purely private person cannot be regarded as a person in authority even if he is able to exert some influence upon the accused. The panchayat officers can be said to be persons within the meaning of section 24.

Even a village mukhia (head of a village) and the Pradhan of a village have been held to be persons in authority; *Emperor v. Har Piari*, MANU/UP/0201/1926 : AIR 1926 All 737; *Kansa Behera v. State of Orissa*, MANU/SC/0240/1987 : AIR 1987 SC 1507: 1987 Cr LJ 1852: JT 1987 (3) SC 193 (2): MANU/SC/0240/1987 : (1987) 3 SCC 480: 1987 Cr LR (SC) 389: (1987) 2 Cr LC 350: 1987 SCC (Cri) 601: 1987 All WC 1239.

Confession recorded on oath

If any person in authority records the confession of an accused on oath, the statement becomes non-voluntary. Giving oath to the accused would by itself amount to a concealed threat because if the statement was found to be false, the appellant may have entertained a genuine belief that he might be prosecuted; *Brijbasi Lal Shrivastava v. State of Madhya Pradesh*, MANU/SC/0090/1979 : AIR 1979 SC 1080: 1979 Cri LR (SC) 123: 1979 Cur LJ (Cri) 162: 1979 UJ (SC) 314: 1979 Cr LJ 913: 1978 Serv LC 160: MANU/SC/0090/1979 : (1979) 4 SCC 521.

Burden of proof

In case of an ordinary confession there is no initial burden on the prosecution to prove that the confession sought to be proved is not obtained by inducement, threat, etc. It is the right of the accused to have the confession excluded and equally the duty of the court to exclude it even suo motu. In the absence of an evidence to show that any threat, promise or inducement was made to the accused and when he had continuously questioned all the time but only at intervals during the period the mere fact that it took two or three hours from the time that accused was brought to the house of the Mukhia to the time when he made the confessional statement cannot make his confession one other than free and voluntary; *Ratan Gond v. State of Bihar*, MANU/SC/0054/1958 : AIR 1959 SC 18: 1959 Cr LJ 108: 1959 BLJR 1: 1959 All LJ 35: 1959 MPC 46: 1959 SCJ 222: 1959 All Cr R 118: MANU/SC/0054/1958 : 1959 SCR 1336.

Confession to police officer not to be proved

Section 25 of the Act, expressly bars that confession made to a police officer² shall not be admitted. It provides that:

1. Cockel's cases and statutes on Evidence, citing *R. v. Wilson*, (1967) 2 QB 406 (CA).

2. In *State of Punjab v. Barkat Ram*, MANU/SC/0021/1961 : AIR 1962 SC 276: (1962) 1 Cr LJ 217: (1962) 2 SCA 321: (1962) 3 SCR 338, it was held that, beyond the definition of section 1 of the Indian Police Act, the "police officer" has more comprehensive and wider meaning. For this purpose, every person is a police officer who is clothed with the powers of police. It includes regular police, excise inspector, etc.

25. Confession to police officer not to be proved.-

No confession made to a police officer, shall be proved as against a person accused of any offence.

Confessional statement

The confessional statement made by accused under TADA Act, in different cases cannot be utilised by prosecution in instant case as charges were framed only for offences under the Indian Penal Code; *Sunderlal Kanaiyalal Bhatija v. State of Maharashtra*, MANU/SC/0223/2010 : AIR 2010 SC 1666.

Admissibility of confessional statement

The Court admits the confessional statement in a very tight way as was held by the Supreme Court in case of *Sunderlal Kanaiyalal Bhatija v. State of Maharashtra*, MANU/SC/0223/2010 : AIR 2010 SC 1666, that where confessional statement relates to allegations both under Indian Penal Code and TADA Act and later the allegations on TADA Act, were dropped and trial is based on only for offences under the Indian Penal Code, then the confessional statement made under TADA Act, could not be utilised by prosecution as charges were framed only for offences under Indian Penal Code.

Reasons for exclusion of confession to police

The principle upon which the rejection of confession made by an accused to a police officer or while in the custody of such officer is founded is that a confession thus made or obtained is untrustworthy. The broad ground for not admitting confessions made to a police officer is to avoid the danger of admitting a false confession.

The reason for this rule is stated *Queen Empress v. Babu Lal*, (1884) ILR 6 All 509; wherein it has been said that the object of the rule is to prevent the extortion of confessions by police officers who in order to gain credit by securing conviction go to the length of positive torture. If confession to police were allowed to be proved in evidence, the police would torture the accused and thus force him to confess to a crime which he might not have committed. A confession so obtained would naturally be unreliable. It would not be voluntary. Such a confession will be irrelevant whatever may be its form, direct, express, implied or inferred from conduct.

Section 25 of the Act, expressly declares that such confessions which are regarded as involuntary and those are made to a police personal shall not be proved; *Haider v. State of Maharashtra*, MANU/SC/0290/1979 : (1979) 4 SCC 600.

A series of conflicting suggestions as to the rational underlying this inflexible statutory bar emerges from the decided cases:

- (1) An objective and dispassionate attitude cannot confidently be expected from police officers.
- (2) The privilege against self-incrimination has been thought to lie at the root of the principle.
- (3) Importance has been attached to the discouragement of abuse of authority by the police that could erode the fundamental rights of the citizen. The risk is great that the police will accomplish behind their closed doors precisely what the demands of our legal order forbid.

This is to be noted that, this principle of exclusion applies only to statement which amount to a confession. If a statement falls short of a confession, that is, it does not admit the guilt in terms or substantially all the facts which constitute the offence; *Palvinder Kaur v. State of Punjab (I)*, MANU/SC/0038/1952 : AIR 1952 SC 354: 1952 Cr LJ 154: 1952 SCJ 545: 1953 SCR 94: 1953 SCA 226: 1953 Mad WN 418: ILR 1953 Punj 107.

When confession said to have made to police officer

In order that a statement may be said to be made to a police officer must be near the person making the confession, rather the statement must be in presence of the police officer.

In *Murli alias Denny v. State of Rajasthan*, MANU/SC/0136/1994 : AIR 1994 SC 610: 1994 Cr LJ 1114: 1994 AIR SCW 378: 1995 Scc (Cri) 57: (1995) Supp 1 Scc 39; the confession was made in F.I.R. This cannot be used for any purpose in favour of prosecution and against the accused. However, the admission in favour of accused can be taken into account to examine whether the case falls under Exception 1 to section 300, IPC particularly when there is evidence disclosing as to how the quarrel ensued and attack took place.

Sitaram accused wrote a letter as follows:

"My dear Darogaji, I have myself committed the murder of my wife Smt. Sindora Rani. Nobody else perpetrated this crime. I would appear myself after 20 or 25 days and then will state everything. One day the law will extent its hands and will get me arrested. I would surrender myself." (Signed Sitaram.)

This letter was kept near the dead body of Sindora and found by the S.I. It was held to be admissible.

Who are police officers?

Section 25 of the Evidence Act, provides a healthy protection. This section should not be interpreted in narrow and technical sense; but it should be understood in popular and wide perspective. But at the same time its interpretation should not be made in such a wide sense that those persons should be included in as police officer who had been given some powers of Police Officer.

The important quality (feature) of a police officer is that he must not only have power to make investigation of crime but to file a report against criminal and to have the power to prosecute the criminal. Unless and until a person has power to make investigation and frame charge against accused under 173 of Cr. P.C. he cannot be called a police officer within the meaning of section 25 of the Evidence Act.

In reference to custom officers the Supreme Court did not find them possessing the powers of a police officer and held them to be outside the purview of section 25 of the Act; *State of Punjab v. Barkat Ram*, MANU/SC/0021/1961 : AIR 1962 SC 276: (1962) 1 Cr LJ 217: (1962) 2 SCA 321: (1962) 3 SCR 338; followed by *Balakishan A. Devidayal v. State of Maharashtra*, MANU/SC/0112/1980 : AIR 1981 SC 379: 1980 Cr LJ 1424: 1980 SC Cr R 421: 1980 Cr LR (SC) 588: (1981) 1 APLJ (SC) 17: 1980 BBCJ (SC) 131: MANU/SC/0112/1980 : (1980) 4 SCC 600: 1981 SCC (Cri) 62: (1981) 1 SCR 875.

Confessional statement under English Law: Admissibility

In England, a confession made to a police officer would be relevant evidence. If the judge feels confident that there was no oppression and the statement was free, fair and voluntary, he may admit it.

Confession while in Custody

The value of confession depends upon the voluntary nature of confession. Section 26 of the Act, provides that no confession, which is made by any accused while in police custody can be proved against him unless it was made in the immediate presence of the Magistrate. Section 26 reads:

26. Confession by accused while in custody of police not to be proved against him.-

No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation.-

In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882).

Object

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

Police custody: meaning of

In section 26 of the Act, the word 'custody' is used in wider sense. Here, custody means 'control' and it includes any sort of restriction or restrains by police. For custody, no formality is required.¹ Mere submission to custody by words or action is sufficient. The movement of an accused may be controlled directly or indirectly like eye-arrest, house arrest etc; *Paramhansa Jadav v. State of Orissa*, MANU/OR/0057/1964 : AIR 1964 Ori 144: (1963) 5 OJD 372: 1964 (1) Cr LJ 680: 31 Cut LT 17.

The custody of a police officer for the purposes of section 26, Evidence Act, is no mere physical custody. A person may be in custody of a police officer though the other may not be physically in possession of the person of the accused making the confession. There must be two things in order to constitute a custody. Firstly, there must be some control imposed upon the movement of

1. See section 46 of Cr. P.C., 1973.

the confessor, he may not be at liberty to go any way he likes. Secondly, control must be imposed by some police officer indirectly. The crucial test is whether at the time when a person makes a confession he is a free man or his movements are controlled by the police by themselves or through some other agency employed by them for the purpose of securing such confession. The word 'custody' in this and the following section does not mean formal custody but includes such state of affairs in which the accused can be said to have come into the hands of a police officer, or can be said to have been subjected to some sort of surveillance or restriction.

Exceptions

(1) In the immediate presence of a Magistrate:

As a general rule, a confession which has been made by an accused during police custody, will not be admissible. But one of the exceptions to this general rule is that, when a confession is made to or in the

immediate presence of a Magistrate, is a valid confession. It is immaterial that, while making such confession the accused was in custody. The expression "immediate presence" means presence in the same room before the maker where the confession being recorded. No policeman should be present in the room. Where the Magistrate was taking tea in the adjoining room, the confession shall not be a valid confession as it was not recorded in the immediate presence of the Magistrate; *Nika Ram v. State of Himachal Pradesh*, MANU/SC/0193/1972 : AIR 1972 SC 2077: (1973) 1 SCR 428: ILR 1974 HP 187.

Confession recorded by a second class Magistrate:

Where a second class Magistrate, not specially authorised by the State Government to record a statement of confession, under section 164, Criminal Procedure Code has recorded the confession of the accused under section 164, Criminal Procedure Code is not admissible. His oral evidence to prove the confession will also be inadmissible.

In *Preetam Singh v. State of Madhya Pradesh*, MANU/SC/0120/1997 : AIR 1997 SC 445:

1996 Cr LJ 4458: 1996 AIR SCW 3829: 1996 (3) All Cr LR 642: 1996 (2) Cr CJ 630: MANU/SC/0120/1997 : (1996) 10 SCC 432: (1996) 3 SCR 939: 1996 Scc (Cri) 1343; the Supreme Court held that, when Magistrate cautioned the accused as required, that he was not bound to make confession and that if he did make the confession, it might be used against him, however, not fulfilling other requirement of putting the question to the accused to satisfy himself that the accused was making confession voluntarily the confession cannot be entertained as a piece of evidence.

(2) Confession and Consequential discovery:

Another exception to the general rule of section 26 is section 27 of the Evidence Act, which is explained in later part of this chapter.

Conditions for the applicability of section 26

Following conditions must be satisfied to invoke section 26:

- (i) Statement must amount to confession;
- (ii) It must have been made while the accused was in police custody; and
- (iii) It must not have been made in the immediate presence of the Magistrate.

The following confessions are, thus, held to be irrelevant:

- (1) A woman arrested for the murder of a young boy was left in the custody of villagers while the chowkidar (watchman) who arrested her left for the police-station and she confessed in his absence; *Emperor v. Jagia*, MANU/BH/0098/1938 : AIR 1938 Pat 308.
- (2) While the accused being carried on a tonga was left alone by the policeman in the custody of the tonga-driver and he told of his criminality to the tonga-driver; *R. v. Lester*, ILR (1817) 20 Bom 165.
- (3) Where the accused was taken to a doctor for treatment, the policeman standing outside at the door, the accused confessed to the doctor; *Emperor v. Mallangowda*, (1917) 19 Bom LR 683.

Confession and consequential discovery

Discuss the relationship between section 26 and section 27 of the Evidence Act. How is 'a fact discovered' different from 'object produced'? Discuss with case laws.

Section 27 of the Evidence Act, is the second exception to the general rule that confession made to the police is not admissible. It reads as under:

27. How much of information received from accused may be proved.-

Provided that, when any fact is proved to be discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

From this section it is clear that, section 27 is in the nature of a proviso to section 26; *Lal Singh v. State of Gujarat*, MANU/SC/0017/2001 : AIR 2001 SC 746: 2001 Cr LJ 978: 2001 AIR SCW 389: 2001 (1) Crimes 115: JT 2001 (1) SC 410: (2001) 3 SCC 221: 2001 (1) SCJ 236: (2001) 1 Scale 284: 2001 Scc (Cri) 473: 2001 (1) Supreme 78: 2001 (1) UJ (SC) 608. The reason for admissibility of evidence under this section is that the discovery of fact guarantees the truth of the confession. This section of the

Act, is founded on the principle that if the confession of the accused is supported by the discovery of a fact then it may be presumed to be true and not to have been extracted. It comes into operation only-

(1) If an when certain facts are deposed to as discovered in consequence of information received from an accused person in police custody, and

(2) If the information relates distinctly to the facts discovered.

This section is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. But clearly the extent of the information admissible must depend upon the exact nature of the facts discovered to which such information is required to relate.

Admissibility of disclosure statement by accused

In case of *Vikram Singh v. State of Punjab*, MANU/SC/0062/2010 : AIR 2010 SC 1007, the Supreme Court held that the word "accused of any offence" in section 27 are descriptive of person making statement. It could not be said that section 27 would be operable only after formal arrest under section 46(1).

Protection against self-incrimination

Section 27 of Evidence Act, permits the derivative use of custodial statements in the ordinary course of events to the extent, that they can be proved by the subsequent discovery of facts. In Indian Law there is no automatic presumption that the custodial statements have been extracted through compulsion. However in circumstances, where it is shown that a person was indeed compelled to make statements while in custody relying on such testimony as well as its derivative use will offend article 20(3); *Selvi v. State of Karnataka*, MANU/SC/0325/2010 : AIR 2010 SC 1974.

Evidentiary value of discovery of weapon

The Supreme Court in case of *Musheer Khan @ Badshah Khan v. State of Madhya Pradesh*, MANU/SC/0065/2010 : AIR 2010 SC 762, held that if the discovery of weapon was otherwise reliable, its evidentiary value was not diluted just by reason of non-compliance with the provision of section 100(4) or section 100(5) of Criminal Procedure Code.

Case laws

Pulukuri Kottaya case

In *Pulukuri Kottaya v. Emperor*, AIR 1947 PC 67; the scope of section 27 was explained by the Privy Council.

In the instant case, the appellants guilty of murder made some confessions in the police custody. In the appeal, they contended that their statements were admitted in violation of sections 26 and 27. The statement of one of them was: "I, Kottaya, and others beat Sivayya and Subbaya to death. I hid the spear and my stick in the rick of my village. I will show if you come. We did all this at the instance of P. Kottaya". Another accused said: "I stabbed Sivayya with a spear. I hid the spear in a yard in my village. I will show you the place". The relevant articles were produced from their respective places of hiding.

While explaining the scope of section 27, their Lordships observed: Section 27 provides an exception to the prohibition imposed by section 26 and enables certain statements made by a person in police custody to be proved. The condition necessary to bring section 27 into operation is that discovery of a fact in consequence of information received from accused (in police custody) must be deposed to, and thereupon so much of the information as related distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence. Normally, the section is brought into operation when a person in police custody produces from some place of concealment some object e.g. a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused.

Explaining the relationship between section 26 and section 27, their Lordships said: The proviso to section 26 added by section 27 should not be held to nullify the substance of the section. It is fallacious to treat the "facts discovered" as equivalent to the object produced; the facts discovered also embraces the place from which the object is produced and the knowledge of accused as to this fact. Information as to the 'past use' of the object produced is not related to its discovery.

Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife. It leads to the discovery of a fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in commission of offence, the fact discovered is very relevant. But if to the statement the words "with which I stabbed A" are added, these words are inadmissible because they do not relate to the discovery of knife in the house of the informant. The part which relates as 'what he

did to the object' and not 'what he did with the object', is relevant under section 27, because the letter entails a remote connection with the fact. Further, if there is no other evidence connecting the knife with the crime and only the evidence is a statement coming under section 27, then the accused must be acquitted.

Referring to the facts of the case, their Lordships held that the whole of the statement except the passage "I hid it (spear) and my stick in the rick in the village. I will show if you come", is admissible. The above passage is admissible as it served to connect the object discovered with the offence charged. The other portions of the statement relates to the past history of the object produced, thus, not admissible.

Mohmed Inayatullah case

In Mohmed Inayatullah v. State of Maharashtra, MANU/SC/0166/1975 : AIR 1976 SC 483:

1975 Cr LR (SC) 567: MANU/SC/0166/1975 : (1976) 1 SCC 828: 1976 Cr LJ 481: 1976 SCC (Cri) 199: 1976 (1) SCJ 517: (1976) 1 SCR 715; the accused, charged with theft, stated: "I will tell the place of deposit of the three chemical drums which I took from the Haji Bunder on first August". The facts discovered were - chemical drums, the place of deposit of drums, and the accused's knowledge of such deposit.

The Supreme Court laid down following propositions:-

- (1) that it is necessary for bringing this section (section 27) into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence.
- (2) that the discovery of such fact must be proved to. The 'discovery of fact' includes the object found, the place from which it is produced and the knowledge of the accused as to its existence.
- (3) that at the time of the receipt of the information the accused must be in police custody.
- (4) that only "so much of information" as relates distinctly to the fact thereby discovered is admissible. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably".

It was held that only the first part of the statement, namely "I will tell the place of deposit of three chemical drums" was relevant because only this part was immediate and direct cause of the act discovered. The rest of the statement was a pure and simple confession (past history) which led to no discovery.

However, the relevant portion was not, by itself, sufficient to presume that the accused was a thief. He himself deposited drums, or he only knew that the drums were lying there? Since it was a public place (railway platform) and not a place of hiding, anyone could have put them there and the accused might have only knowledge of that fact. Thus, he was given 'benefit of the doubt' (if the whole of his statement had been admitted he would undoubtedly have been held guilty).

Confession made after removal of inducement

Section 28 deals with the validity of confession which is made after the effect of inducement is already over in the following manner:

28. Confession made after removal of impression caused by inducement, threat or promise relevant.-If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

This section should be read with section 24 of the Act. Under section 24 we have seen that if in the opinion of a court a confession seems to have been caused by any inducement, threat or promise having reference to the charge and proceeding from a person in authority, it is irrelevant and cannot be proved even against a person making the confession.

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

The impression created by threat, promise or inducement, etc. can be removed:

- (i) by lapse of time; or
- (ii) by warning given by some person superior in authority to the person inducing or making such threat or promise; or
- (iii) by conduct of the person making threat or promise etc; R. v. Navroji Dadahai, 9 Bom HCR 358 (370); Bhagirathi v. State of Andhra Pradesh, MANU/MP/0009/1959 : AIR 1959 MP 17; Vali Isa Mahmed v. State, AIR

1963 Guj 135: (1962) 3 Guj LR 1052: 1963 (1) Cr LJ 755.

Confession made under promise of secrecy

Under section 29 of the Evidence Act, a confession, unlike an admission, is relevant even if it is made under promise of secrecy. In addition to this, section 29 provides for so many other things also in the following words:

29. Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc.-If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

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

- (1) giving him promise of secrecy; or
- (2) by deceiving him; or
- (3) when he was drunk; or
- (4) because it was made clear in answer to question which he need not have answered, or because no warning was given that he was not bound to say anything and that whatever he will be state will used against him.

Section 24 lays down that a confession which is the outcome of inducement, threat or promise from a person in authority would not be relevant. Section 25 lays down that a confession to a police officer is irrelevant. Section 26 excludes the statement of an accused in a police custody to any person other than a Magistrate. Section 29 lays down that if a confession is not excluded by sections 24, 25 or 26 it will not be excluded on the ground of the promise of secrecy or of deception or of being drunk, or for being made in answer to question or without warning that it will be used against him in evidence.

To make it clear it may be said that if a confession is made voluntary without an inducement, threat or promise from a person in authority and if it is not made to a police officer nor was it made while the accused was in police custody to any person other than a Magistrate will be received in evidence even if it was made by a promise of secrecy, in consequence of deception, in a state of drunkenness, or in answer to questions or without any warning that it may be used against him.

Section 29 assumes that there is no bar to the admissibility of the confession in question arising from any of the earlier provisions, viz., sections 24 to 26 and it then proceeds to invalidate or negative other positive objections or bars that may be raised against its admissibility.

Confession of co-accused

Section 30 of the Evidence Act, is an exception to the general rule that a confession of the crime is only admissible against the maker. Section 30 reads:

30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.-When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Explanation.-

"Offence", as used in this section, includes the abetment of, or attempt to commit the offence.

Illustrations

(a) A and B are jointly tried for the murder of C. It is proved that A said-

"B and I murdered C". The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said-

"A and I murdered C".

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

According to this section, when two or more persons are tried jointly for the same offence, and the confession made by one of them is proved, the Court may take into consideration that confession against all accused. It should be noted that, when more than one person are being jointly tried for and the same offence or offences they are called 'Co-accused'; Vinayak v. State of Maharashtra, MANU/SC/0136/1984 : AIR 1984 SC 1793: (1984) 4 SCC 441: 1984 SCC (Cri) 605. It appears to be very strange that the confession of one person is to be taken into consideration against another. Where the confession of one accused is proved at the trial, the other accused persons have no opportunity to cross-examine him. It is opposed to the principle of jurisprudence to use a statement against a person without giving him the opportunity to cross-examine the person making the statement. This section is an exception to the rule that the confession of one person is entirely inadmissible against another.

Retracted confession

When a person, having once recorded a confession which is relevant, goes back upon it, saying either that he never confessed or that he wrongly confessed or confessed under pressure it is called a retracted confession. A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and voluntarily made. However, a court shall not base a conviction on such a confession without corroboration; Pyare Lal Bhargava v. State of Rajasthan, MANU/SC/0152/1962 : AIR 1963 SC 1094: 1963 All LJ 459: 1963 BLJR 407: 1963 SCD 341: (1963) 2 Cr LJ 178: 1963 SUPP 1 SCR 689.

Distinction between Admissible and Confession

What is evidentiary value of confession?

Sections 17 to 31 deal with admissions generally and include sections 24 to 30 which deal with confession as distinguished from admission. From this it would appear that confessions are a species of which admission is a genus. All admissions are not confession but all confessions are admissions. Thus, a statement amounting under sections 24 to 30 to confession in a criminal proceeding may be an admission under section 21 in a civil proceeding. Sections 18 to 21 are not confined in their application to civil cases only. Incriminating statements not hit by section 162, Cr. P.C. may be admissible as admissions even in criminal cases.

Confessions

1. A confession is a statement made by an accused person which is sought to be proved against him in criminal proceeding to establish the commission of an offence by him.
2. Confession if deliberately and voluntarily made may be accepted as conclusive of the matters confessed.
3. Confessions always go against the person making it.
4. Confessions made by one or two or more accused jointly tried for the same offence can be taken into consideration against the co-accused (section 30).
5. Confession is statement written or oral which is direct admission of suit.

Admissions

1. An admission usually relates to civil transaction and comprises all statements amounting to admission defined under section 17 and made by person mentioned under sections 18, 19 and 20.
2. Admissions are not conclusive as to the matters admitted it may operate as an estoppel.
3. Admission may be used on behalf of the person making it under the exceptions provided in section 21 of Evidence Act.
4. Admission by one of the several defendants in suit is no evidence against other defendants.
5. Admission is statement oral or written which gives inference about the liability of person making admission.

Evidentiary value of confession

A confession is considered as best and most conclusive evidence, as no person will make an untrue statement against his own interest. It is well-settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt.

However, the evidential value of a confession is not high. As observed a confession may be 'false' due to mental aberration, mistake of law, to escape physical or moral torture, to escape ignominy of a stifling enquiry, due to vanity, to endanger others by naming them as co-offenders, and so on. Therefore, confessions may not always be true.

Therefore, the confessions must be checked in the light of the whole of the evidence on the record in order to see if they carry conviction. It would be very dangerous to act on a confession put into the mouth of the accused.

Muthuswamy v. State, AIR 1954 SC 47; the Apex Court observed that a confession should not be accepted merely because it contains details. Unless the main features of the story are shown to be true, it is unsafe to regard mere wealth of uncorroborated details as a safe guard of truth. Normally speaking, it would not be quite safe as a matter of prudence, if not of law, to base a conviction for murder on a confession by itself.

In Sahoo v. State of Uttar Pradesh, AIR 1966 SC 40: (1965) 2 SCA 292: 1965 SCD 809: (1965) 2 SCWR 484: 1966 Cr LJ 68: 1966 MPLJ 533: 1966 (2) SCJ 172: (1965) 3 SCR 86; it was held by the Supreme Court that there is clear distinction between the admissibility of evidence and the weight to be attached to it. The Court must apply a double test: (1) whether the confession was perfectly voluntary; (2) if so, whether it is true and trustworthy. The Court should carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If the confession appears to be probable catalogue of event and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be relied on.

Case laws

Veera Ibrahim case

In Veera Ibrahim v. State of Maharashtra, MANU/SC/0514/1976 : (1976) 2 SCC 302:

MANU/SC/0514/1976 : AIR 1976 SC 1167: 1976 SCC (Cri) 278: 1976 Cr LJ 860: 1976 Cr LR (SC) 165: (1976) 3 SCR 672; the fact was, one Veera Ibrahim was accused of offences under sections 135(a), 135(b) of Customs Act and section 5 of Imports and Exports (Control) Act, 1947. The appellant was called by custom authorities to Custom House and his statement was recorded while in custody. The statement was that he was not aware that the packages which were loaded in the truck were contraband goods and alleged that goods were not loaded under his instructions. He claimed to be an innocent traveler in the truck when he said, "I did not ask Mulaji (Driver) what goods were being loaded in his lorry-Mulaji was only my friend and I was not aware of any of his mala fide activities." Question for decision was whether this statement was hit by section 24 of the Evidence Act.

It is necessary to establish the following facts in order to attract the provisions of section 24.

- (i) that the statement in question is a confession.
- (ii) that such confession has been made by an accused person.
- (iii) that it has been made to a person in authority.
- (iv) that confession has been obtained by reason of any inducement, threat or promise, proceeding from a person in authority.
- (v) such inducement, threat or promise must, in opinion of the Court, be sufficient to give the accused person grounds which would appear to him reasonable for supposing that by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

In the present case, the facts under items (i), (iv) and (v) above have not been established. Firstly, the statement in question is not a confession within the meaning of section 24. It is now well-established that a statement in order to amount to a 'confession' must either admit in terms, the offence or at any rate substantially all the facts which constitute the offence. An admission of an incriminating fact, however grave, is not by itself a confession. A statement which contains an exculpatory assertion of some fact, which if true would negative the offence alleged, cannot amount to confession as held in Pakalo Narain Swami v. King Emperor, MANU/PR/0001/1939 : AIR 1939 PC 47; Palvinder Kaur v. State of Punjab (I), MANU/SC/0038/1952 : AIR 1952 SC 354: 1952 Cr LJ 154: 1952 SCJ 545: 1953 SCR 94: 1953 SCA 226: 1953 Mad WN 418: ILR 1953 Punj 107 or Om Prakash v. State of Uttar Pradesh, MANU/SC/0205/1959 : AIR 1960 SC 409: 1960 Cr LJ 514.

It was held by the Supreme Court that the statement was not a confession within meaning of section 24, and was admissible in evidence under section 21 as an admission of incriminating facts. The mere fact that the Inspector of Custom had, before recording the statement, warned the deponent of possibility of his prosecution for perjury in case he did not make statement truthfully, cannot be constructed as a threat held out by the officer while could have reasonably caused the person making the statement to suppose that he would, by making the statement, gain any advantage or avoid any evil of a temporary nature in reference to the proceeding against him for smuggling. Appeal was dismissed.

Aghnoo Nagesia case

Aghnoo Nagesia v. State of Bihar, MANU/SC/0079/1965 : AIR 1966 SC 119:

(1965) 2 SCA 367: (1965) 2 SCWR 750: 1966 Cr LJ 100: 1966 MPLJ 49: 1966 (1) SCJ 193: 1966 SCD 243: (1966) 1 SCR 134; the principle evidence was the confessional F.I.R. containing 18 parts and there was no eye witness to the murders. But the medical report confirmed that the wounds on the dead bodies were caused by a sharp weapon. The question for decision was whether the statement (FIR) or any portion of it was admissible in evidence. The appellant's contention was the entire statement is a confession made to a police officer and is not provable under section 25 against the appellants.

The respondent State contended that section 25 protects only those portions of the statements which disclose the killing by the appellant and rest of the statement is not protected under section 25, and is relevant under section 27.

The Supreme Court observed: A confession or admission is evidence against the maker of it unless its admissibility is excluded by some provisions of law. Section 25 excludes confessions caused by certain inducements, threats and promises. Section 25 provides that no confession made to a police officer shall be proved as against a person accused of any offence (a confessional FIR, thus, hit by section 25). Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer unless it is made in the immediate presence of a Magistrate. Section 27 is in the form of a proviso or exception and partially lifts the ban imposed by sections 24-26. These provisions have been made on grounds of public policy and fullest effect should be given to them.

The Court further observed that a confession may consist of several parts, and may reveal not only the actual commission of the crime but also the motive, preparation, opportunity, provocation, weapons used, intention, concealment of the weapon, and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not permissible in law to separate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, i.e., some fact which by itself or along with other admitted or proved facts, suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of the confessional statement partakes of the character of the confession. If proof of the confession is excluded by any provision of law, the entire confessional statement, in all its parts, including the admissions of minor incriminating facts, must also be excluded, unless proof of it is permitted by some other section.

If an admission of an accused is to be used against him, the whole of it should be tendered in evidence, and if part of the evidence is exculpatory and part inculpatory, the prosecution is not at liberty to use in evidence the inculpatory part only. The accused is entitled to insist that the entire admission, including the exculpatory part, must be tendered in evidence.

The Court held that, no part of the statement can be separated and the entire confessional statement is hit by section 25, except the formal part identifying the accused as maker of the report and the portions within the purview of section 27. Thus, the information leading to the discovery of dead bodies, knife and clothes is admissible in evidence, being the 'discovery of facts' under section 27. This evidence is insufficient to convict the appellant of the offence under section 302, IPC. The corroboration by medical report will not be sufficient.

M.C. Verghese case

In M.C. Verghese v. T.J. Ponnann, MANU/SC/0054/1968 : (1969) 1 SCC 37:

MANU/SC/0054/1968 : AIR 1970 SC 1876: 1968 Ker LT 904: 1970 Cr LJ 1651: 1970 SC Cr R 198: (1969) 2 SCR 692: 1970 (2) SCJ 353: 1970 Mad LJ (Cri) 630. Rath, daughter of M.C. Verghese, was married to T.J. Ponnann. On July 18, 1964, July 25, 1964 and July 30, 1964, Ponnann wrote from Bombay letters to Rath who was then residing with her parents at Trivandrum which it is claimed contained defamatory imputations concerning Verghese. Verghese then filed a complaint in the Court of the District Magistrate, Trivandrum, against Ponnann charging him with offence of defamation.

The District Magistrate held that a communication by a husband to his wife or by a wife to her husband of a matter defamatory of another person does not amount in law to publication, since the husband and wife are one in the eye of the law. In so holding, he relied upon the judgment in *Wennhak v. Morgan and Wife*, (1888) 20 QBD 635.

In a revision application filed by Verghese before the Court of Session, the order was set aside and further enquiry into the complaint was directed.

The case was then carried to the High Court of Kerala in revision. The High Court set aside the order of the Court of Session and restored the order of the District Magistrate.

The Supreme Court held that the question whether the complainant in this case is an agent of the wife because he has received the letters from the wife and may be permitted to give evidence is a matter on which no opinion at this stage can be expressed. The complainant claims that he has been defamed by the writing of the letters. The letters

are in his possession and are available for being tendered in evidence. We see no reason why inquiry into that complaint should, on the preliminary contentions raised, be prohibited. If the complainant seeks to support his case only upon the evidence of the wife of the accused, he may be met with the bar of section 122 of the Indian Evidence Act. Whether he will be able to prove the letters in any other manner is a matter which must be left to be determined at the trial and cannot be made the subject-matter of an enquiry at this stage.

The Supreme Court further held that, when the letters were written by Ponnai to Rathi, they were husband and wife. The bar to the admissibility in evidence of communications made during marriage attaches at the time when the communication is made, and its admissibility will be adjudged in the light of the status at that date and not the status at the date when evidence is sought to be given in Court. We are, therefore, of the view that the appeal must be allowed and the order passed by the High Court set aside. The proceedings will be remanded for trial to the District Magistrate according to law.

David Razario case

In State of Karnataka v. David Razario, MANU/SC/0800/2002 : AIR 2002 SC 3272:

2002 Cr LJ 4127: 2002 AIR SCW 3798: JT 2002 (7) SC 283: (2002) 7 SCC 728: 2002 (4) SCJ 326: 2002 (5) SLT 400: 2002 (9) SRJ 352: (2002) 6 Scale 500: 2002 Scc (Cri) 1852: 2002 (6) Supreme 491; an octogenarian old lady was the victim of robbery and murder allegedly committed by the respondents David Rozario and Christopher David. The VII Additional Sessions Judge, Bangalore, on the basis of evidence on record found the accused appellants guilty under section 302 read with section 34 of the Indian Penal Code. They were sentenced to undergo imprisonment for life for aforesaid two offences. The Division Bench of the Karnataka High Court set aside the conviction.

The State of Karnataka appealed to the Supreme Court.

The Supreme Court on issue whether the evidence in relation to recovery is sufficient to fasten the guilt on the accused, held that, the statement which is admissible under section 27 is the one which is the information leading to discovery, thus what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer; in other words the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is therefore necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so record the exact information must be adduced through evidence, the basic idea embedded in section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee one is true, the information might be confessional or non-inculpatory in nature but if it results in discovery of a fact it becomes a reliable information. It is now well-settled that recovery of an object is not discovery of fact it becomes a reliable information. It is now well-settled that recovery of an object is not discovery of fact envisaged in the section. Section of Privy Council in Pullkari Kottayya v. Emperor, is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced the knowledge of the accused as to it, but the information given must relate distinctly to the effect. No doubt the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicated of the information given.

The Supreme Court set aside the judgment of the High Court allowing the appeal.

Jayawant Dattatray case

In Jayawant Dattatray Suryarao v. State of Maharashtra, MANU/SC/0710/2001 : (2001) 10 SCC 109:

2002 Cr LJ 226: 2001 AIR SCW 4717: 2002 (1) Crimes 31: JT 2001 (9) SC 605: 2001 (5) SCJ 180: (2001) 8 Scale 36: 2002 Scc (Cri) 897: 2001 (8) Supreme 362; the prosecution version as revealed from the confessional statement and other evidence is that there are two gangs operating in Mumbai i.e., one of Dawood Ibrahim and other of Arun Gawli. Their activities are of eliminating or causing harm or injury to those who do not obey their dictates and of extortion from builder, hoteliers, industrialists, professionals and other persons. They also indulge in smuggling and drug trafficking and for undertaking all these activities in an organized manner, they employ a number of persons. Such a situation, it could be inferred that the dastardly act was to administer a terror or a shock wave in the people at large and convey that the fate of all those who did not obey their dictates or oppose them would be the same as that of Shailesh Haldankar.

The Supreme Court held that, it is true that if the confessional statements are taken as they are, the accused can be convicted for the offences for which they are charged as the said statements are admissible in evidence and are

substantive pieces of evidence. However, considering the facts of the case, particularly that the confessional statements were recorded by the police officer during investigation; the said statements were not sent to the Judicial Magistrate forthwith; and that after recording the statements, the accused were not sent to judicial custody, unless there is sufficient corroboration to the said statements, it is not safe to convict the accused solely on the basis of the confessions.

The Apex Court further held that, confessional statement before the police officer under section 15 of the TADA is substantive evidence and it can be relied upon in the trial of such person or co-accused, abettor or conspirator for an offence punishable under the Act or the Rules. The police officer before recording the confession has to observe the requirement of sub-section (2) of section 15. Irregularities here and there would not make such confessional statement inadmissible in evidence. If the legislature in its wisdom has provided after considering the situation prevailing in the society that such confessional statement can be used as evidence, it would not be just, reasonable and prudent to water down the scheme of the Act on the assumption that the said statement was recorded under duress or was not recorded truly by the officer concerned in whom faith is reposed. It is true that there may be some cases where the power is misused by the authority concerned. But such contention can be raised in almost all cases and it would be for the court to decide to what extent the said statement is to be used. Ideal goal may be confessional statement is made by the accused as repentance for his crime, but for achieving such ideal goal, there must be altogether different atmosphere in the society. Hence, unless a foolproof method is evolved by the society or such atmosphere is created, there is no alternative, but to implement the law as it is.

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Chapter 4

Dying Declaration

Q. What do you mean by term 'dying declaration'?

A 'Dying declaration' means the statement of a person who has died explaining the circumstances of his death. Such a statement can be proved when it is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death. The statement will be relevant in every case or proceeding in which the cause of that person's death comes into question.¹ Clause (1) of section 32 of the Evidence Act, provides for the 'dying declaration' which is incorporated from the English Law principle, which relates to what are popularly known as dying declaration but marks a remarkable departure from them, as in English Law this type of statement is relevant only when the charge is that of murder or manslaughter. Section 32(1) reads as under:

32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.- Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-

(1) when it relates to cause of death.-When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

1. See illustration (a) to section 32 of the Evidence Act

Illustrations

(a) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

Therefore, this section provides exception to the general rule that, all oral evidence must be direct.¹

Principle.--

Dying declarations are statements oral or documentary made by the person as to the cause of his death or as to the circumstances of the transactions resulting in his death. The grounds of admission of a dying declaration are:

1. firstly, necessity, for the victim being generally the only principal eye-witness to the crime, the exclusion of his statement might defeat the ends of justice; and
2. secondly, the sense of impending death which creates a sanction equal to the obligation of an oath.

The general principle on which this species of evidence is admitted is that they are declarations made in extremity,

when the party is at the point of death and when every hope of this world has gone, when every motive to falsehood is silence and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn and so lawful is considered by law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice; *R. v. Woodcock*, (1789) 1 Leach 500.

The principle on which the Dying Declarations are admitted in evidence is indicated in legal maxim "Nemo moriturus praesumitur mentiri" implies that a man who is on death bed would not tell a lie to falsely implicate innocent person; *Sharda v. State of Rajasthan*, MANU/SC/1894/2009 : AIR 2010 SC 408.

English Law and the Indian Law - Difference.--

- (1) Under English Law, a dying declaration is admissible only on a criminal charge of homicide or manslaughter, whereas in India it is admissible in all proceedings, civil or criminal.
- (2) Under the English Law, the declarations should have been made under the sense of impending death, whereas under the Indian Law it is not necessary that the deceased, at the time of making the dying declaration, should have been under expectation of death.
- (3) Under the English Law, the declaration must have been competent as a witness, thus, imbecility of tender age will exclude the declaration. It is, however, doubtful whether this rule is applicable in India. The credit of such a declarant may be impeached in the same way as that of witness actually examined in a court.

1. Section 60 of the Evidence Act, provides that, all oral evidence must be direct.

Evidentiary value of a dying declaration.--

By enacting section 32 the Legislature in its wisdom has placed a dying declaration on par with evidence on oath for the reason that at the time when a man is in danger of losing himself it is not likely that he would speak a falsehood and involve an innocent person. There is no absolute rule of law nor is there any rule of prudence which has ripened into a rule of law that a dying declaration cannot form the sole basis of a conviction unless it is corroborated by independent evidence. The circumstances which lend strength and assurance to a dying declaration are as follows:

- (1) That it was recorded by a competent Magistrate after taking all proper precautions.
- (2) That it was taken down in the exact words in which it was spoken.
- (3) That it was made shortly after the assault when there was no opportunity of its being coloured by impressions received from others.
- (4) That deceased had ample opportunity of observation.
- (5) That the incident happened in a sufficiently lighted place.
- (6) That the deceased had made more than one statement and all of them were consistent as to the circumstances of the occurrence and the identity of the attackers.

Essential conditions for the applicability of dying declaration

Q. What are the essential conditions for the applicability of dying declaration?

- (1) To whom the statement is to be made and its form:-

A statement of dying declaration could be made to any person - a doctor, a Magistrate, a friend or near relative, a police officer. However, a statement recorded by a Magistrate or doctor is considered more reliable, and that recorded by a police officer or close relative not (require more scrutiny).

No particular form of recording a statement is prescribed. The statement could be written, oral or even verbal

(e.g., gestures). In *Queen Empress v. Abdullah*, (1885) ILR 7 All 385; where the throat of the deceased girl was cut and she being unable to speak indicated the name of the accused by the signs of her hand, this was held to be relevant as dying declaration.

Two dying declarations giving contrary versions. Dying declaration duly recorded by the doctor in presence of two other doctors stating that she was burnt by her mother-in-law and husband for failure to bring dowry. Second declaration not proved by competent witness, cannot be relied upon, accused convicted on the dying declaration recorded by doctor; *Harbans Lal v. State of Haryana*, MANU/SC/0113/1993 : AIR 1993 SC 819: 1993 Cr LJ 75: 1992 AIR SCW 3303: 1992 (3) Crimes 758: 1993 East Cr C 109: 1992 JT (Supp) 7: 1993 (1) Mah LR 90: 1992 (3) SCJ 362: 1994 SCC (Cri) 130: (1993) Supp 4 SCC 641.

Q. What is dying declaration? Can a conviction be based solely on the basis of a dying declaration? Can a dying declaration be relied upon without corroboration?

(2) The person making the statement must have died:-

The death need not occur immediately after the making of the statement (as discussed above). However, the death must occur. If the persons making the declaration chances to live, his statement is inadmissible as a 'dying declaration', but it might be relied under section 157 to corroborate his testimony when examined. Such a statement can also be used to contradict him under section 145. Further, it can be used to corroborate the evidence in Court under sections 6 and 8. The fact that the person is dead must be proved by the person proposing to give evidence of his statement.

(3) Statement must relate to the cause of his death or the circumstances of the transaction which resulted in his death:-

If the statement made by the deceased does not relate to his death, but to the death of another, it is not relevant; *Ratan Gond v. State of Bihar*, MANU/SC/0054/1958 : AIR 1959 SC 18: 1959 Cr LJ 108: 1959 BLJR 1: 1959 All LJ 35: 1959 MPC 46: 1959 SCJ 222: 1959 All Cr R 118: MANU/SC/0054/1958 : 1959 SCR 1336. For example, where the wife made a statement that her husband is killed by Z and then she committed the suicide.

The circumstances of transaction resulting in death must bear proximate relation to the cause of death or actual occurrence. The general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly related to the occasion of death will not be admissible. But, statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, would to each of them be circumstances of the transaction.

(4) The cause of death must be in question:-

The declaration under section 32(1) must relate to the death of the declarant. In *Dannu Singh v. Emperor*, 25 Cr PC 574, A and five other persons were charged with having committed a dacoity in a village. A, who was seriously wounded while being arrested, made before his death a dying declaration as to how the dacoity was committed and who had taken part in it. It was held that declaration was not admissible in evidence against other persons, as it does not relate to his death, but relates to participation of his associates in the dacoity.

(5) The statement must be complete and consistent:-

If the deceased fails to complete the main sentence (as for instance, the genesis or the motive for the crime), a dying declaration would be unreliable. However, if the deceased has narrated the full story, but fails to answer the last question as to what more he wanted to say, the declaration can be relied upon; *Kusa v. State of Orissa*, MANU/SC/0150/1980 : (1980) 2 SCC 207: AIR 1980 SC 559: 1980 Cr LJ 408: 1980 SCC (Cri) 389: 1980 Cr LR (SC) 200: 1980 SC Cr R 315.

A dying declaration ought not to be rejected because it does not contain details or suffers from minor inconsistencies. Merely because it is a brief statement, it is not to be discharged. Shortness, in fact,

guaranteed truth;

Surajdeo Oza v. State of Bihar, MANU/SC/0269/1979 : AIR 1979 SC 1505: 1979 SCC (Cri) 519: 1979 UJ (SC) 412: 1979 Cr LR (SC) 368: 1979 Cr LJ 1122: 1979 All Cri R 359: 1979 Cr LR (SC) 570. Where the bride recorded two declarations, one to a police officer and other to a Magistrate, they being similar in material factors, evidence accepted though minor discrepancies were there; Raoji v. State of Maharashtra, (1994) SC LJ 1 (SC).

In Kamla v. State of Punjab, MANU/SC/0086/1993 : AIR 1993 SC 374: 1993 Cr LJ 68: 1992 AIR SCW 3420: 1992 (3) Crimes 1088: 1993 (1) DMC 4: JT 1992 (6) SC 707: 1993 (6) OCR 92: (1993) 1 SCC 1: 1992 (3) SCJ 449: 1993 SCC (Cri) 1: 1993 (1) UJ (SC) 89, four dying declarations were made by the deceased. One of them indicated the incident as an accident. The accused (mother-in-law of the deceased) had been convicted on the basis of another declaration implicating her. The court also found glaring inconsistencies as far as naming the culprit was concerned. On facts it was held that the conviction cannot be based upon such declarations.

(6) Declarant must be competent as a witness:-

It is necessary for the relevancy of a dying declaration that the declarant, if he had lived on, would have been competent witness. Thus, in a prosecution for the murder of a child, aged four years, it was proposed to put in evidence, as a dying declaration, what the child said shortly before her death. The declaration was held to be inadmissible; R. v. Pike, (1829) 3 CLP 598.

(7) Other points:-

Where the injured person was unconscious, dying declaration should be rejected; Kake Singh alias Surendra Singh v. State of Madhya Pradesh, MANU/SC/0160/1981 : AIR 1982 SC 1021: 1981 SCC (Cri) 645: 19981 Cr App R (SC) 319: 1982 Cr LR (SC) 8: 1982 Cr LJ 986: 1982 Chand Cr C 64 (SC): 1981 Supp SCC 25. Where for some unexplained reasons the person who noted down (scribe) the statement was not produced, the declaration was not accepted as an evidence; Govind Narain v. State of Rajasthan, MANU/SC/0374/1993 : AIR 1993 SC 2457: 1993 Cr LJ 2598: 1993 AIR SCW 2179: 1994 (1) APLJ 52: 1994 APLJ (Cri) 150: 1993 JT (Supp) 522: 1993 SCC (Cri) 1012: (1993) Supp 3 SCC 343.

Where there are more than one declaration, the one first in point of time should be preferred; Mohanlal Gangaram Gehani v. State of Maharashtra, MANU/SC/0090/1982 : AIR 1982 SC 839: 1982 Cr LJ 630: (1982) 2 APLJ (SC) 15: 1982 Cr LR (SC) 77: MANU/SC/0090/1982 : (1982) 1 SCC 700: 1982 SCC (Cri) 334: 1982 Mah LR (SC) 117: 1982 Mad LJ (Cri) 431: 1982 (1) SCJ 380. Where an injured person lodged the F.I.R. and then died, it was held to be relevant as dying declaration; K. Ramachandra Reddy v. Public Prosecutor, MANU/SC/0127/1976 : AIR 1976 SC 1994: 1976 Cr LR (SC) 286: 1976 Cr LJ 1548: MANU/SC/0127/1976 : (1976) 3 SCC 618: 1976 SCC (Cri) 473: 1976 SC Cr R 366: (1976) 2 APLJ (SC) 39: 1977 (1) SCJ 36: 1976 Supp SCR 542.

(8) Compliance with section 164 of the Criminal Procedure Code:-

The admissibility of a dying declaration is not dependent upon the compliance with section 164, Criminal Procedure Code; Allah Baksh v. Crown, 1951 FCR 193.

Statement made before a police officer: Whether admissible?

The Supreme Court in Ramprasad v. State of Maharashtra, MANU/SC/0365/1999 : AIR 1999 SC 1969: 1999 Cr LJ 2889: 1999 AIR SCW 1657: 1999 (3) Crimes 96: JT 1999 (4) SC 74: 1999 (17) OCR 181: (1999) 5 SCC 30: 1999 (7) SRJ 39: (1999) 3 SCALE 623: 1999 SCC (Cri) 651: 1999 (5) Supreme 554, observed that at the time when declarant gave the statement he would have been under expectation of death but that is not sufficient to wiggle it into the cassette of section 32 of Evidence Act, 1872. As long as the maker of the statement is alive it would remain only in the realm of a statement recorded during investigation. It was held, that if a person making a dying declaration survives his statement cannot be used as evidence under section 32 of the Act.

Dying declaration recorded by a police officer if found truthful may base conviction; Urgeu Sherpa v. State of Sikkim, (1985) 1

SCC 278.

Need for corroboration.--

Where the dying declaration is believed to be true, consistent and coherent, it can be relied upon for conviction, even if there was no corroboration; *Khushal Rao v. State of Bombay*, MANU/SC/0107/1957 : AIR 1958 SC 22: 1958 Cr LJ 106: 1957 MPC 813: 1958 SCJ 198: 1958 All LJ 91: 1958 Mad LJ (Cri) 100: 1958 Jab LJ 175: 1958 SCC 28: 1958 SCR 552: 1959 SCA 281; *Ram Nath Madhoprasad v. State of Madhya Pradesh*, MANU/SC/0101/1953 : AIR 1953 SC 420: 1953 Cr LJ 1772.

In *Lallubhai Devchand Shah v. State of Gujarat*, MANU/SC/0130/1971 : AIR 1972 SC 1776: 1972 Cr LJ 828; a married woman was burnt to death by her in-laws, her dying declaration was accepted and conviction was based solely on the basis of the declaration. It was held that if the truthfulness of a dying declaration is accepted, it can always form the basis of conviction of the accused. The Court, in the present case, thus convicted the appellants on the basis of the dying declaration.

In the recent decision, the Supreme Court observed that, dying declaration though an exception to the hearsay rule, but like any other evidence, it has to pass the test of credibility. If found reliable, it can be the basis of conviction. It can be acted upon in reference to one accused though not in reference to others; *Narain Singh v. State of Haryana*, MANU/SC/0095/2004 : AIR 2004 SC 1616: 2004 Cr LJ 1409: 2004 AIR SCW 902: 2004 (1) Crimes 398: 2004 (2) JCJR 126: JT 2004 (2) SC 327: 2004 (27) OCR 680: 2004 (2) SLT 171: 2004 (3) SRJ 411: (2004) 2 SCALE 251: 2005 SCC (Cri) 185: 2004 (1) Supreme 909. However, it is well-settled that if the truthfulness of dying declaration cannot be doubted, the same alone can form the basis of conviction without any corroboration; *Ravi v. State of Tamil Nadu*, (2004) 10 SCC 776.

Evidentiary value of dying declaration.--

The general principle on which dying declaration is admitted is that, no one would wish to die with a lie on his lips. Being the victim, dying man might have been the only eye-witness to such time, his statement would be a piece of direct evidence. Exclusion of his statement would tend to defeat the ends of justice. If the truthfulness of a dying declaration is beyond doubt, the conviction can be held solely upon it; *State of Assam v. Mafizuddin Ahmed*, AIR 1983 SC 274: 1983 Cr LJ 426: 1983 All Cri C 60: MANU/SC/0153/1983 : (1983) 2 SCC 14: 1983 Cr LR (SC) 163: 1983 (1) Crimes 380: 1983 SCC (Cri) 325: (1983) 1 Cr LC 394: 1983 UP Cr R 148.

Circumstances when a dying declaration is meaningless

Following are the circumstances when a dying declaration held meaningless:

- (i) When the relatives of the declarant arrange with him as to what he has to say; *Varand v. Emperor*, AIR 1944 Sind 137.
- (ii) When the maker of a dying declaration is proved to have been unconscious or semi-conscious at the spot and died a few minutes after the making of the declaration; *Bhagwan Dass v. State*, MANU/SC/0037/1957 : AIR 1957 SC 589: 1957 Cr LJ 889: 1957 SCJ 515: 1957 MPC 564: 1957 SCC 308: 1957 SCA 836: 1957 BLJR 678: 1957 All LJ 722.
- (iii) Where there is clear discrepancy between the facts mentioned in the dying declaration and those in the statements of the witness; *Bapu Rao v. State of Maharashtra*, AIR 1968 SC 855.
- (iv) When a dying declaration contradicts itself in its various parts; *Jaya Ram v. State of Tamil Nadu*, AIR 1976 SC 791.
- (v) Where the identity of accused could not be established through the dying declaration; *Shabir Mohamad Syed v. State of Maharashtra*, MANU/SC/0948/1997 : (1997) 11 SCC 499: AIR 1997 SC 3808: 1997 Cr LJ 4416: 1997 AIR SCW 3724: JT 1997 (8) SC 1: 1997 (3) SCJ 157: 1998 Sc Cr R 33: 1997 SCC (Cri) 1226.

Q. There is no absolute rule of law that dying declaration cannot form the sole basis for conviction? Comment and elaborate what are the tests laid down by the Supreme Court in *Khushal Rao* case for judging the veracity of dying

declaration. 82

Case Laws

Khushal Rao Case

In *Khushal Rao v. State of Bombay*, MANU/SC/0107/1957 : AIR 1958 SC 22: 1958 Cr LJ 106: 1957 MPC 813: 1958 SCJ 198: 1958 All LJ 91: 1958 Mad LJ (Cri) 100: 1958 Jab LJ 175: 1958 SCC 28: 1958 SCR 552: 1959 SCA 281; the deceased made four separate and identical declarations before the doctor, police inspector, Magistrate, and to other person, stating that he has been assaulted by Kaushal and one other person. The question was whether the accused could be convicted only on the basis of this declaration or the declaration needed corroboration. There are divergent views of different High Courts in this regard. According to Bombay High Court, dying declaration is a weaker type of evidence and require corroboration. According to Calcutta High Court, it is not permissible to accept a declaration in one part and reject the other part. According to Madras High Court, a declaration can be relied without corroboration, if the court is convinced of its truth, i.e., there is no suspicion of its credibility.

The Supreme Court, agreeing with Madras High Court, laid down the following principles:

- (1) There is no absolute rule of law that a dying declaration cannot be the sole basis of conviction unless corroborated.
- (2) Each case must be determined on its own facts keeping in view the circumstance in which the dying declaration was made.
- (3) A dying declaration is not a weaker kind of evidence than any other piece of evidence. It stands on the same footing as any other piece of evidence.
- (4) A dying declaration cannot be equated with a confession or evidence of approver, as it may not come from a tainted source. If it is made by the person whose antecedents are as doubtful as in the other cases that may be a ground for looking upon it with suspicion.
- (5) Necessity of corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, but from the fact the Court in a particular case came to the conclusion that a particular declaration is not free from infirmities.
- (6) To test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man's observation, e.g., whether there was sufficient light if the crime was committed at night; whether the capacity of the declarant was not impaired at the time of the statement; that the statement has been consistent throughout if he had several opportunities for making a dying declaration; and that the statement was at the earliest opportunity and was not the result of tutoring by the interested parties.
- (7) A dying declaration recorded by a competent Magistrate in a proper manner in the form of questions and answers, and in the words of the maker as far as practicable stands on much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and character.
- (8) If the Court, after taking every thing into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement, and naturally, it could not be fully convinced if there was anything in the surrounding circumstances to raise suspicion as to its credibility. Thus, a true and voluntary declaration needs no corroboration.

The statement of the deceased in this case satisfied all these conditions (the declaration was true in all respects e.g., consistent in so far as naming of the two accused) and therefore the appellants should be convicted.

Kusa Case.--

In *Kusa v. State of Orissa*, MANU/SC/0150/1980 : (1980) 2 SCC 207: AIR 1980 SC 559: 1980 Cr LJ 408: 1980 SCC (Cri) 389: 1980 Cr LR (SC) 200: 1980 SC Cr R 315; the deceased made dying declaration before a doctor. It was clear in all respects. However, the appellants challenged it on the following grounds: (1) it did not contain all those names which were include in F.I.R. (2) the account of the eye-witnesses also different (3) the deceased was in a state of shock, thus his statement could not be relied (4) the declaration was incomplete as the deceased did not answer the last question put to him (to wind up the statement the doctor asked the injured if he had anything else to say, he lapsed into unconsciousness without answering the question).

The Court observed that only certain names were included in F.I.R. but were not mentioned in dying declaration does not detract from the value of dying declaration and would not by itself prove the falsity of the declaration. In *Surat Singh's* case, the first declaration did not mention the name of the eye-witness, but the second declaration (which was more detailed) contained it. The Court observed that first declaration was a short version of the entire incident and contained true facts when the deceased was under great pain.

The Apex Court further observed: The statement of doctor was that deceased became semi-conscious when the last question was put to him. Logically it means that prior to that he was fully conscious. The last question was in the nature of a mere formality "What more you want to say", and all the necessary questions were asked before that formal question. The statement was not incomplete.

Kishanlal Case.--

In *Kishanlal v. State of Rajasthan*, MANU/SC/0481/1999 : AIR 1999 SC 3062: 1999 Cr LJ 4070: 1999 AIR SCW 2998: 1999 (4) Crimes 103: JT 1999 (6) SC 41: 1999 (17) OCR 457: (2000) 1 SCC 310: 1999 (9) SRJ 90: (1999) 5 SCALE 31: 2000 SCC (Cri) 182: 1999 (7) Supreme 386: 1999 (2) UJ (SC) 1284; Smt. Sulochana, was sleeping on the intervening night between 11th and 12th September, 1976 with the mother of the appellant on a separate cot when she was burnt by sprinkling kerosene oil on her chest. She was shifted to the hospital at Pilibanga at 2.00 a.m. Doctor of the hospital sent information to SHO Police Station Lekhuwali on which investigation started. At 4.30 a.m. police recorded the statement of the deceased. The statement recorded by the police was not brought on the records by the prosecution.

On the 15th of November, 1976, all of sudden the condition of Smt. Sulochana deteriorated and she died in the evening. On basis of the above complaint dated 11th November, 1976, a case was registered against the accused and investigation was started. The police after investigation could not find any sustainable evidence against the appellant and other family member mentioned in the complaint hence submitted final report.

Dealing with the oral dying declaration, the Trial Court acquitted both the appellant and his mother. The High Court convicted both the appellant and his mother. The case went to the Supreme Court.

The Supreme Court held that, in the present case, as aforesaid the dying declaration was after two months of the alleged incident. It was not at a time when the deceased was expecting imminent death. Neither the post-mortem nor deposition of doctor carry any definite inference that the cause of death was on account of burning. There is a conflict between two dying declarations, in one there is inter se inconsistency as revealed in the depositions of witnesses, in the other no naming of any accused, when made before a Magistrate. On such an evidence Trial Court rightly declined to base a conviction. The High Court committed manifest error in placing reliance on it.

The Supreme Court further held that, so far as the extra judicial confession is concerned it is said that the same was made by the accused at panchayat on two occasions. First panchayat is alleged to have taken place at Chak 22 P.S. and the other in the school at Raisinghnagar. The father's testimony in cross-examination, when confronted with his statement wherein he did not name any of the accused persons, he made the usual answer that the name might not have been recorded by mistake. But in the alleged second panchayat, the names of large number of persons were referred to as to have confessed their guilt, including the appellant. It includes even the names of those who are not even accused. It is alleged that they sought for the pardon of the local leaders for this guilt. We find even in this alleged confession, there is no mention that the accused had burnt the deceased Smt. Sulochana. The alleged confession by large number of persons is more in a general and vague term. Before a confession is relied on, it must be

clear and unequivocal, whether it is in a judicial or in an extra judicial confession.

On the fact discussed above there is no hesitation to hold that reliance should not have been placed on the so called confession, the Trial Court rightly rejected it but unfortunately the High Court very casually accepted it which cannot be sustained and accordingly, the present appeal is allowed.

Shariff Case.--

In State of Karnataka v. Shariff, MANU/SC/0049/2003 : AIR 2003 SC 1074: 2003 Cr LJ 1254: 2003 AIR SCW 600: 2003 (2) Crimes 144: JT 2003 (2) SC 15: 2003 (25) OCR 72: (2003) 2 SCC 473: (2003) 1 SCR 572: (2003) 1 SCALE 469: 2003 SCC (Cri) 561: 2003 (2) Supreme 16: 2003 (1) UC 679; the accused respondent was charged under section 302, IPC for having committed murder of his wife Muneera Begum by pouring kerosene on her body and setting her on fire in his house at about 4.00 a.m. on July 24, 1986.

The learned Sessions Judge believed the case of the prosecution and convicted the accused respondent under section 302, IPC and sentenced him to imprisonment for life. The appeal preferred by the accused was allowed by the High Court and his conviction and sentence was set aside.

The Supreme Court held that, the Court rules that it cannot be laid down as an absolute rule of law that a dying declaration cannot form that sole basis of conviction unless it is corroborated. Each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; it cannot be laid down as a general proposition that dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstance and with reference to the principle governing the weighing of evidence. It has been further held that in order to pass the test of reliability a dying declaration has to be subjected to a very close scrutiny keeping in view the fact that the statement has been made in the absence of the accused who has not opportunity of testimony the veracity of the statement by cross-examination. But once the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstance of the death and the assailants of the victim, there is no question of further corroboration (Vide Khushal Rao v. State of Bombay, MANU/SC/0107/1957 : AIR 1958 SC 22: 1958 Cr LJ 106: 1958 SCJ 198: 1958 Jab LJ 175: 1958 SCC 28: 1958 SCR 552: 1959 SCA 281).

The Court further held that, "there is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The primary effort of the Court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear of convincing, then the Court may, for its assurance, look for corroboration to the dying declaration.....".

In the present case, the reason given by the High Court is that the dying declaration was not in question-answer form. Very often the deceased is merely asked as to how the incident took place and the statement is recorded in a narrative form. In fact such a statement is more natural and gives the version of the incident as it has been perceived by the victim. The question whether a dying declaration which has not been recorded in question-answer form can be accepted in evidence or not has been considered by this Court on several occasions.

Thus, the Supreme Court allowed the appeal and set aside the impugned judgment of the High Court and restored that of the Session Court.

Rattan Singh Case.--

In Rattan Singh v. State of Himachal Pradesh, MANU/SC/0177/1997 : AIR 1997 SC 768: 1997 Cr LJ 833: 1997 AIR SCW 587: 1996 (4) Crimes 282: 1997 (13) OCR 57: MANU/SC/0177/1997 : (1997) 4 SCC 161: 1996 (4) SCJ 628: 1997 SCC (Cri) 525. A young house wife enceinte by four months, was shot at with a double barrel gun by an assailant who gate crashed into her courtyard during the odd hours of the night when she was sleeping. The Sessions Court acquitted him but a Division Bench of the High Court of Himachal Pradesh on appeal filed by the State convicted him under section 302, IPC and sentenced him to imprisonment for life.

He then filed this appeal under section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act,

1970 and also under section 379 of the Cr. P.C.

Section 32(1) of the Evidence Act, renders a statement relevant which was made by a person who is dead in cases in which cause of his death comes into question, but its admissibility depends upon one of the two conditions; either such statement should relate to the cause of his death or it should relate to any of the circumstances of transaction which resulted in his death.

Three aspects have to be considered pertaining to the above intent of evidence. First is whether the said statement of the deceased would fall within section 32(1) of the Evidence Act, so as to become admissible in evidence. Second is whether what the witnesses have testified in court regarding the utterance of the deceased can be believed to be true. If the above two aspects are found in the affirmative, the third aspect to be considered is whether the deceased would correctly identify the assailant?

When Kanta Devi (deceased) made the statement that appellant was standing with a gun she might or might not have been under the expectation of death, but that does not matter. The fact spoken by the deceased has subsequently turned out to be a circumstances which intimately related to the transaction which resulted in her death. The collection of the words in section 32(1) "circumstances of the transaction which resulted in his death" is apparently of wider amplitude than saying "circumstances which caused his death" there need not be direct necessary nexus between "circumstances" and death. It is enough if the words spoken by the deceased have reference to any circumstances, which has connection with any of the transaction which ended up in the death of the deceased. Such statement would also fall within the purview of section 32(1) of the Evidence Act. In other words, it is not necessary that such circumstances can also become admissible under the sub-section, provided it has nexus with the transaction which resulted in the death.

In the present case, the act of assailant intruding into the courtyard during the night, victim's invention of the assailant here the pronouncement that appellant was standing with a gun and his firing the gun at her, all circumstances so intermingled with each other by proximity of time and space that the statement of the deceased became part of the same transaction. Hence, it is admissible under section 6 of the Evidence Act.

In either case, whether it is admissible under section 32(1) or under section 6 of the Evidence Act, it is substantive evidence, which can be acted upon with or without corroboration in finding guilt of the accused.

Thus, the Supreme Court come to the conclusion that the deceased had correctly identified that appellant who was standing with a gun. Therefore, the Supreme Court confirmed the conviction and sentence passed on the appellant and dismissed the appeals.

P.V. Radhakrishna Case.--

In P.V. Radhakrishna v. State of Karnataka, AIR 2003 SC 2859: 2003 Cr LJ 3717: 2003 AIR SCW 3587: 2003 (3) Crimes 180: JT 2003 (6) SC 84: (2003) 6 SCC 443: 2003 (4) SLT 603: (2003) 5 SCALE 438: 2003 SCC (Cri) 1679: 2003 (2) UC 1269. Accused-appellant allegedly committed suicide was found guilty of offence punishable under section 302, Indian Penal Code, 1860 ('IPC'); and sentenced to undergo imprisonment for life and a fine of Rs. 1,000 with default stipulation of one month imprisonment by Sessions Judge, Bangalore. The appeal before the High Court of Karnataka having yielded no success this appeal has been filed.

The Supreme Court observed that:

"This is a case where the basis of conviction of the accused is the dying declaration. The situation in which a person is on death bed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement, it is for this reason the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eye-witness in a serious crime, the exclusion of the statement would leave the Court without a scrap of evidence. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that

the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

The Court further held that, the residuary question whether the percentage of burns suffered is determinative factor to affect the credibility of the dying declaration and the improbability of its recording. There is no hard and fast rule of universal application in this regard. Much would depend upon the nature of the burns, part of the body affected by the burns, impact of the burns on the faculties to think and convey the idea or facts coming to mind and other relevant factors. Percentage of burns alone would not determine the probability or otherwise of making dying declaration.

Thus, it was held that the trial court and the High Court were justified in placing reliance on the dying declaration for the purpose of convicting the accused-appellant. Hence, the appeal is dismissed.

Patel Hiralal Case.--

In Patel Hiralal Joitaram v. State of Gujarat, MANU/SC/0669/2001 : (2002) 1 SCC 22: AIR 2001 SC 2944: 2001 AIR SCW 4411: 2002 (1) Crimes 94: JT 2001 (9) SC 282: 2002 Mad LJ (Cri) 184: 2001 (5) SCJ 342: 2001 (10) SRJ 501: (2001) 7 SCALE 440: 2002 SCC (Cri) 1: 2001 (8) Supreme 23: 2002 (1) UJ (SC) 237; a business of Patan (Gujarat) was arraigned for scorching a young hapless woman (mother of two infant children) to death. The felony was perpetrated in broad daylight on a public road. The man against whom the accusation was made had no relationship with the victim, marital or otherwise. The trial court exonerated him, but a Division Bench of the High Court of Gujarat found him to be the killer of that lady and convicted him and sentenced him to imprisonment for life. Hence this appeal by him as of right.

The Supreme Court held that, section 32(1) of the Evidence Act, relates to the statement made by a person before his death. Two categories of statements are made admissible in evidence and further made them as substantive evidence. They are: (1) his statement as to the cause of his death; (2) his statement as to any of the circumstances of the transaction which resulted in his death. The second category can envelop a far wider amplitude than the first category. The words "statement as to any of the circumstances" are by themselves capable of expanding the width and contours of the scope of admissibility. When the word "circumstances" is linked to "transaction which resulted in his death" the sub-section casts the net in a very wide dimension. Anything which has a nexus with his death, proximate or distant, direct or indirect, can also fall within the purview of the sub-section. As the possibility of getting the maker of the statements in flesh and blood has been closed once and for all the endeavour should be how to include the statement of a dead person within the sweep of the sub-section and not how to exclude it therefrom. Admissibility is the first step and once it is admitted the Court has to consider how far it is reliable.

Once that test of reliability is found positive the Court has to consider the utility of that statement in the particular case.

In the instant case, the appellant did not even make an effort to bring the case within any of the four exceptions enumerated in section 300. Hence, the only question to be answered is whether he did the act with the intention of causing such bodily injury as he knew "to be likely to cause death of the deceased". It is inconceivable that the appellant would not have known that setting a human being ablaze after soaking her clothes with inflammable liquid would cause her death as the type of burns resulting therefrom would at least be "likely" to cause her death (if not, they are sufficient in the ordinary course of nature to cause her death. The fact that she died only after a fortnight of sustaining those burn injuries cannot evacuate the act out of the contours of the secondly clause of section 300, IPC. There was a little abatement of the ferocity of the flames which engulfed her as she, in the instinctive human thirst of getting extricated from the gobbling tentacles of the fire, succeeded in tracing out a water flow. Such a reflex action performed by her had mitigated the conflagration of the flames but did not save her from the fatality of the calamity.

Hence, the interval of fourteen days between the attack and her death is not a cause for mitigation of the offence perpetrated by the offender. We are, therefore, not impressed by the alternative argument advanced by the learned Senior Counsel for the appellant. In the result, the Supreme Court dismiss this appeal.

Laxman Case.--

In *Laxman v. State of Maharashtra*, MANU/SC/0707/2002 : AIR 2002 SC 2973: 2002 Cr LJ 4095: 2002 AIR SCW 3479: 2002 (4) Crimes 42: MANU/SC/0707/2002 : (2002) 6 SCC 710: 2002 (4) SCJ 52: 2002 (5) SLT 49: (2002) 6 SCALE 135: JT 2002 (6) SC 313: 2002 (5) Supreme 557: 2002 (2) UJ (SC) 1363. In this criminal appeal, the conviction of the accused-appellant is based upon the dying declaration of the deceased which was recorded by the Judicial Magistrate. The learned Sessions Judge as well as the High Court held the dying declaration made by the deceased to be truthful, voluntary and trustworthy. The Magistrate in his evidence had stated that he had contacted the patient through the Medical Officer on duty and after putting some questions to the patient to find out whether she was able to make the statement; whether she was set on fire; whether she was conscious and able to make the statement and on being satisfied he recorded the statement of the deceased. There was a certificate of the doctor which indicates that the patient was conscious. The High Court on consideration of the evidence of the Magistrate as well as on the certificate of the doctor on the dying declaration recorded by the Magistrate together with other circumstances on record came to the conclusion that the deceased Chandrakala was physically and mentally fit and as such the dying declaration can be relied upon.

The Supreme Court held that, there is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidentiary value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon, provided the Court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

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Chapter 5

Expert Evidence and Relevancy of Character

Opinions of third persons, when relevant

What is the importance of expert opinion in a case?

There are certain matters which cannot be perceived by the senses. Their existence or non-existence is ascertained by inferences to be drawn by persons specially trained in the science, art or business with which the subject is connected. The general principle is that only those witnesses may appear before the Court who have been well acquainted with the facts because every witness is a witness of facts. But under sections 45 to 51, a third person, who is unknown to the facts, may appear before the Court when Court invites him to give his opinion on a particular point. For example: whether a certain injury was caused by a spear or knife. A states that he saw the accused causing the injury by a spear. This is not A's opinion. But if a doctor, who did not see the injury being caused, says that he thinks that the injury was caused by a spear. It is his opinion, what one sees, hears or perceived by any of the senses is not opinion and on the other hand what is the conclusion of an individual is his opinion. A claims that he has a right to take water from a particular well. B has been seeing A taking water from the well. If B states the same, his seeing A taking water is not opinion. He does not give his opinion rather he states a fact of which he received direct knowledge through his eyes. But if he says that in his opinion A has right to take water from the well he gives an inference at which he had arrived by thinking and reasoning. That a man has acquired a certain right cannot be perceived by any of the senses. It can be only the subject of thinking and reasoning.

The opinion of the third person is admissible as an expert's opinion under the provisions. For the purpose, "opinion" means 'something more than gossip or hearsay'. It must be based on some belief, reasoning or result. However, the expert opinion is only an opinion evidence on either side and does not aid Court in interpretation; *Forest Range Officer v. P. Mohammed Ali*, MANU/SC/0037/1994 : AIR 1994 SC 120: 1993 AIR SCW 3754: 1993 (2) Crimes 415: JT 1993 (3) SC 222: (1993) 3 SCR 497: 1993 SCC (Cri) 1070: (1993) Supp 3 SCC 627.

Section 45 of the Evidence Act, provides for the 'expert opinion' in the following words:

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 handwriting 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.

Illustrations

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

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

(b) The question 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.

The Courts have been accustomed to act on the opinion of experts from early times.¹ Matters commonly made the subject of such evidence includes causes of death, insanity, effects of poison, genuineness of works of art, value of articles, genuineness of handwriting, proper navigation of vessels, meaning of trade terms, foreign laws, and finger impressions etc.² A witness who is qualified to speak on these matters is called an "expert". Section 45 makes the opinion of persons specially skilled in some science, art, foreign law, identity of handwriting and finger impressions is relevant.

Test

The subject on which the witness is testifying must be one, upon which competency to form an opinion can only be acquired by a course of special study or experience. Thus:

- (a) the subject-matter must require specialized skill or knowledge, and
- (b) the subject must not be one an inference of which can conveniently be drawn.

Only such subject-matter shall be referred to an expert on the subject.

Expert Evidence

The evidence of finger print expert is not substantive evidence. Such evidence can only be used to corroborate some items of substantive evidence which are otherwise on record; *Musheer Khan @ Badshah Khan v. State of Madhya Pradesh*, MANU/SC/0065/2010 : AIR 2010 SC 762.

For the admissibility of expert evidence, it requires to hear an expert opinion as first and foremost; *Ramesh Chandra Agrawal v. Regency Hospital Ltd.*, MANU/SC/1641/2009 : AIR 2010 SC 806.

Expert Witness

The section also provides a definition of an expert witness. An expert is one who has acquired special knowledge, skill or experience in any science, art, trade or commerce: such knowledge, may have been acquired by practice, observation or careful studies. In *Bal Krishna Das Agrawal v. Radha Devi*, MANU/SC/0173/1989 : AIR 1989 SC 1966; an 'expert' was defined as "a person who by his training and experience has acquired the ability to express an opinion" but an ordinary witness does not possess this quality.

Distinction between an expert and an ordinary witness

Tell us the distinction between an expert and an ordinary witness.

- (1) An ordinary witness must depose to what actually took place. An expert's evidence on the other hand is not confined to what actually took place but he can give his opinion on facts, e.g., a medical practitioner may give his opinion as to the cause of a person's death.
- (2) An expert witness can speak about experiments made by him behind the other party.
- (3) He may cite textbooks of accredited authority in favour of his opinion and may refresh his memory by reference to them.
- (4) He may state facts relating to other cases bearing similarities to the case under inquiry in order to supplement his opinion.

Evidentiary Value of Expert opinion

Whether any expert opinion has some value in eyes of a court of law to decide a case?

The Evidence Act, only provides about the relevancy of expert opinion but gives no guidance as to its value. The value of expert opinion has to be viewed in the light of many adverse factors:

(a) firstly, there is the danger of error or deliberate falsehood. Privileged persons might be half-blind, incompetent or even corrupt; Haryana Seeds Development Corporation Ltd. v. Sadhu, MANU/SC/0123/2005 : AIR 2005 SC 2023: 2005 AIR SCW 1208: JT 2005 (2) SC 592: MANU/SC/0123/2005 : (2005) 3 SCC 198: 2005 (2) SCJ 267: 2005 (2) SLT 569: 2005 (4) SRJ 112: (2005) 2 SCALE 270: 2005 (2) Supreme 169.

(b) secondly, his evidence is after all opinion of human being and human judgment is fallible. Human knowledge is limited and imperfect; Mohd. Zahid v. State of Tamil Nadu, MANU/SC/0407/1999 : AIR 1999 SC 2416: 1999 Cr LJ 3699: 1999 AIR SCW 2556: 1999 (3) Crimes 137: JT 1999 (5) SC 5: (1999) 6 SCC 120: 2000 (2) SCJ 226: (1999) 4 SCALE 173: 1999 SCC (Cri) 1066: 1999 (6) Supreme 145: 1999 (2) UJ (SC) 1294 (SC).

(c) thirdly, it must be borne in mind that an expert witness, however impartial, he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him Gulzar Ali v. State of Himachal Pradesh, MANU/SC/0911/1998 : (1998) 2 SCC 192.

Evidence of Expert cannot be taken as substantial piece of evidence unless corroborated by other evidence. Expert evidence is only piece of evidence and weight to be given to it has to be judged along with other evidence of this nature is ordinarily not conclusive. The opinions of experts are not binding upon the judges. It is weak type of evidence and Court considers it unsafe to rely on it without independent and reliable corroboration.

Ganesh K. Gulve v. State of Maharashtra, MANU/SC/0694/2002 : AIR 2002 SC 3068: 2002 AIR SCW 3528: 2002 (4) Crimes 92: JT 2002 (6) SC 337: (2002) 7 SCC 71: 2002 (5) SLT 24: 2002 (8) SRJ 386: (2002) 6 SCALE 422: 2002 SCC (Cri) 1589: 2002 (6) Supreme 45: 2002 (2) UJ (SC) 1318; the present case is related with the murder. There was no mention of certain injuries in post-mortem report that the dead body was dragged by accused person. Post-mortem report was not speaking of injuries on back of deceased. Injuries on back of deceased were, however, mentioned in inquest Panchanama. It was held by Supreme Court that theory of dragging of the bodies could not be discarded only on account of non-mention of injuries on back of bodies in the post-mortem report.

In Murari Lal v. State of Andhra Pradesh, AIR 1980 SC 531: 1980 Cr LJ 396: (1980) 1 SCC 704: 1980 SCC (Cri) 330: 1980 Cr LR (SC) 168: 1980 Mad LW (Cri) 88: (1980) 2 SCR 249; the Supreme Court has laid down the following rules on which the reliability of such opinion has to be tested:

(i) There is no rule of law, not any rule of discretion which has crystallised into a rule of law, that the opinion evidence of an expert must never be acted upon, unless substantially corroborated.

(ii) But, having due regard to the various adverse factors operating in case of expert opinion, the approach should be on caution. Reasons for the opinion must be carefully probed and examined thereto. All other relevant evidence must be considered.

(iii) In appropriate cases where corroboration must be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of an expert may be accepted.

(iv) The hazard in accepting the expert opinion, is not because experts, in general, are unreliable witnesses - the quality of credibility or incredibility being one which an expert may go wrong because of some defect of perception, or honest mistake conclusion. The more developed and more perfect a science, less is the chance of an incorrect opinion.

(v) The opinion of expert is not decisive of the matter. The Court should not surrender its opinion to that of the expert. An expert deposes and not decides. His duty is to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his own independent judgment by the application of those criteria to the facts proved in evidence.

(vi) An expert opinion is not to be believed upon when it is in conflict with direct evidence; Wilayat Khan v.

State, MANU/SC/0068/1951 : AIR 1953 SC 122: 1953 Cr LJ 662: ILR (1953) 1 All 189.

Expert Opinion: Corroboration

Whether reliable corroboration is necessary to consider an expert opinion in a case?

The expert opinion is a rather weak type of evidence and the Courts do not generally consider it as offering conclusive proof and, therefore, safe to rely upon the same without seeking independent and reliable corroboration; Magan Bihari Lal v. State of Punjab, MANU/SC/0105/1977 : AIR 1977 SC 1091: 1977 Cr LJ 711: 1977 UJ (SC) 235: 1977 Pun LJ (Cri) 87: MANU/SC/0105/1977 : (1977) 2 SCC 210: 1977 SCC (Cri) 313: 1977 SC Cr R 203: (1977) 2 SCR 1007; Shashi Kumar Banerjee v. Subodh Kumar Banerjee, MANU/SC/0278/1963 : AIR 1964 SC 529.

Ram Narain Case

In Ram Narain v. State of Uttar Pradesh, MANU/SC/0153/1973 : AIR 1973 SC 2200: 1973 Cr LJ 1187: 1973 SCD 479: (1973) 2 SCC 86: 1973 SCC (Cri) 752: (1973) 1 SCWR 675: 1973 MPLJ 674; a child was kidnapped. The parent of the child received a handwritten post-card followed by an inland letter demanding Rs. 1,000 and Rs. 5,000, respectively as ransom for the child. The author of the letters was traced and a handwriting expert testified the letters to be in the handwriting of the accused. Solely on the basis of this evidence the accused was convicted by the lower courts. The Supreme Court upheld the conviction.

The Supreme Court observed that:

"Both under section 45 and section 47 the evidence is an opinion, in the former by a scientific comparison and in the latter on the basis of familiarity resulting from frequent observations and experience. In either case, the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means is to apply its own observation verify the opinion of the witness. This is not to say that the Court may play the role of an expert, but to say that Court may accept the fact only when it has satisfied itself on its own observation that it is safe to accept the opinion of the expert or the other witness."

In this case, Dua J. himself compared the handwriting in question with a proven handwriting of the accused and satisfied himself and held that no further corroboration was necessary.

The Court held that if after comparison of disputed and admitted writings by Court itself, it is considered safe to accept the opinion of expert, then the conclusion so arrived at cannot be attacked on special leave merely on the ground that comparison of handwriting is generally considered hazardous and inconclusive. It should be noted that the evidence of experts is not final or conclusive.

opinion of examiner of electronic evidence when relevant

The opinion of an expert examiner of Electronic Evidence can be taken as a relevant fact if the concerned Court forms an opinion on a matter of issue relating to computerised information or the information in electronic or in digital form.

The electronic evidence or the electronic form of evidence means any information of probative value, either stored or transmitted in electronic form and includes the computer evidence, digital audio, digital video, cell phones and the digital fax machines.

Further the Central Government, for providing expert opinion on electronic form evidence before any court or any other authority is to specify any department, body or agency of the Central Government or a State Government, as an Examiner of Electronic Evidence.

The provision for opinion of expert examiner of electronic evidence is provided under section 45A which was inserted by the Information Technology (Amendment) Act, 2008 (10 of 2009) reads as follows:

45A. Opinion of Examiner of Electronic Evidence.-

When in a proceeding, the court has to form an opinion on any matter relating to any information

transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000 (21 of 2000), is a relevant fact.

Explanation.-For the purposes of this section, an Examiner of Electronic Evidence shall be an expert.

Facts bearing upon expert opinion

According to section 46 of the Act, when the opinion of an expert is relevant that any fact which will either support his opinion or contradict it, will also become relevant. In other words, facts otherwise not relevant, became relevant to support or rebut the expert opinion section 46 reads:

46. Facts bearing upon opinions of experts.-

Facts not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations

(a) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that person, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

Mohd. Zahid v. State of Tamil Nadu, MANU/SC/0407/1999 : AIR 1999 SC 2416: 1999 Cr LJ 3699: 1999 AIR SCW 2556: 1999 (3) Crimes 137: JT 1999 (5) SC 5: (1999) 6 SCC 120: 2000 (2) SCJ 226: (1999) 4 SCALE 173: 1999 SCC (Cri) 1066: 1999 (6) Supreme 145: 1999 (2) UJ (SC) 1294 (SC). In this case the credibility of doctors 'opinion' concluding post-mortem vis-a-vis statement found in textbook was compared. The prosecution made suggestion to the doctor on basis of statement found in authoritative textbook. The book disagreed with the statement of authoritative textbook without giving any reasons. No other authority was produced in support of opinion. The Evidence of the doctor was self contradictory regarding her opinion about cause of death of victim, cannot be relied.

Opinion as to handwriting

When opinion as to handwriting becomes relevant?

The evidence of experts may not be conclusive regarding the handwriting or mark. No doubt that the opinion of an expert has great weight but in addition to that, section 47 of the Act, permits the court to admit the opinion of non-experts. Section 47 reads:

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 acquainted 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 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 nor D ever saw A write.

This section provides that the genuineness of a handwriting or mark may be proved by the opinions not only of experts, but also of non-experts.

Competency of non-expert witness

A statement of the non-expert witness who was acquainted with the handwriting, is sufficient. Such acquaintance or knowledge might have been acquired:

- (i) by having at any time seen the person write, or
- (ii) by the receipt of written communication purporting to be in his handwriting, or
- (iii) by having observed in the ordinary course of business, received documents written by that person or such documents are habitually submitted to him.

In reference to the first point it was held by the Supreme Court in *Fakhruddin v. State of Madhya Pradesh*, AIR 1967 SC 1326: (1967) 1 SCWR 449: 1967 All LJ 303: 1967 Jab LJ 441: 1967 Cr LJ 38: (1967) 2 SCA 135: 1967 (2) SCJ 885: 1967 MPWR 38; it was held that handwriting may be proved by evidence of a witness in whose presence the writing was done and this would be direct evidence and if it is available the evidence of any other kind is rendered unnecessary.

Modes of proving handwriting

What are the ordinary methods of proving handwriting?

The following are the ordinary methods of proving handwriting under the Evidence Act:

- (i) by the evidence of the writer himself.¹
- (ii) by the opinion of an expert.²
- (iii) by the evidence of a person who is acquainted with the handwriting of the person in question.³
- (iv) by the evidence of a person who saw the document being written i.e., attestation witness.
- (v) by the comparison of the disputed writing with the writing of the alleged writer by the Court.⁴
- (vi) by other circumstantial evidence; *Kanya Ram Vira Singh v. Manipur Drivers Association*, AIR 1957 Manipur 9.

Opinion as to electronic signature

Section 47A has been added in the Evidence Act, by the Information Technology Act, 2000, and as amended by the Information Technology (Amendment) Act, 2008 (10 of 2009) provides for the relevancy of expert opinion on the genuineness of an electronic signature. Section 47A reads:

47A. Opinion as to electronic signature when relevant.-

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

Opinion as to existence of right or custom

Section 48 of the Act, deals with the evidence of a living person as to the existence of a general right or custom in question. This section provides:

48. Opinion as to existence of right or custom, when relevant.-

When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.-The expression "general custom or right" includes customs or rights common to any considerable class of persons.

Illustration

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

From the section it is clear that, this is the supplement to section 13 of the Act, which deals with all kinds of customs and rights whether public or private. But section 48 confines to only public right or custom. If opinion is recorded in a book that is also admissible under section 48 provided that the author is alive; *Samar v. Budhu*, MANU/BH/0294/1937 : AIR 1937 Pat 463.

Opinion as to usages, tenets

India is a multilingual, multi-religious country having different customs, castes, languages, usages and dialects. Thus, there are terms, customs, tenets which prevail in a particular area, community, caste or trade. Therefore, when the court has to form an opinion as to usages and tenets of any body of men or family or as to the Constitution or Government of religious or charitable foundation; or as to the meaning of certain words or terms as used in a particular area or by any class of people, the opinion of any person who has the special means of knowledge on the matter in question is relevant. Section 49 of the Act helps to interpret a particular term in its true meaning. Section 49 reads:

49. Opinions as to usages, tenets, etc., when relevant.-

When the Court has to form an opinion as to-

the usages and tenets of any body of men or family,

the Constitution and Government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

Opinion on relationship

'Opinion' means 'something more than mere gossip or hearsay. Under section 50 of the Act, when the Court has to determine the relationships of one person to another, the opinion expressed by conduct as to such relationship by a person who has special knowledge shall be relevant. Section 50 provides:

50. Opinion on relationship, when relevant.-

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

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860).

Illustrations

(a) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

The evidence under section 50 is a sort of circumstantial evidence. According to this, the opinion under this section should be expressed by conduct, not merely by words or statements. Where the question was of the fact of a valid adoption of the plaintiff, the deposition of the cousin of the adoptive father, the family priest and family barber that the ceremony had taken place at the residence of the natural father was held relevant. They had the special means of knowledge of the fact whether the plaintiff was an adopted son; *Bami Bewa v. Krushna Chandra Swain @ Gochhayat*, MANU/OR/0246/2003 : AIR 2004 Ori 14: 2004 (1) CLR 105: 2004 (1) Civil Court C 543.

Character when relevant

It is a general principle of law that evidence of character is not admissible as a relevant fact. This rule provides a protection to the accused. However, there are some exceptions to this general rule and in the following cases, the evidence of character may be admitted:

(A) Relevancy of character in civil cases, (sections 52 & 55).

(B) Relevancy of character in criminal cases, (sections 53 & 54).

(A) Relevancy of character in Civil Cases

Whether evidence of character is admissible as a relevant fact?

Section 52 of the Act, lays down the general principle that evidence of character in civil cases is irrelevant unless the character is in issue; *Jagannath v. Ram Chandra*, MANU/UP/0154/1952 : AIR 1952 All 408. This section reads:

52. In civil cases character to prove conduct imputed, irrelevant.-

In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

It may be laid down as a general rule that in civil action evidence of character of any person concerned (a party to a suit) is not admissible for the purpose of raising an inference as to his conduct. In other words, that a party did or did not or may not be established in civil actions. By showing that his character is such as to pre-dispose him to one course or to the other. So the exclusion of evidence of character of a party as a basis of inference drawn as to his conduct is practically absolute in civil cases. If a man is sued for breaking his promise or wrongfully detaining of another's goods or selling an article inferior to the sample, evidence cannot be given that it was likely for him to do from his disposition and reputation. X files a suit against Y for possession

of a house alleging that he (Y) has taken forcible possession of it. In this X cannot lead evidence about Y's character to show that it was likely to him for trespass.

Admissible character in civil cases:-

There are certainly cases in which character is a fact in issue or a relevant fact, e.g., in a suit for libel, if the libel consisted in attributing that quality, to the plaintiff and the defendant justifies the existence of this quality, this would be a fact in issue and evidence of character may be led. The character of female chastity has been received in evidence in action for breach of promise for marriage.

There are some exceptions to the general principle laid in section 52:

- (1) Section 55 says "in civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant". The evidence of good or bad character of the defendant is irrelevant to damages. But the character of the plaintiff is relevant. In an action for damages, for seduction or rape, evidence of that character of the plaintiff is allowed as it is likely to affect the damages that the plaintiff ought to receive.
- (2) Evidence can be given of a party's character when his character is itself a fact in issue. Where, for example, an action is brought for divorce on the ground of cruelty, the cruel character of the defendant, being a fact in issue, the plaintiff can lead evidence of it.
- (3) A fact which is otherwise relevant cannot be excluded from evidence only because it incidentally exposes or throws light upon a party's character (section 52).

(B) Relevancy of Character in Criminal Cases

Section 53 says that "in criminal cases, the fact that the person accused is of a good character is relevant". Normally, we presume that a person of

good character and reputation will not generally respond to any criminal act. Thus, goodness is proved, leads to presumption against the commission of a crime.

According to section 54, evidence may not be received regarding the badness of party's character in criminal proceedings, unless evidence has been given that he has a good character in which case it becomes relevant. In other words, the prosecution cannot lead evidence of the bad character of accused as a part of his original case. They can produce evidence of bad character only in reply to the accused showing his good character.

There are certain cases in which evidence of a prisoner's bad character can be given:

- (1) To rebut prior evidence of good character (section 54).
- (2) The character is itself a fact in issue (Explanation 1 to section 54). For example, in a prosecution for rape, the bad character of prosecution (raped woman) may be a fact in issue for it may afford a defence to the accused.
- (3) A previous conviction is relevant as evidence of bad character in criminal cases (Explanation 2 to section 54).

In *Prithvi Singh v. State of Uttar Pradesh*, 2001 Cr LJ 4424: 2001 All LJ 1993: 2001 (43) All Cr C 457: 2002 (1) All Cr LR 182: 2001 (2) All Cr R 1572: 2002 (1) Rec Cr R 477 (All); the prosecution was not allowed to adduce evidence tending to show that accused was a person of bad character.

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Chapter 6

Proof

Facts which need not be proved (Sections 56-58)

What are the facts which need not to be proved?

The general principle is that, all the relevant facts or facts in issue of a case must be proved by some evidence viz., oral or documentary. However, as exceptions to the aforesaid general rule, there are certain facts which need not to be proved by evidence. Those exceptions are:

- (i) When judicial notice has been taken regarding the facts (section 57), or
- (ii) When facts have been formally admitted by the parties (section 58).

To understand this topic more clearly, first of all we may take note of sections 56 and 57. Section 56 provides that, no formal evidence is required of facts for which the Court has taken judicial notice. While section 57 of the Act mentions a list of facts of which the Court can take judicial notice. For the purpose of reference let us see what sections 56 & 57 read:

56. Fact judicially noticeable need not be proved.-

No fact of which the Court will take judicial notice need to be proved.

57. Facts of which Court must take judicial notice.-

The Court shall take judicial notice of the following facts:-

- (1) All laws in force in the territory of India;
- (2) All public Acts passed or hereafter to be passed by Parliament of the United Kingdom, and all local and personal Acts directed by Parliament of the United Kingdom to be judicially noticed;
- (3) Articles of War for the Indian Army, Navy or Air Force;
- (4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any law for the time being in force in a Province or in the State;
- (5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland;
- (6) All seals of which English Courts take judicial notice : the seals of all the Courts in India, and all Courts out of India established by the authority of the Central Government or the Crown Representative: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by the Constitution or an Act of Parliament of the United Kingdom or an Act or Regulation having the force of law in India;
- (7) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in any Official Gazette;
- (8) The existence, title and national flag of every State or Sovereign recognized by the Government of India;
- (9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;
- (10) The territories under the dominion of the Government of India;

(11) The commencement, continuance, and termination of hostilities between the Government of India and any other State or body of persons;

(12) The names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it;

(13) The rule of the road, on land or at sea.

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

In order to understand the correct meaning of sections 56 and 57 they should be taken together. Section 56 lays down that when a fact, which is relevant in a case, is of such a nature that the Court must take judicial notice of it, no evidence in proof of it should be given. The Apex Court has held that the Court can take judicial notice of alternative sources. The Apex Court can take judicial cognizance of the fact that a certain area is terrorist stricken. Section 57 gives a list of facts of which the Courts must take judicial notice of. Thus, both the sections taken together mean that when controversy arises with regard to the facts enumerated in section 57, the parties who assert their existence, need not produce any evidence to prove the existence of such fact. The judge shall try to know about such facts and if the judge's own knowledge will not help him, he can call upon the parties to assist him. The judge may resort to any source of information which he finds handy and which he thinks will help him. Thus he might consult any book, or obtain information from any person. Judicial notice can be taken of a notification issued by the Government or any competent authority in the exercise of any delegated power of legislation; Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd., MANU/SC/0169/1984 : AIR 1985 SC 330: (1985) 1 SCC 260: 1985 (1) Land LR 443: 1985 SCC (Tax) 75: (1985) 1 Andh LT 257: 1985 UJ (SC) 368: (1985) 58 Comp Cas 145: (1985) 2 SCR 190.

In State of Madhya Pradesh v. Dharendra Kumar, MANU/SC/1029/1997 : AIR 1997 SC 318: 1997 AIR SCW 74: 1996 (4) Crimes 195: JT 1996 (10) SC 93: 1997 (1) Jab LJ 215: 1997 (1) Raj LW 38: MANU/SC/1029/1997 : (1997) 1 SCC 93: 1997 SCC (Cri) 54; it was held by Supreme Court that, judicial notice can be taken of fact that many a time prescribed registers are not available and so they are kept in non-prescribed way. Many a time even a case diary is not kept in prescribed way.

Facts Admitted

The second class of facts which need not to be proved are facts which have been admitted by the parties or his agents. Section 58 of the Act, provides that:

58. Facts admitted need not be proved.-

No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Section 58 lays down that if the parties to a proceeding or their agent agree to admit a fact at the hearing, or which they agree to admit by writing before the hearing, or which by any rule of pleading in force they are deemed to have admitted by their pleadings, it need not, be proved by the opposite party. X sends a notice to Y in writing that Y is a tenant in his house on a rent of

Rs. 8 per month, that he had not paid the rent for 6 months and so he should pay the rent and vacate the house. Y sends a notice in reply that he is tenant of X but has paid the rent up to date. Afterwards X files a suit against Y for ejectment and for arrears of rent, Y denies the contract of tenancy between the parties. Here Y has admitted the fact of tenancy in writing before the hearing and so X may rely on that notice and need not adduce any other evidence to prove the contract of tenancy.

Admission in civil and criminal cases

In a civil case if the party or his pleaders agrees to admit a fact, it need not be proved by the opposite party. In criminal case, the rule of evidence are subject to the general principle of jurisprudence that it is the duty of the prosecution to prove the case against the accused and that they should not rely admission made by him in the course of the trial for convicting him. It is a well-established principle of Criminal Law that the prisoner can consent to nothing. It is an elementary rule that except by a plea of guilty admissions dispensing with proof are not permitted in a criminal trial. No consent or admission by the prisoner to his counsel can dispense with proof.

Modes of proof

Facts which need to be proved, may be proved by the following methods:

- (i) Oral evidence; and
- (ii) Documentary evidence.

This means that there are two methods of proving a fact. One is by producing witnesses of fact, which is called 'oral evidence', and the other, by producing a document which records the fact in question and this is called 'documentary evidence'.

(i) Oral evidence

What are the methods by which facts may be proved in a case?

The meaning of the expression 'oral evidence' is given along with the definition of the term "evidence" in section 3 of the Evidence Act. It says:

"All statements which the Court permits or requires to be made before it by witnesses in relation to the matter of fact under inquiry; such statements are called oral evidence."

Oral evidence is the evidence which is confined inter alia to words spoken by mouth. Oral evidence, if worthy of credit, is sufficient without documentary evidence to prove a fact or title. Where a fact may be proved by oral evidence it is not necessary that the statement of the witness should be oral. Any method of communicating thought which the circumstance of the case or the physical condition of the witness demand may, in the discretion of the Court, be employed. Thus, a dumb may testify by signs or by writing.

Proof of facts by oral evidence

Section 59 of the Act provides that:

59. Proof of facts by oral evidence.-

All facts, except the contents of documents or electronic records, may be proved by oral evidence.

This means, all facts, except the contents of the document, may be proved by oral evidence. It means circumstances, background of the document, location of the document, contents of last documents, identification etc. may be proved by oral evidence; *Fuljari Lal v. Ram Sarup*, AIR 1953 MB 177.

This section lays down that where written documents exists, they shall be produced as being the best evidence of their own contents and no oral evidence can be adduced to prove as to what is wrong in the document. For example X

and Y enter into a contract that Y shall be supplying 20 mounds of wool to X every month. This contract was reduced in writing. If controversy arises between the parties about the terms of the contract it can be proved only by the document. Oral evidence will not be allowed. The document must be produced before the Court.

Oral evidence must be direct

Section 60 lays down condition that oral evidence must be direct. The word "must" is mandatory and imposes a duty on the Court to exclude all indirect oral evidence. This means that a witness can tell the Court, only a fact of which he has the first hand personal knowledge in the sense that he perceived the fact by any of the five senses. When the statement was not made in presence or hearing and the person subsequently come to know of it through some other source, he cannot appear as a witness, for his knowledge is a derived knowledge and is nothing but hearsay and it is a maxim of law that hearsay evidence is not relevant, subject to a few exceptions which is provided in the later part of this chapter.

Hearsay: meaning of

"Hearsay evidence does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the competency of some other person." Comment.

The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else.¹

The term 'hearsay' is used with reference to that which is written as well as that which is spoken, and, in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the competency of some other person. When the witness says that he himself did not hear the defamatory words but another person told him about it, the credit for hearing the statement does not go to the witness but to somebody else. Similarly, when the witness says that he did not see the occurrence himself but somebody told him, the credit of seeing the occurrence does not go to witness but it goes to somebody else. Hearsay evidence is that evidence which comes indirectly that is to say which comes not from the knowledge of the person who deposes it but through some other person.

Section 60 excludes hearsay evidence. Hearsay evidence means the statement of a witness not based on his personal knowledge but on what he heard from others; Sakatar Singh v. State of Haryana, AIR 2004 SC 2570: (2004) 11 SCC 291: 2004 Cr LJ 2076: 2004 AIR SCW 2388: 2004 (3) Crimes 1: 2004 (3) SLT 257: 2004 (5) SRJ 213: (2004) 4 SCALE 529: 2004 (3) Supreme 661.

Exception to the rule of hearsay

In law of Evidence, it is very difficult to make any general statement about the law of hearsay evidence which is entirely accurate. The rule has never been absolute. The correct rule as to hearsay therefore is that, statement, oral or written reported to have been made by persons not called as witnesses are not admissible in evidence subject to certain exceptions:

- (i) Res Gestae (section 6);
- (ii) Admissions and Confessions;
- (iii) Certain statements, made by persons dead or who cannot be called as witnesses which include dying declarations, statements made in due course of business, statement is against interest, statements giving opinion as to public right or custom, statements relating to pedigree (section 32);
- (iv) Previous deposition of a witness who is dead or cannot be called as a witness (section 33);
- (v) Entries in books of account kept in the course of business (section 34);
- (vi) Entries in public registers of record (section 35); maps and charts, etc.

(vii) Statement of Experts in treatises (section 60, proviso). Every article published or a book written cannot ipso facto be regarded as conclusive or worthy of acceptance. What is stated therein may only be a view of the author and may not be based on a date which is scientifically collected from reliable source. Kripal, J. in *Hasmattullah v. State of Madhya Pradesh*, MANU/SC/0518/1996 : (1996) 4 SCC 391 (401): AIR 1996 SC 2076: 1996 AIR SCW 2498: JT 1996 (5) SC 295: 1996 Jab LJ 406: 1996 (3) SCJ 113: 1996 (2) UJ (SC) 478.

Hearsay and Circumstantial Evidence

A circumstantial evidence though not a direct evidence of the facts of issue or relevant fact, cannot be said identical with hearsay evidence. X is charged with murder of Y. Z says that he saw X killing Y. This is direct evidence. H says that Y told him that X killed Y. It is hearsay evidence. H says that he saw X coming out of the room, where Y's body, was found, with a blood-stained knife. This is a circumstantial evidence. Circumstantial evidence must be proved by direct evidence and not hearsay evidence.

Difference between Direct Evidence and Hearsay Evidence

Write down the differences between 'direct evidence' and 'hearsay evidence'.

Direct Evidence	Hearsay Evidence
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1. Direct evidence is that which the witness is giving on basis of his own perception.	1. Hearsay evidence is that which has been derived by other person.
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2. Direct evidence is best oral evidence of the fact to be proved.	2. Hearsay evidence is secondary one. It is admitted in exceptional cases.
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3. The liability of veracity of direct evidence is on person who is giving evidence.	3. In case of hearsay evidence, the person giving evidence does not take the responsibility of its veracity.
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4. The person giving direct evidence is available for cross-examination for testing its veracity.	4. The person giving hearsay evidence is not author of original evidence. It is derived from original author.
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5. The source of direct evidence is the person who is present in court and giving evidence.	5. In case of hearsay evidence, the person giving hearsay evidence is not original source of evidence given by him.
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(ii) Documentary Evidence

61. Proof of contents of documents.-

The contents of documents may be proved either by primary or by secondary evidence.

Generally speaking 'document' means anything or matter which contains a permanent record of a relevant fact or fact in issue.

The word "document" has been defined under section 3 of the Act, as follows:

"Document".-"Document" under section 3 of Evidence Act, 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

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.

As a general rule, the contents of every document must be proved by the "primary evidence" i.e., by document itself. But in exceptional cases, the same may be proved by the "secondary evidence".¹ Thus, the contents of document must be proved by two means, viz.,

(i) Primary Evidence; and

(ii) Secondary evidence.

Document in computerised system and cheque

The Supreme Court in case of *Mir Nagvi Askari v. C.B.I.*, MANU/SC/1412/2009 : AIR 2010 SC 528 held that before signing the document relating to the posting of cheque an officer of the Current Account Department only would verify the entries made in computer on the basis of which a printout would be taken out which is considered to be a document authorisation in respect thereof.

Primary Evidence (section 62)

What do you mean by 'primary evidence'? How it is different from secondary evidence?

The expression 'primary evidence' has been defined under section 62 of the Act in the following words:

62. Primary evidence.-

Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.-Where a document is executed in several parts, each part is primary evidence of the document;

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

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

Illustration

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

This section based on the principle that best evidence must be produced before the Court of law. The following four are included in the expression "primary evidence":

(i) The original document itself produced for the inspection of the Court; *C.P. Agarwal v. P.O., Labour Court*, MANU/SC/0906/1997 : (1996) 11 SCC 97: AIR 1997 SC 3655: 1997 Lab IC 1496: 1997 AIR SCW 1338: JT 1996 (9) SC 729: 1997 (3) LLJ 788: 1997 (2) LLN 7: 1997 SCC (L&S)

370: 1997 (1) Supreme 288: 1997 (1) UJ (SC) 284.

(ii) Where a document is executed in several parts, each part is primary evidence of the document.¹

(iii) Where a document is executed in counterparts, each counterpart is primary evidence against the party signed it.² For the other party, it is a secondary evidence. E.g., the cheque is a primary evidence against drawn but its counterfoil which has been signed by the payee, will be a primary evidence against him.

(iv) Where a number of documents are all made by one uniform process (as in the case of printing, lithography, or photograph) each is primary evidence of the contents of the documents.

Explanation:-The first portion of the first explanation of the section refers to what are known as duplicate, triplicate or the like original. Sometimes it is convenient that each party to transaction should have a complete document in his possession. To fulfil this purpose, the document is written as many times as there are parties and each document is signed by all the parties. All of them are originals.

Secondary Evidence

The expression "secondary evidence" of a document is defined in section 63 as follows:

63. Secondary evidence.-

Secondary evidence means and includes-

- (1) Certified copies given under the provisions hereinafter contained;
- (2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3) Copies made from or compared with the original;
- (4) Counterparts of documents as against the parties who did not execute them;
- (5) Oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

- (a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.
- (b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.
- (c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.
- (d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

Section 63 is not restricted to its five clauses but leaves enough scope for the words "means and includes". Certified copies of original documents comes within the ambit of secondary evidence; Kalyan Singh v. Chhoti, MANU/SC/0258/1989 : AIR 1990 SC 396: JT 1989 (4) SC 439; A.P. State Road Transport Corporation, Hyderabad v. P. Venkaiah, MANU/SC/0676/1997 : (1997) 10 SCC 128: AIR 1997 SC 2600: 1997 AIR SCW 2556: JT 1997 (5) SC 362: 1997 (2) LACC 35: 1997 (2) Land LR 257: 1997 (2)

SCJ 35: (1997) 3 SCR 1054: (1997) 4 SCALE 154: 1997 (4) Supreme 606. When secondary evidence is admitted because primary document is not available, then oral accounts of the contents of a document must be given by some person who himself has seen it.

Difference between Primary Evidence and Secondary Evidence

Primary Evidence Secondary Evidence

1. Primary evidence is original document which is presented to the Court for its inspection. those documents which are mentioned in section 63.
2. Primary evidence is the best evidence in all circumstances. Secondary evidence is not best evidence but is evidence of secondary nature and is admitted in exceptional circumstances mentioned in section 63.
3. Giving primary evidence is general rule. Giving secondary evidence is exception to the general rule.
4. No notice is required before giving primary evidence. Notice is required to be given before giving secondary evidence.
5. The value of primary evidence is highest. The value of secondary evidence is not as that of primary evidence.

Proof by primary evidence

Section 64 of the Act, embodies one of the underlying principles that a document must be proved by its primary evidence. Section 64 says:

64. Proof of documents by primary evidence.-

Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Section 64 lays down the best evidence rule with reference to documentary evidence. It says that the best evidence of the contents of the document is the document itself i.e., the original document. The contents of the document must be proved by production of original document i.e., primary evidence. The production of certified copy of revenue records to prove the settlement is inadmissible. Order of settlement being primary evidence has to be produced.

Admissibility of Documentary Evidence

The Supreme Court in case of *Malaya Kumar Ganguly v. Sukumar Mukherjee*, MANU/SC/1416/2009 : AIR 2010 SC 1162, observed that "it is true that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. It is however trite that a document becomes inadmissible in evidence unless author thereof is examined, the contents thereof cannot be held to have been proved unless he is examined and subjected to cross-examination in a Court of Law."

When secondary evidence can be given

Under what circumstances secondary evidence can be given?

Section 65 of the Act, regulates the circumstances in which secondary evidence can be given. This section reads:

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 produce 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 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 original consists 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.

In substance, section 65 provides that secondary evidence can be given in the following cases:

- (a) (i) Where the original is in possession of adversary party.-The first case in which a secondary evidence of the contents of a document may be given is when the original is in possession or power of the person against whom it is sought to be proved; *Maneklal Mansukhbhai v. Hormutsji Jamshedji Ginwalla and Sons*, MANU/SC/0037/1950 : AIR 1950 SC 1: 1949 FLJ 398: 1949 FCR 484: (1950) 1 MLJ 752: 1950 MWN 767: 1950 ALJ 369: MANU/SC/0037/1950 : 1950 SCR 75: 1950 SCJ 317: (1950) 2 MLJ 344.
- (ii) Where the original is in possession of a person out of reach or not subject to the process of the Court.

(iii)Where the original is in possession of a person legally bound to produce it.

(b)Where the existence or contents of the original have been admitted.-In this clause when the existence or contents of the original deed has been proved to be admitted in writing by the person against whom it is sought to be proved or by his representative-in-interest, the original need not be summoned and the contents of a document may be proved by secondary evidence.

Ishwar Das Jain (dead) through L.R. v. Sohan Lal (dead) through L.R., MANU/SC/0747/1999 : AIR 2000 SC 426: 1999 AIR SCW 4573: JT 1999 (9) SC 305: MANU/SC/0747/1999 : (2000) 1 SCC 434: 2000 (1) SCJ 197: 2000 (1) SRJ 247: (1999) 7 SCALE 277: 1999 (10) Supreme 27: 2000 (1) UJ (SC) 666; in the present case there was question of proof of execution of mortgage deed. The execution of mortgage deed not specifically denied by defendant. It was therefore not necessary to call attester into witness box. The defendant mortgagee refusing to file original deed. Thereupon the plaintiff filing certified copy as secondary evidence. It was sufficient proof of execution of mortgage deed.

(c)When the original is not easily movable.-When the original is of such a nature as not to be easily movable, the secondary evidence of the contents of the document may be allowed. In this case, secondary evidence is admissible on account of great inconvenience and impracticability of producing the original.

(d)When the original is a public document.-When the original is a public record, under section 74 of the Evidence Act, a secondary evidence of its contents are admissible under this clause. In this case secondary evidence is admissible even when the original is in existence. This exception is based upon the consideration of conveniences.

(e)Certified copy permitted by the Act.-Secondary evidence of the contents of a document is admissible when the original is a document of which a certified copy is permitted by this Act, or by any other law enforceable in India.

(f)When the original consists of numerous account or huge document.-This Provision is for the saving of public time. If the points to be ascertained where the balance in a long series of account in a merchant's account-book, certainly great inconvenience would be caused and much of public time would be wasted if the whole of the books were to be produced before the court. Therefore, a person is asked to examine the account-books and then make his statement before the Court.

(g)When the original has been destroyed or lost or cannot be produced.

Secondary Evidence is admissible

In case of Sattamma v. Bikshapati, MANU/AP/0360/2010 : AIR 2010 AP 166 it was held that section 65(c) comes into play where the original has been destroyed or lost and when the party has made diligent search for it and exhausted all sources and means available for its production secondary evidence is admissible; Sattama v. Ch. Bikshapati, MANU/AP/0360/2010 : AIR 2010 AP 166.

The clause (e) of section 65 which enumerates the cases in which secondary evidence relating to documents may be given, carves out an exception to the extent that when the original document is public document secondary evidence is admissible even though the original document is still in existence and available; Tukaram S. Dighole v. Manikrao Shivaji Kokate, MANU/SC/0086/2010 : AIR 2010 SC 965.

Exclusion of oral evidence by documentary evidence

Write short note on 'exclusion of oral by documentary evidence'?

One of the fundamental principles of the law of evidence is that in all cases the best evidence should be given. Where

the fact to be proved is embodied in a document, the document is the best evidence of the fact. The maxim of law is that "whatever is in writing must be proved by the writing". Section 91 of the Act incorporates this principle in the following words:

91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.-

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.-When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.-Wills admitted to probate in India may be proved by the probate.

Explanation 1.-This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.-Where there are more originals than one, one original only need be proved.

Explanation 3.-The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved.

(d) A contracts, in writing, with B, for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(e) A gives B receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

The section emphasizes that when a contract, grant or some other disposition of property is reduced to the form of a document or is required by the law to be reduced to a document, no evidence shall be given for the proof of it except the primary or secondary evidence of the writing itself. Section 91 extends to both types of transaction, namely:

(i) Which have voluntarily been made by writing; and

(ii) for which writing is compulsory. E.g., transfer of immovable property of the value of more than Rs. 99 is required to be in writing and registered.¹

Exception 1.-The general rule is that when the contents of a writing is to be proved, the writing itself must be produced or when its absence is accounted for, secondary evidence may be given. To this general rule there is an exception. When it is required that a public officer should be appointed by some writing, and when it is shown that any particular person has acted as such officer the writing by which he has been appointed need not be proved. When the question is whether X is a High Court Judge, the warrant of appointment need not be proved, the only fact that he is working as a High Court Judge will be proved. X appears before a Court as a witness. He says that he is a civil surgeon, to establish that he is a civil surgeon he need not to produce the appointment order. He has only to show that he has been working as civil surgeon. The fact that a person has acted in an official capacity is also an evidence of his due appointment to the officer, because it cannot be supposed that any man would venture to intrude himself into a public situation which he was not authorised to fill.

Exception 2.-To the general rule of producing the writing itself there is one more exception. When a probate has been obtained on the basis of a Will and afterwards question arises about the existence of that Will, the mere production of the probate will prove the existence of the Will, the original Will need not be produced. Under this exception the contents of a Will of which probate has been granted may be proved by the probate. The 'probate' means the copy of a Will certified under the seal of the Court of competent jurisdiction with a grant of administration to the estate of the testator.

Explanation I.-A written evidence need not be comprised in a single document, or be drawn up in the any particular form. A contract or a grant may be executed by a single document or by several documents. Explanation (1), requires that section 91 applies equally whether a contract, grant or any other disposition of the property is comprised in a single document, or in more documents than one. If the terms of the contract, grant or other disposition of the property is contained in documents more than one all the documents are to be produced before the Court to prove the terms of the contract. It is not open to a party to a judicial proceeding to lead oral evidence to prove the terms contained in any of the documents. A, a resident of Calcutta proposes to sell a house to B a resident of Delhi. The terms of the sale are settled between them by letters. Five letters on each side comprised the terms of the contract. To prove the terms of the contract all the ten letters are to be produced before the Court.

Explanation II.-Explanation 2 lays down that when there are more originals than one, only one of them is to be proved before the Court. A common instance is that if a bill of exchange is drawn in a set of three, one only need to be proved.

Explanation III.-Explanation 3 attempts to illustrate what is called as Exceptions to the rule embodied in this section. In the opening words of the section the facts coming within its purview are described as the terms of the contract or of a grant or of any other dispositions of the property, reduced to writing by agreement of the parties or by the requirements of law. Thus it is clear that section 91 shuts up any other kind of evidence except the original document in cases whether the terms of a contract or of a grant or of any other disposition of property had been reduced to the forms of a document by the agreement of the parties or by the requirements of law. Therefore, if in any document there is a statement of facts other than those referred to above i.e., if any document does not relate to any of the three classes of facts mentioned in the section, oral evidence is not excluded by it.

Exclusion of evidence of oral agreement

Section 92 of the Evidence Act, provides that:

92. Exclusion of evidence of oral agreement.-

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no

evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).-Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law:

Proviso (2).-The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3).-The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:

Proviso (4).-The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:

Proviso (5).-Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract:

Proviso (6).-Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

(a) A policy of insurance is effected on goods "in ships from Calcutta to London". The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(b) A agrees absolutely in writing to pay B Rs. 1,000 on the 1st March, 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till the thirty-first March, cannot be proved.

(c) An estate called "the Rampure tea estate" is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and

accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words "Bought of A a horse for Rs. 500". B may prove the verbal warranty.

(h) A hires lodgings of B, and gives B a card on which is written-"Rooms, Rs. 200 a month". A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. A may not prove that board was included in the term verbally.

(i) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this.

(j) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

Principles relating to section 92

Discuss the scope of section 92 of the Evidence Act?

In the light of ratio laid down in *R. Janakiraman v. State*, 1 (2006) SLT 50, we may bring out the principles relating to section 92 of the Evidence Act; thus:

(i) Section 92 is supplementary to section 91 and corollary to the rule contained in section 91.

(ii) The rule contained in section 92 will apply only to the parties to the instrument or their successors-in-interest. Strangers to the contract (which would include the prosecution in a criminal proceeding) are not barred from establishing a contemporaneous oral agreement contradicting or varying the terms of the instrument. On the other hand, section 91 may apply to strangers also.

(iii) The bar under section 92 would apply when a party to the instrument, relying on the instrument, seeks to prove that the terms of the transaction covered by the instrument are different from what is contained in the instrument. It will not apply where anyone, including a party to the instrument, seeks to establish that the transaction itself is different from what it purports to be. To put it differently, the bar is to oral evidence to disprove the contract itself, or to prove that the document was not intended to be acted upon and that intention was totally different.

Applying the aforesaid principles, it is clear that the bar with section 92 will apply to a proceeding inter-parties to a document and not to a criminal proceeding, where the prosecution is trying to prove that a particular document or set of documents are fictitious documents created to offer an explanation for disproportionate wealth. Oral evidence can always be led to show that a transaction under a particular document or set of documents is sham or fictitious or nominal, not intended to be acted upon.

Exceptions

Sections 91 and 92 also recognize certain exception to this general rule. Section 91 sets out the exceptions in form of exceptions and explanations, while section 92 sets them out in the form of provision to the main rule. The exceptions are as follows:

(1) Validity of document (Proviso 1)

The Supreme Court in *Gangabai v. Chhabubai*, MANU/SC/0385/1981 : (1982) 1 SCC 4: AIR 1982 SC 20: 1982 UJ (SC) 1: (1982) 1 APLJ (SC) 1: 1982 MPLJ 1: (1982) 1 SCR 1176: (1982) 14 Lawyer 48: (1982) 2 SCWR 53;

relied by the Supreme Court in *R. Jankiraman v. State*, 1 (2006) SLT 50 observed that,

".....Section 91 of the Evidence Act, lays down that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, proviso (1) of section 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. And the first proviso to section 92 says that any fact may be proved which would invalidate any document, or which would entitle any person to decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. It is clear to use that the bar imposed by proviso (1) of section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms."

According to proviso (1) to section 92, no man will be debarred from proving a fact, which will invalidate the contract. A contract, created by fraud, undue influence is invalid and not enforceable. So a man can easily prove such facts though the contract has been reduced to writing and that deed has been filed and proved under section 91 of the Evidence Act.

In *K.M. Rajendran v. Arul Prakasham*, MANU/TN/0284/1998 : AIR 1998 Mad 336: 1998 (4) Cur CC 286: 1998 (2) Mad LJ 423: 1998 (2) Mad LW 225: 1999 (1) Arb LR 227; the Madras High Court held that even though proviso (1) to section 92, it is open to the party to the agreement to lead evidence to vary, he or she precluded from varying the consideration amount either less or more than what it is specified in that agreement.

(2) Matter on which document is silent (Proviso 2)

Evidence can be given of an oral agreement on a matter on which the document is silent. Such evidence is allowed subject to two conditions:

- (a) Firstly, the oral agreement should not be inconsistent with the terms stated in the document. Such evidence is allowed to be proved only on matters on which the document is silent; and
- (b) Secondly, in permitting the evidence of oral agreement the court is to have regard of the degree of formality of the document. If the document is extremely formal, evidence of an oral agreement shall not be allowed even on matters on which the document is silent.

In *Vinod Chaturvedi v. State of Madhya Pradesh*, MANU/SC/0137/1984 : AIR 1984 SC 911: 1984 Cr LJ 814: (1984) 2 SCC 350: 1984 SCC (Cri) 250: 1984 (1) Crimes 733: 1984 Cur Cri J 128: 1984 Cr LR (SC) 202: (1984) 1 Cr LC 417; the Apex Court held that, where room was allotted by writing to a doctor because he was attached to the hospital as an honorary surgeon, he cannot be allowed to give oral evidence that he was lessee.

When there is a prior contemporaneous oral agreement about a matter on which the document is silent, proof of it can be given only when such oral agreement is not inconsistent with or does not contradict the terms of the contract. The proviso requires that (1) the separate oral agreement should relate to a matter on which the document is silent, and (2) that it is not inconsistent with the terms; *Balaram Agasti v. Ramesh Chandra Mohanty*, MANU/OR/0005/1973 : AIR 1973 Ori 13.

(3) Separate oral agreement as condition precedent (Proviso 3)

The third proviso provides that the existence of any separate oral agreement constituting condition precedent to the attaching of any obligation under the document may be proved.

This proviso lays down that where there is oral separate agreement to the effect that the terms of a written contract will not take effect or will be of no force until a condition precedent has been fulfilled or a certain event has happened, oral evidence is admissible to show that the condition not having been performed the contract did not mature and so was not enforceable; *Balaram Agasti v. Ramesh Chandra Mohanty*, MANU/OR/0005/1973 : AIR 1973 Ori 13.

(4) Rescission or modification (Proviso 4)

This proviso permits proof of an oral agreement by which the document in question was either rescinded or modified. To rescind the document means to set it aside and to modify means to drop some of its terms.

In *S. Saktivel (dead) Rep. by L.R. v. M. Venugopal Pillai*, MANU/SC/0499/2000 : AIR 2000 SC 2633: 2000 AIR SCW 2849: JT 2000 (9) SC 345: MANU/SC/0499/2000 : (2000) 7 SCC 104: 2000 (3) SCJ 212: 2000 (8) SRJ 53: (2000) 5 SCALE 517: 2000 (5) Supreme 450. The Supreme Court held that proviso 4 of section 92 provides that where a contract or disposition not required by law to be in writing had been arrived at orally then subsequent oral agreement modifying or rescinding the said contract or disposition can be substantiated by oral evidence and such evidence is admissible.

The second part of the proviso 4 of section 92 does not permit leading a part (oral) evidence for providing a subsequent oral agreement modifying or rescinding the registered document. The terms of a registered document can be altered, rescind or modified only by subsequent registered document and not otherwise.

The document required by law to be in writing; the deed by which the property is settled by father and his son. Law requires it to be in writing. The oral evidence to substantiate any subsequent arrangement which has effect of modifying earlier written deed cannot be permitted.

In *Md. Serajuddin v. Md. Abdul Khaliq*, MANU/GH/0491/2003 : AIR 2004 Gau 126: 2003 (3) Gau LT 696: 2005 (1) Gau LR 299; it was held by the Gauhati High Court that, the fact that the mortgagor visited the mortgagee twice over for redeeming the mortgage was allowed to be proved by oral agreement.

(5) Usages or Customs (Proviso 5)

Any usages or customs by which incidents not mentioned in any contract are usually annexed to contract. Parole evidence of usages or customs is always admissible. Where the object is to make intelligible to the Court the meaning in which the parties have used language the parole evidence may be given to prove any local custom of the general application so that it may be applied to the subject-matter and bind the parties to a written contract, unless it is inconsistent with the writing. In commercial transaction sometimes such terms are used which have got attached to them some peculiar meaning by customs.

Therefore, the proviso provides that, the existence of any usage or a custom by which incidents are attached to a particular type of contract can be proved.

(6) Relation of language to facts (Proviso 6)

The last proviso provides that, any fact may be proved which shows in what manner the language of a document is related to existing facts.

Whenever a Court has to deal with a document which have been proved, its object is to endeavour, to ascertain its real meaning and for this purpose extrinsic evidence is sometimes necessary. So the proviso (6) says that "any fact may be proved which shows in what manner the language of a document is related to the existing facts." The object of admissibility of the evidence of the surrounding circumstances is to ascertain the real intention of the parties but those intentions of the parties must be gathered from the language of the document as explained by extrinsic evidence. No evidence of any intention inconsistent with plain meaning of

the words used will be admitted for the object is not to vary the language used, but only to explain the clause in which the words are used by.

In *Raj Kumar Rajindra Singh v. State of Himachal Pradesh*, MANU/SC/0322/1990 : AIR 1990 SC 1833; the Supreme Court held that if some condition of a document is unambiguous, then to determine the real intention of the parties extrinsic evidence is not allowed because section 92 provides that the real intention of the parties to the document should be gathered from the language used in the document. But if the document is ambiguous and there is more than one meaning of the language used in document then the sixth proviso of section 92 should be looked into which gives permission to the Court to take into consideration the conduct of the parties and surrounding circumstances in order to ascertain the real meaning of the document. In the cases of this type the oral evidence of this type give directive to the Court in ascertaining the real intention of the parties to the document. In these cases the subsequent conduct of the parties provides the evidence to ascertain the real intention of the parties and to remove the ambiguity in the language of the document.

Best Evidence Rule

The 'best evidence rule' means that the best evidence of which the case in its nature is susceptible must always be produced. The rule does not require the production of the greatest possible quantity of evidence, but it is framed to prevent the introduction of any evidence which raises the supposition that there is a better evidence behind it, in possession or under control of the party by which he might prove the same fact, and which is withheld by the party.

The main object of the law of evidence is the investigation or inquiry must be made by Courts within the bounds prescribed by general convenience. The best evidence must be given in all cases and the evidence must be confined to the matter in issue, hearsay evidence must not be admitted.

It is one of the cardinal rules of law of evidence that the best evidence in possession of the party must always be given, i.e., if a fact is to be proved by oral evidence, the evidence must be that of a person who had directly perceived the fact to which he testifies. Otherwise, it would be impossible to test, by cross-examination, the truth of the testimony; and the law rejects the evidence which can not adequately be tested.

In *Bai Hira Devi v. Official Assignee of Bombay*, MANU/SC/0001/1958 : AIR 1958 SC 448: 1958 SCJ 766: (1958) 2 Andh WR (SC) 108: 60 Bom LR 932: (1958) 2 MLJ (SC) 108: 1959 SCA 136: MANU/SC/0001/1958 : 1958 SCR 1384; the apex Court observed that, in the Evidence Act, section 91 lays down the 'best evidence rule' i.e., the contents of a document must be proved by the document itself. When the document has been produced to prove its terms then section 92 comes into operation for the purpose to excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. Therefore, sections 91 and 92 are supplement to each other, but differs in the following material particulars:

Section 91

- (i) It applies to all documents whether they purport to dispose of rights or not.
- (ii) It applies to documents which are Both bilateral and unilateral.
- (iii) It lays down the rule of universal application and is not confined to the executant or executants of the documents.
- (iv) It may apply to strangers.

Section 92

- (i) It applies only to the documents which can be described as dispositive.
- (ii) It confines only to bilateral documents.
- (iii) It applies only between the parties as the representatives-in-interest, to the instrument.
- (iv) It cannot apply to strangers of instrument.

Case law

Sara Veeraswami Case

In *Sara Veeraswami v. Talluri Narayyan*, AIR 1946 PC 32; the appellant sold some property through a registered sale deed in 1932. It was an outright sale. But simultaneously, there was an oral agreement for sale and right to reconveyance if sale price was repaid within 5 years. The question involved in dispute is whether the document is a sale with or without right to reconveyance as per oral agreement and benefit of proviso to section 92 is available? According to operating part of section 92, written agreement will prevail over oral agreement. But proviso (2) makes a difference. In this case, it is necessary to see whether oral agreement as to the reconveyance of property sold, contradicts, varies, adds to or subtracts from the terms of sale document. The answer lies in the truth of the agreement.

Whether the transaction of sale and reconveyance are a single transaction or two separate ones? There can be different agreements of sale and then resale or reconveyance relating to the same subject-matter. The Privy Council held that, there were two different transactions. The determining factor is the ultimate shape of agreement and both written as well as oral agreement can be separate transactions though touching on a common subject-matter. Such was the character of transactions in this case and the oral agreement did not contradict, vary and subtract from the terms of sale deed. The words 'adding to' also do not suffice to exclude oral agreement relied by the appellant. Thus, proviso 2 to section 92 is applicable and oral agreement is a valid separate transaction which will prevail. The appeal was allowed.

Roop Kumar Case

In *Roop Kumar v. Mohan Thedani*, MANU/SC/0276/2003 : (2003) 6 SCC 595: AIR 2003 SC 2418: 2003 AIR SCW 2425: (2003) 3 SCR 292: 2003 (3) SLT 80: 2003 (7) SRJ 81: (2003) 3 SCALE 611: 2003 (3) Supreme 296; a suit for injunction had been filed and the same is pending adjudication. Additional plea was taken that as per averments in the plaint, defendant is alleged to have committed act of criminal trespass on 2-5-1980 after surrendering possession to the plaintiffs, so the suit on the basis of agreement dated 15-5-1975 or on the basis of termination of agency-cum-licence deed is not maintainable.

Before the High Court the parties agreed that the basic question which required consideration was whether relationship between the respondent and the appellant was that of licensor and licensee or it was that of lessor or lessee. The trial Judge had held that the transaction between the respondent and appellant evidenced by an agreement dated 15-5-1975 amounts to licence and not sub-letting. There was a finding recorded by the Trial Court to the effect that the appellant was a party to earlier ejectment proceeding which was not factually correct.

The High Court held that the agreement dated 15-5-1975 was entered into between them with mutual consent and the appellant-defendant signed the same voluntarily and out of his free will; it was not a sham document; was in fact acted upon; the appellant-defendant was an accounting party in terms of the agreement.

The Supreme Court held that:

Every jural act may have the following four elements:

- (a) the enaction or creation of the act;
- (b) its integration or embodiment in a single memorial when desired;
- (c) its solemnization or fulfilment of the prescribed forms, if any; and
- (d) the interpretation or application of the act to the external objects affected by it.

The first and further are necessarily involved in every jural act, and second and third may or may not become practically important, but are always possible elements.

The enaction or creation of an act is concerned with the question whether any jural act of the alleged tenor has been

consummated; or, if consummated, whether the circumstances attending its creation authorize its avoidance or annulment. The integration of the act consists in embodying it in a single utterance or memorial — commonly, of course, a written one. This process of integration may be required by law, or it may be adopted voluntarily by the actor or actors and in the latter case, either wholly or partially. Thus, the question in its usual form is whether the particular document was intended by the parties to cover certain subjects of transaction between them and, therefore, to deprive of legal effect all other utterances.

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Chapter 7

Burden of proof and presumption

Burden of Proof

What do you understand by burden of proof? On whom does it lie and under what circumstances?

Every case is the combination of various facts. Parties to the suit have to establish facts which go in his favour or against his opponent. This is called 'burden of proof'. The expression 'burden of proof' is defined under section 101 of the Act, in the following words:

101. Burden of proof.-

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true.

A must prove the existence of those facts.

This section has been divided into two propositions; the first proposition is based on the principle that the time of the Court ought not to be wasted in idle controversies, nor should a party be dragged without factual basis. The second proposition is that, the burden of proof lies on the person who will have to prove the existence of the facts. The facts can be divided into two categories, namely:

(a) Affirmative; and

(b) Negative (those deny it).

Normally, the affirmative facts are easy to prove in comparison to the negative facts. The principle of the section is that a party who wishes the Court to believe in the existence of a fact and to pass a judgment on the basis of it should have to prove the fact. Where the issue was whether the document in question was genuine or sham or bogus, the party who alleged that fact had to prove nothing till the party relying upon the document established its genuineness in the first place; *Subhra Mukherjee v. Bharat Coking Coal Ltd.*, MANU/SC/0162/2000 : AIR 2000 SC 1203: 2000 AIR SCW 865: JT 2000 (3) SC 55: MANU/SC/0162/2000 : (2000) 3 SCC 312: 2000 SCFBR 230: 2000 (4) SRJ 45: (2000) 2 SCALE 259: 2000 (5) Supreme 88; *Paka Venkaiah v. Taduri Buchi Reddy*, AIR 2005 (NOC) 31 (AP).

On whom burden of proof lies

Section 102 of the Act, locates the party on whom the burden of proof lies. This section says that:

102. On whom burden of proof lies.-

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

This section deals with "burden of proof" in the sense of adducing evidence. It lays down that the burden of adducing the evidence rests upon the party who would fail if no evidence at all, or no more evidence, as the case may be, were adduced by either side. The burden of proof in the sense of the burden of introducing evidence may and constantly does shift during the trial. There are many cases in which the party on whom the burden of proof in the first instance lies may shift the burden to the other side by proving facts giving rise to a presumption in his favour.

'Burden' and 'onus': distinction

There is an essential distinction between burden of proof and onus of proof. Burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in an evaluation of evidence; *Abdulla Mohammed Pagarkar v. State (Union Territory of Goa, Daman and Diu)*, (1980) 3 SCC 110: AIR 1980 SC 499: 1980 Cr LJ 220: 1980 All Cr C 302: 1980 SCC (Cri) 546: 1979 Cr App R (SC) 349: 1979 Cr LR (SC) 683: (1980) 1 SCR 604. Therefore, 'burden of proof' is static while 'onus of proof' is dynamic.

Burden of Proof has two distinct meanings, namely, (i) the burden of proof as a matter of law and pleadings, and (ii) burden of proof as a matter of adducing evidence. Section 101 deals with the former and section 102 with the latter. The first remains constant, but the second shifts; Citing *A. Raghavamma v. A. Chenchamma*, MANU/SC/0250/1963 : AIR 1964 SC 136: (1964) 1 SCA 593: (1964) 2 SCR 933.

In Civil Cases onus is always on a person who asserts a proposition or a fact which is not self-evident; *State Bank of India (Successor to the Imperial Bank of India) v. Shyama Devi*, MANU/SC/0360/1978 : AIR 1978 SC 1263: 1978 UJ (SC) 514: (1978) 3 SCC 399. In Criminal case, the burden of proving everything essential to establish the charge against the accused lies upon the prosecution, and the burden never shifts; *State of Maharashtra v. Wasudeo Ramchandra Kaidalwar*, MANU/SC/0249/1981 : (1981) 3 SCC 199: AIR 1981 SC 1186: 1981 Cr LJ 884: (1981) 2 Serv LR 68: 1981 Cr LR (SC) 390: 1981 SCC (Cri) 690.

Burden of proving a particular fact

Section 103 of the Evidence Act, provides that:

103. Burden of proof as to particular fact.-

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustrations

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

The principle of the section is that whenever a party wishes the Court to believe and to act upon existence of a fact, burden lies upon him to prove that fact. If a party wishes the Court to believe that his opponent has admitted a fact, burden lies upon him to prove the fact of admission.

'Burden of proof' and 'Onus probandi'

As discussed earlier the burden of proof is of two kinds:

- (1) burden of proof on pleading, and
- (2) burden of adducing evidence.

The burden that arises from pleading depends upon the facts asserted or denied and is determined by the rules of substantive and statutory law or by presumption of law and fact.

A files a suit against W, widow of B for declaration that he is owner of all the property left by B being his adopted son: W the widow denies the factum of adoption. In this case A desires the Court to give judgment to the effect that he is owner of the property left by B depending on the fact that he was adopted by B. So he must prove that he was adopted by B.

In this case the burden of proof lies on A. In this illustration the burden has arisen from pleading and is determined by rules of substantive law.

The burden of adducing evidence rests on the party who would lose if no evidence is led by any of the parties.

In S.J. Ebenezer v. Velayudhan, MANU/SC/0887/1998 : AIR 1998 SC 746: 1998 AIR SCW 449: 1998 (1) All CJ 535: 1998 (2) Mad LJ 50: 1998 (1) Ren CJ 138: MANU/SC/0887/1998 : (1998) 1 SCC 633: 1998 SCFBRC 95: (1997) 7 SCALE 635: 1997 (10) Supreme 539: 1998 (1) UJ (SC) 249; the Apex Court held that where a landlord wants to evict the tenant on ground of genuine need of accommodation, the burden of proving that he genuinely required the accommodation lies on the landlord.

In Neelkantan v. Mallika Begum, MANU/SC/0062/2002 : AIR 2002 SC 827: 2002 AIR SCW 490: JT 2002 (1) SC 433: 2002 (1) Mad LJ 166: MANU/SC/0062/2002 : (2002) 2 SCC 440: 2002 SCFBRC 154: 2002 (1) SLT 548: 2002 (3) SRJ 506: (2002) 1 SCALE 512: 2002 (1) Supreme 369; the occupant of the building in slum area claimed for protection from eviction. Plea of the tenant was that the property was situated in slum area. The landlady denied that the property was situated in slum area, so no protection of Slum Area Act, 1971. The burden to prove that the property was situated in Slum Area would be on tenants.

Proof of fact on which evidence becomes admissible

'A' Hindu woman, was married to S in October 1986. 'S' died in June 1990. She then married to another man 'K' in July 1990 and gave birth to a son in September 1990. Can it be lawfully claimed that son is the legitimate son of 'K'.

Where the admissibility of one fact depends upon the proof of the another fact, the party who wants to prove it will have to prove the fact on which admissibility depends. Section 104 of the Act provides that:

104. Burden of proving fact to be proved to make evidence admissible.-

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations

- (a) A wishes to prove a dying declaration by B. A must prove B's death.
- (b) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

Whenever it is necessary to prove any fact, in order to render evidence of any other fact admissible, the burden of proving that fact is on the person who wants to give such evidence. The burden of proof in the sense of adducing evidence applies not only to matters which are the subject of express allegation in the pleading, but also to those that relate merely to the admissibility of evidence or to the construction of the documents. Therefore, a party desiring to adduce a hearsay evidence or secondary evidence of a lost deed must first establish the conditions necessary to its reception.

Where any petition challenging constitutionality of statute, specific, clear and unambiguous allegation regarding violation of Constitutional provision should be made. The burden is on the person challenging constitutionality; *Amrit Banaspati Co. Ltd. v. Union of India*, MANU/SC/0249/1995 : AIR 1995 SC 1340.

Burden of proving exception in criminal cases

Sections 101 to 104 nowhere mention that they are to be confined to civil cases only and some of the illustrations appended to these sections are on criminal matters. However, section 105 is confined to criminal cases only. This section provides that:

105. Burden of proving that case of accused comes within exceptions.-

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b) A, accused of murder, alleges, that by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Indian Penal Code, (45 of 1860), provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances bringing the case under section 335 lies on A.

According to this section, an accused is presumed to be innocent, till proved guilty and to prove guilt burden always lies on the prosecution beyond reasonable doubt. But when the accused took the liability of the crime that the benefit under the exceptions to criminal liability as per chapter IV of I.P.C. the burden of proof lies upon him to establish the circumstances required for the exceptions to criminal liability. Under section 105, there are two kinds of burden of the accused who sets up an exception:

(i) There is the onus laid down of proving the existence of circumstances bringing the case within any of the General Exceptions of the Indian Penal Code or within any special exception or proviso contained in any other part of the Code, or in any law defining the offence.

(ii) There is the burden of introducing or showing evidence which results from the last part of the provision which says "the Court shall presume the absence of such circumstances".

Onus of Proof

In case of Sidhartha Vashist @ Manu Sharma v. State (N.C.T. of Delhi), MANU/SC/0268/2010 : AIR 2010 SC 2352, it was held that, in case the pistol used in murder case, the onus would be on accused to show where it was, possession and whereabouts of pistol being in special knowledge of accused. When the accused gave evasive or incorrect answers and failed to produce the same, than the adverse inference can be drawn against him under section 106 of the Act.

Presumption

What do you mean by word 'presumption'

Presumption: meaning of

Presumption is an inference of fact drawn from other known or proved facts. It is a rule which treats an unknown fact as proved on proof or admission of certain other facts. It means a rule of law that Courts shall draw a particular inference from a particular fact or from a particular evidence, unless and until the truth of such inference is disproved. Presumptions help in determining the probative force of evidence by bringing the estimation of probative force under some inflexible rules excluding judicial discretion.

Presumption: Kinds of

There are two kinds of presumptions:

(i) May Presume:

Presumption of fact are permissive in the sense that the Court has discretion to draw or not to draw them. They are also rebuttable as their evidentiary value may be negated by contrary proof. Thus these presumptions afford a provisional proof. That a person found in possession of stolen property soon after the theft is either the thief or has received the goods knowing them to be stolen is a presumption of this type.

(ii) Shall presume:

They are always obligatory; and a judge cannot refuse to draw the presumption. Such presumptions are either (1) rebuttable, or (2) irrebuttable. Rebuttable presumptions of law are indicated by the expression 'shall presume'. They hold good unless and until there is contrary evidence, e.g., the Court shall presume the genuineness of every Government publication. (section 84).

These two kinds of presumptions of law are:

(i) Rebuttable (shall presume); and

(ii) Irrebuttable (conclusive proof).

Rebuttable Presumption	Irrebuttable ('Conclusive proof') Presumption
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(i) It means a presumption which be
overthrown by a contrary

(i) It is drawn so conclusively that con-contrary
evidence is not allowed. It is evidence. Juris et de
jure, i.e., incapable of rebuttal.

(ii) The Court regard such fact as proved
unless and until it is disproved. The Court,
here, dispenses with the necessity of
formal proof (section 4).

(ii) The Court shall on proof of one fact regard the
other as proved (When one fact is declared to be
conclusive proof of another) and shall not
allow evidence to disprove it. (section 4)

(iii) Examples-A person not heard
of for 7 years is dead, or that a
bill of exchange has been given

(iii) Examples-A child under a certain
age is incapable of committing any
crime (section 82, IPC) section 41 (final

for value. Section 105 (burden of proving that case of accused comes within exceptions) and section 144A (presumption as to absence of consent in certain prosecution of rape) judgment in probate, matrimonial, admiralty or insolvency jurisdictions are conclusive in certain respect), section 112 (conclusive proof of legitimacy) and section 113 (valid cession of territory).

Proof and Presumptions

The question of presumption has to be kept distinct from the question of proof. For the purpose of raising the presumption what one has to see is the state of affairs prevailing on the date on which the presumption is sought to be invoked. On the other hand, in order to prove a certain legal relationship between the parties, the Court is not only concerned with the state of affairs prevailing at the time when the question arose, but also with the state of affairs prevailing when the alleged legal relationship is said to have arisen; Chet Ram v. Manjoor Hasan, AIR 1954 AP 441. Suspicion, however, strong, cannot take place of the proof; Union Territory of Goa v. Boaventura D'Souza, MANU/SC/0175/1993 : AIR 1993 SC 1199: 1993 Cr LJ 181: 1992 AIR SCW 3357: 1993 (2) Rec Cr R 702: 1993 SCC (Cri) 999: (1993) Supp 3 SCC 305.

Presumption relating to documents

Write short note on 'presumption of fact' and 'presumption of law'.

Sections 79 to 90 of the Evidence Act, are founded on the maxim *omnia prosumuntur rite esse acta* which means all acts are presumed to be rightly done. But these presumptions are only *prima facie* presumptions and if the documents are incorrect, evidence can be led to disprove them.

The first eight presumptions i.e., sections 79 to 85 and 89 are mandatory and the Court shall have to presume. But other four presumptions under sections 86 to 88 and 90 are discretionary and the Court is at the discretion to presume or not to presume. Let us find out what these sections say:

79. Presumption as to genuineness of certified copies.-

The Court shall presume to be genuine every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or of a State Government, or by any officer in the State of Jammu and Kashmir who is duly authorized thereto by the Central Government:

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such paper.

80. Presumption as to documents produced as record of evidence.-

Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume-

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or

confession was duly taken.

81. Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents.-

The Court shall presume the genuineness of every document purporting to be 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.

81A. Presumption as to Gazettes in electronic forms.-

The Court shall presume the genuineness of every electronic record purporting to be the Official Gazette or purporting to be electronic record directed by any law to be kept by any person, if such electronic record is kept substantially in the form required by law and is produced from proper custody.

82. Presumption as to document admissible in England without proof of seal or signature.-

When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

83. Presumption as to maps or plans made by authority of Government.-

The Court shall presume that maps or plans purporting to be made by the authority of the Central Government or any State Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

84. Presumption as to collections of laws and reports of decisions.-

The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country, and of every book purporting to contain reports of decisions of the Courts of such country.

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, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated.

85A. Presumption as to electronic agreements.-

The Court shall presume that every electronic record purporting to be an agreement containing the electronic signatures of the parties was so concluded by affixing the electronic signature of the parties.

85B. Presumption as to electronic records and electronic signatures.-

(1) In any proceedings involving a secure electronic record, the Court shall presume unless contrary is proved, that the secure electronic record has not been altered since the specific 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 electronic signature is affixed by subscriber with the intention of signing or approving the electronic record;

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

85C. Presumption as to Electronic Signature Certificate.-

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

86. Presumption as to certified copies of foreign judicial records.-

The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of India or of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Central Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

An officer who, with respect to any territory or place not forming part of India or Her Majesty's dominions, is a Political Agent therefore, as defined in section 3, clause (43), of the General Clauses Act, 1897 (10 of 1897), shall, for the purposes of this section, be deemed to be a representative of the Central Government in and for the country comprising that territory or place.

87. Presumption as to books, maps and charts.-

The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published.

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.

88A. Presumption as to electronic messages.-

The Court may presume that an electronic message, forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the Court shall not make any presumption as to the person 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 (b) and (za) of sub-section (1) of section 2 of the Information Technology Act, 2000.

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.

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 if 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.

According to section 79, the Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by the law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central or State Government.

Section 80 includes documents produced before the Court, purporting to be a record or memorandum of evidence. Section 81 includes all Government publications ('public documents') e.g., currency notes, judicial paper, postal stamps, etc. Section 83 includes maps and plans made by the authority of Government. Section 84 includes all publications of judicial records or decisions.

Section 85 provides that, the court shall presume authentic, every document purporting to be a power-of-attorney. Here, 'power-of-attorney' means a document by which an agent is given power to act for his principal. Section 85A relates to electronic agreements, while, 85B and 85C are related to 'presumption as to electronic records and digital signature' and 'presumption as to digital signature certificate' respectively.

Section 86.-lays down the presumption as to certified copies of foreign judicial records.

Section 87.-lays down the presumption as to books, maps and charts.

Section 88.-lays down the presumptions as to telegraphic messages.

Section 88A.-lays down the presumption as to electronic messages.

Section 89.-lays down the presumption as to due executive, etc. of documents not produced.

Section 90.-lays down that, where a document is purported or proved to be thirty-year old and is produced from any custody which the Court in particular case considers proper, the Court may presume that signature and every part of document is in that person's handwriting, and in case of document attested or executed that it was duly attested or executed by the person by whom it purports to be attested or executed. The basis of the section is that as time passes, the executants, vendors, witnesses may not be available to prove title, etc.

Presumption as to survivorship or burden of proving death

There is a general presumption of continuity of things. Once a thing is shown to exist, the law presumes that it continues to exist until the contrary is shown. Section 107 of the Evidence Act provides that:

107. Burden of proving death of person known to have been alive within thirty years.-

When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

This section provides that if it appears that a person, whose present existence is in question, was alive within thirty years, and nothing whatever appears to suggest the probability of his being dead, the Court is bound to regard the fact of his still being alive as proved. But as soon as anything appears which suggests the probability of being dead; the presumption disappears and the question has to be determined on the balance of proof.

Presumption of Death

According to section 108 of the Act:

108. Burden of proving that person is alive who has not been heard of for seven years.-

Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

Section 108 materially qualifies the operation and effect of the presumption raised by section 107. As per this section, if a person has not been heard of for seven years it is presumption of law that he is dead the burden of proving that he is alive is shifted to the other side. The presumption of death does not extend to the date of death.

In *Darshan Singh v. Gujjar Singh*, MANU/SC/0007/2002 : AIR 2002 SC 606: 2002 AIR SCW 201: JT 2002 (1) SC 11: 2002 (1) Land LR 287: MANU/SC/0007/2002 : (2002) 2 SCC 62: 2002 (1) SCJ 208: 2002 (1) SLT 119: 2002 (2) SRJ 424: (2002) 1 SCALE 70: 2002 (1) Supreme 36; the Supreme Court considered the provisions of sections 107 and 108. In this case, the plaintiff claimed succession to the estate of a person who had not been heard of for seven years. The High Court held that the date of the suit should be taken to be the date of death. The Supreme Court disapproved this view and relied on the decision of Privy Council in *Lal Chand Marwari v. Mohant Ramrup Gir*, AIR 1926 PC 9; and held that, there is no presumption of the exact time of death and the date of death has to be established on evidence by the person who claims a right for the establishment of which that fact is essential. In the case in hand, the plaintiff claimed succession to the estate of Mr. X and, therefore, the burden was upon him to prove the date of death. There is neither any pleading nor an averment by the plaintiff regarding the date of death.

Presumption of Certain Offences

The general rule of law is that every accused is presumed to be innocent till proved guilty. However, section 111A of the Act, is an exception to this general rule. This section provides that:

111A. Presumption as to certain offences.-

(1) Where a person is accused of having committed any offence specified in sub-section (2), in-

(a) any area declared to be a disturbed area under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order; or

(b) any area in which there has been, over a period of more than one month, extensive disturbance of the public peace, and it is shown that such person had been at a place in such area at a time when firearms or explosives were used at or from that place to attack or resist the members of any armed forces or the forces charged with the maintenance of public order

acting in the discharge of their duties, it shall be presumed, unless the contrary is shown, that such person had committed such offence.

(2) The offences referred to in sub-section (1) are the following, namely:-

(a) an offence under section 121, section 121A section 122 or section 123 of the Indian Penal Code (45 of 1860);

(b) criminal conspiracy or attempt to commit, or abatement of, an offence under section 122 or section 123 of the Indian Penal Code (45 of 1860).]

Presumption of Legitimacy

It is the general presumption of the society that, the husband could be the father of the child who was conceived and born during marriage. This presumption is based upon public policy which requires that every child born during wedlock shall be deemed to be legitimate. Therefore, it is the conclusive presumption of law. Section 112 of the Act, provides for the conditions when this presumption can be rebutted in the following words:

112. Birth during marriage, conclusive proof of legitimacy.-

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

This section is based on the legal maxim, "Semper praesumitur pro legitimatione puerorum" (it is always to be presumed that children are legitimate). Section 112 is an example of law furthering social objectives by leaning against the tendency to bastardise the child. It does so by making a conclusive presumption in favour of the legitimacy of the child. The basis of the rule contained in section 112 seems to be a notice that it is undesirable to enquire into the paternity of a child whose parents have access to each other:

The following points to be noted:

(i) section 112 refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child; the latter point of time has to be considered only to see whether the husband had no access to the mother.

(ii) As legitimacy involves 'sexual intercourse' between husband and wife, there is therefore, a presumption when a child is conceived and born during marriage that such intercourse took place at a time when according to the laws of nature, the husband could be father of child.

(iii) The presumption applies with equal force even where the child is born within a few days or even hours after the marriage. Further, it is immaterial that the mother was married or not at the time of the conception.

In *Sethu v. Palani*, ILR (1925) 49 Mad 523; a Hindu woman was married to S in Oct. 1903. She was divorced by him in June 1904. She married another man, T, in July 1904 and gave birth to a son in Sept., the same year. Thus, the conception was formed when she was the wife of one and birth took place when she was the wife of another man.

The child was held to be the legitimate child of second husband, the court relying upon the fact that no proof was available of the fact that T could not have had access to her even when she was the wife of S. The marriage of the mother to one person is not considered to be a proof of the lack of access to any other person.

If a man marries a woman not knowing that she is pregnant, he could, by showing that he could not have had access to the woman when pregnancy commenced, make out that the child is not his. But if a

person knowing that a woman is pregnant marries her, the child of woman though born immediately after the marriage becomes in law his child unless the man proves that he had no access to the woman when he could have been begotten.

(iv) Section 112 appears to provide a simple presumption of legitimacy which applies to children born during a marriage whether conceived before or after the marriage took place, and to children conceived during the marriage, whether born before the marriage dissolved by the husband's death or otherwise.

(v) The phrase "non-access" implies no-existence of opportunity for physical intercourse. As the presumption of legitimacy is highly favoured by law it is necessary that proof of non-access must be clear and satisfactory.

In *Chandramathi v. Pazhetti Balan*, MANU/KE/0014/1982 : AIR 1982 Ker 68: (1982) 1 DMC 256; a married woman became pregnant even after her husband had undergone vasectomy operation. The Court held that vasectomy was not sufficient by itself to over throw the presumption of legitimacy. No proof was offered to show whether the operation was successful. Nor there was any evidence regarding the fact that parties had no access before the conception.

(vi) Biomedical test-In some recent cases it has been held that only way to rebut presumption under section 112 is by proving non-access, and biomedical evidences like blood test, DNA test, etc. cannot be allowed; *Goutam Kundu v. State of West Bengal*, MANU/SC/0345/1993 : AIR 1993 SC 2295: 1993 Cr LJ 3233: 1993 AIR SCW 2325: 1993 (2) Crimes 481: JT 1993 (3) SC 443: (1993) 3 SCC 418: 1993 (3) SCJ 206: (1993) 3 SCR 917: 1993 SCC (Cri) 928; *Tushar Roy v. Sukla Roy*, 1993 Cr LJ 1659: 1993 (1) All Cr LR 313: 1992 Cal Cr LR 401: 1992 (2) CHN 327: 1992 (3) Crimes 1014: 1993 (1) Cur Cr R 642: 1992 Mat LR 377 (Cal). Where, however, such evidences are available, it can be used as a circumstantial evidence.

(vii) It may be noted that an admission by the wife that the child is illegitimate is admissible in evidence.

Dispute as to paternity of Child

Where husband filed the petition for divorce and specifically averred that the wife maintained extra marital relations with respondent and the child was born not through him but due to adulterous life of the wife and the wife in her cross-examination expressed no objection for subjecting herself to DNA test, in the circumstances the application filed by the husband to subject wife and her son including husband to DNA test to determine of paternity of son, would be liable to be allowed; *Buridi v. Venkata*, MANU/AP/0398/2010 : AIR 2010 AP 172.

Presumption in suicide cases

In the recent past, due to the increasing number of dowry death cases, the Parliament amended the Indian Penal Code, Code of Criminal Procedure and the Indian Evidence Act, in order to deal effectively not only the cases of dowry death, but also cases of cruelty to married women by their in-laws. Therefore, sections 113A and 113B have been inserted in the Evidence Act. This section provides that:

113A. Presumption as to abetment of suicide by a married woman.-

When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.-For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860).

113B. Presumption as to dowry death.-

When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.-For the purposes of this section, "dowry death" shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).

This should be noted that, the provision is procedural, therefore, section 113A has retrospective application; Gurbachan Singh v. Satpal Singh, MANU/SC/0034/1990 : AIR 1990 SC 209: 1990 Cr LJ 562: JT 1989 (4) SC 38: 1989 Marriage LJ 602.

Cruelty:-The Apex Court said that the incorporation of section 113A of the Evidence Act, in the statute book depicted a legal presumption though however the time period of within seven years of marriage is a prerequisite for such presumption. The circumstances in the contextual facts and the materials on record substantiate the need of section 113A and having regard to the language used in section 498A of the Indian Penal Code there cannot be any hesitation in coming to a finding that cruelty was writ large as regards the conduct of the appellant towards the deceased. The explanation to section 113A provides that 'cruelty' shall have the same meaning as under section 498A of the Indian Penal Code. With the situation existing and having regard to statutory presumptions the Supreme Court held that the circumstances pointedly point out the accused as guilty persons, as abettors and in the wake of the order of conviction which cannot be interfered with; Pawan Kumar v. State of Haryana, MANU/SC/0167/2001 : (2001) 3 SCC 628: AIR 2001 SC 1324: 2001 Cr LJ 1679: 2001 AIR SCW 1111: 2001 (2) Crimes 1: JT 2001 (3) SC 475: 2001 (2) SCJ 507: 2001 (4) SRJ 207: (2001) 2 SCALE 440: 2001 SCC (Cri) 594: 2001 (2) Supreme 335: 2001 (1) UJ (SC) 749.

Section 113B provides when the question is whether a person has committed the dowry death of a woman, and it is shown that, soon after her death, she had been subjected by that person to cruelty or harassment in connection with any demand for dowry, the court shall presume that such a person had caused the dowry death.

The basic burden is on the prosecution to establish the requirement for application of the presumption, e.g., the incident took place within seven years of marriage; Baljeet Singh v. State of Haryana, MANU/SC/0159/2004 : AIR 2004 SC 1714: 2004 AIR SCW 1230: 2004 (2) Crimes 285: JT 2004 (3) SC 93: (2004) 3 SCC 122: 2004 (2) SLT 320: 2004 (3) SRJ 561: (2004) 2 SCALE 632: 2004 SCC (Cri) 692: 2004 (2) Supreme 279.

Presumption of existence of certain facts

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of (a) natural events, (b) human conduct, and (c) public and private business, in their relation to the facts of the particular case.

Section 114 provides that:

114. Court may presume existence of certain facts.-

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume-

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

- (b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;
- (c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;
- (d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;
- (e) That judicial and official acts have been regularly performed;
- (f) That the common course of business has been followed in particular cases;
- (g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;
- (h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;
- (i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:-

As to illustration (a)-A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;

As to illustration (b)-A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself;

As to illustration (b)-A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable;

As to illustration (c)-A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was young and ignorant person, completely under A's influence;

As to illustration (d)-It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course;

As to illustration (e)-A judicial act, the regularity of which is in question, was performed under exceptional circumstances;

As to illustration (f)-The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;

As to illustration (g)-A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family;

As to illustration (h)-A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked;

As to illustration (i)-A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

Section 114 is based on the maxim that 'all are presumed to have been done correctly and regularly'. Section 114

authorises the Court to make certain presumptions of facts, without the help of any artificial rules of law. Such presumptions of facts are always rebuttable (i.e., can be disproved by a contrary fact). Looking at so many factors if the court thinks that a particular fact should exist, it presumes the existence of the fact. If, for example, a person refuses to answer a question the Court may presume that the answer, if given, would have been unfavourable to the person concerned. There is the presumption that every person is presumed to intend the natural consequences of his act, that every person charged with a crime is innocent, etc.

Illustrations - The Court may presume

- (a) That a man in possession of stolen goods after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.
- (b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars.
- (c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration.
- (d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such thing or state of things usually ceases to exist, is still in existence.
- (e) That judicial and official acts have been regularly performed (if the judicial act was performed under exceptional circumstances, the Court shall have regard to such fact).
- (f) That the common course of business has been followed in particular case (if the usual course was interrupted by disturbances, the court shall have regard to such fact).
- (g) That evidence which could be and is not produced would, if produced, be unfavourable to the person withholding it (if a man refuses to produce a document which would bear on a contract of small importance on which he sued, but which might also injure the feelings and reputations of his family, the Court shall have regard to such fact).
- (h) That, if a man refuses to answer question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him (if the answer might cause loss to him in matters unconnected with the matter in relation to which it is asked, the Court shall have regard to such fact).
- (i) That, when a document creating an obligation is in the hands of the obligor the obligation has been discharged (if it appears that obligor may have stolen it, the Court shall have regard to such fact).

In reference to illustration (e), the Supreme Court has observed:

A presumption has to be drawn under section 114(e) that the competent authority must have before it the necessary materials which prima facie establish the commission of the offence charged and that the authority had applied

its mind before tendering the consent; *State of Bihar v. P.P. Sharma*, MANU/SC/0542/1992 : AIR 1991 SC 1260: 1991 Cr LJ 1438: 1991 AIR SCW 1034: 1991 (2) Crimes 113: JT 1991 (2) SC 147: (1991) 2 SCR 1: 1992 SCC (Cri) 192: (1992) Supp 1 SCC 222.

In *Shahnaz Shaharyari alias Shirin Sha-haryari, Nagpur v. Dr. Vijay Yeshwant Gawande, Bombay*, MANU/MH/0005/1995 : AIR 1995 Bom 30: 1996 (1) Bom CR 473, after a judicial divorce, the wife was not permitted to say that her signature on the divorce petition was taken by force.

The Supreme Court has observed, commenting on illustration (g), that an adverse inference against a party for his failure to appear in Court can be drawn only in absence of any evidence on record. Where the admission of the parties and other materials on record amply prove the points in issue, no presumption can be raised against the person who has failed to appear in the Court; *Pandurang Jivaji Apte v. Ramchandra Gangadhar Ashtekar*, (dead) by LRs, (1981) 4 SCC 596: AIR 1981 SC 2235. Similarly, no adverse inference can be drawn against the prosecution if it merely fails to obtain certain evidence e.g., opinion of expert not taken. An adverse presumption cannot be drawn where the party supposed to be in possession of the best evidence has neither

been called upon to produce nor directed by the Court to do so; Oriental Fire and General Insurance Company Ltd. v. Bondili Sitharam Singh, MANU/AP/0045/1995 : AIR 1995 AP 268: 1995 (1) ACC 540: 1996 ACJ 242: 1995 (1) APLJ 232: 1995 (1) Andh LT 696: 1995 (2) TAC 488.

In case of State of Madhya Pradesh v. Jiyalal, MANU/SC/1474/2009 : AIR 2010 SC 1451 it was held that in case of sanction to prosecute the order passed by Magistrate in course of official duty the presumption attaches to such order and examination of Magistrate not necessary (It is a new provision added in 1983 by Act 43 of 1983)

Adverse Inference

In case of Sidhartha Vashista @ Manu Sharma v. State (N.C.T. of Delhi), MANU/SC/0268/2010 : AIR 2010 SC 2352, the Supreme Court held that nothing on record to prove that newspapers in question have shown the photograph of accused. The photograph taken, when he surrendered before the police, was in muffled face. Thus in absence of any defence the refusal of test Identification Parade by accused on ground that his photograph has appeared in newspaper. Unjustified and adverse inference can be drawn against the accused.

Sanction to Prosecute

In case of State of Madhya Pradesh v. Jiyalal, MANU/SC/1474/2009 : AIR 2010 SC 1451, the Supreme Court held that the findings of sanction of prosecution was mechanically granted and hence is not sufficient to set aside conviction. The serious prejudice must have been caused to accused thereby.

Concurrent Finding of Fact

The fact that the sale deed was got executed under decree of court was not a ground to presume genuineness of sale price mentioned therein; State of Haryana v. Manoj Kumar, MANU/SC/0161/2010 : AIR 2010 SC 1779.

Presumption in Rape Cases

Section 114A says that:

114A. Presumption as to absence of consent in certain prosecutions for rape.-

In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she States in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

According to section 114A, where the question before the Court is whether an intercourse between a man and woman was with or without consent and the woman states in the Court that it was against her consent, the Court shall presume that there was no consent. The burden of proof shifts to the accused. If he is not able to prove that there was a consent, he becomes guilty.

Section 114A was introduced because of the increasing number of acquittals of accused when the victim of rape is an adult woman. If she was really sopped, it was very difficult for her to prove absence of consent. The new provision (inserted in 1983) has brought about a radical change in the Indian law relating to rape cases.

This presumption would apply not only to rape cases, but also to cases of "attempted rape", as for instance, when the victim was disrobed and attempts were made to rape her, which however could not materialize because of intervening circumstances; Fagnu Bhoi v. State of Orissa, 1992 Cr LJ 1808: 1992 (1) Cr LC 405: 1992 (1) Crimes 10: 1991 (72) Cut LT 702.

In a recent case of alleged 'gang rape' of a girl above 16, the F.I.R. was lodged 7 days after the occurrence. The girl admitted that she was desirous of marrying one of the accused, and the chemical examiner's report ran counter to any sexual intercourse, in the circumstances, it was held that the presumption under section 114A could not be invoked;

Shatrughan v. State of Madhya Pradesh, 1993 Cr LJ 120.

Case laws

Somawanti Case

In *Somawanti v. State of Punjab*, MANU/SC/0034/1962 : AIR 1963 SC 151: (1963) 1 SCA 548: 1963 (2) SCJ 85: (1963) 2 Mad LJ (SC) 18: (1963) 2 Andh WR (SC) 18: (1963) 33 Comp Cas 745: (1963) 2 SCR 774, the Supreme Court defined the difference between 'conclusive evidence' and 'conclusive proof'. In the instant case, the land belonging to the appellants was acquired by the Government of Punjab on the grounds of 'public purposes', after a notification in the Official Gazette. The petitioners contended that the said action violate their fundamental rights under article 19 to possess said land carry on their trade, etc. And, the Governmental declaration is 'conclusive evidence' only of a need and nothing more, and is not a 'conclusive proof'. The contention of the State Government was that its opinion about 'public purposes' was a 'conclusive proof' and Court cannot go behind the question. The question, is when a fact is only 'conclusive evidence' as to existence of another fact, other evidence as to the existence of other fact is shut out or not.

The Supreme Court observed: The object of adducing evidence is to prove a fact. Since an evidence means and includes all statements which the Court permits, when the law says that a particular kind of evidence would be conclusive as to existence of a particular fact, it implies that fact can be proved either by that or some other evidence which the Court permits. Where such other evidence is adduced, the Court could consider whether upon that evidence, the fact exists or not.

On the other hand, when evidence which is made conclusive is adduced, the Court has no option but to hold that fact exists. Otherwise, it would be meaningless to call a particular evidence as 'conclusive'. A 'conclusive evidence' shuts out any other evidence which would detract from the conclusiveness of that evidence.

The concept of 'conclusive proof' is defined under section 4: When one fact is declared by this Act, to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

In substance, therefore, there is no difference between 'conclusive evidence' and 'conclusive proof'. In each, the effect is same, i.e., making a fact non-justiciable (irrebuttable). The aim of both being to give finality to the establishment of existence of a fact from the proof of another.

In the present case, thus, the opinion or declaration of State Government is conclusive proof or conclusive evidence, and any further judicial probe is barred. The petitioner cannot lead to disprove the irrebuttable presumption.

Goutam Kundu Case

A marriage was solemnized between 'X' & 'Y' on 1st January, 1990. After just 2 days of the marriage of 'Y' the wife started living separately. In April a son was born to the wife. 'Y' filed a petition of maintenance for herself and for son. 'X' denies the paternity of the child and alleges adulterous relation of 'Y' to deny the claim of maintenance. 'Y' makes an application praying for order from the court directing the wife to get her DNA/Blood test to deny the Paternity. Decide?

In *Goutam Kundu v. State of West Bengal*, MANU/SC/0345/1993 : AIR 1993 SC 2295: 1993 Cr LJ 3233: 1993 AIR SCW 2325: 1993 (2) Crimes 481: JT 1993 (3) SC 443: (1993) 3 SCC 418: 1993 (3) SCJ 206: (1993) 3 SCR 917: 1993 SCC (Cri) 928; the wife conceived a child and later on she filed a petition under section 125, Cr. P.C. for maintenance.

By an order dated 14-8-95 CJM, Alipur, which was passed ex parte, awarded a sum of Rs. 300 per mensem to the wife and Rs. 200 to the child. Against this order, the petitioner moved an application to the High Court.

In that proceeding the petitioner herein disputed the paternity of the child and prayed for blood group test of the child to prove that he was not the father of the child. According to him if that could be established he would not be liable to pay maintenance. That application was dismissed on two grounds: (i) there were other methods in the Evidence

Act, to disprove the paternity; (ii) moreover it is settled law that medical test cannot be conclusive of paternity.

Aggrieved by this order, a revision was preferred before the High Court. Dismissing the revision it was held that section 112 of the Evidence Act, says where during the continuance of valid marriage if a child is born that is a conclusive proof about the legitimacy. This section would constitute a stumbling block in the way of the petitioner getting his paternity disproved by blood group test.

The English law permitted blood test for determining the paternity of legitimacy could not be applied in view of section 112 of the Evidence Act. Therefore, it must be concluded that section 112 read with section 4 of the said Act debars evidence except in cases of non-access for disproving the presumption of legitimacy and paternity.

The Supreme Court observed that:

The conclusion of the whole matter is that a Judge of the High Court has power to order a blood test whenever it is in the best interest of the child. The Judges can be trusted to exercise this discretion wisely. I would set no limit, condition or bounds to the way in which Judges exercise their discretion. The object of the Court always is to find out the truth. When scientific advances give us fresh means of ascertaining it, we should not hesitate to use those means whenever the occasion requires.

Blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by courts as a circumstantial evidence which ultimately excludes a certain individual as a father of the child. However, it requires to be carefully noted no person can be compelled to give sample of blood for analysis against her will and no adverse inference can be drawn against her for this refusal.

The Supreme Court held that:

"We find no difficulty in upholding the impugned order of the High Court, confirming the order of Addl. Chief Judicial Magistrate, Alipore in rejecting the application for blood test. We find the purpose of the application is nothing more than to avoid payment of maintenance, without making any ground whatever to have recourse to the test. Accordingly, the Special Leave Petition will stand dismissed.

Limbaji Case

In *Limbaji v. State of Maharashtra*, MANU/SC/0792/2001 : AIR 2002 SC 491: 2002 Cr LJ 590: 2002 AIR SCW 22: 2002 (1) Crimes 63: JT 2001 (2) SC (Supp) 79: (2001) 10 SCC 340: 2001 (5) SCJ 229: 2002 (1) SLT 1: 2002 (2) SRJ 235: (2001) 8 SCALE 522: 2002 SCC (Cri) 1044: 2001 (8) Supreme 722: 2002 (1) UJ (SC) 307; the three appellants faced trial in the Court of the Sessions Judge, Osmanabad, for the offences punishable under section 302 read with section 34 and section 392 read with section 34, IPC. They were charged of committing the murder of the deceased and robbing him of golden earrings and silver 'lingakar' worn by him in the early hours of 30th May, 1984.

The case rests on circumstantial evidence of recovery of ornaments worn by the deceased, pursuant to the information furnished by the accused to

the police. The High Court pressed into service the presumption under

section 114(a) of the Evidence Act, in support of its conclusion. It is the correctness of that view that falls for the Supreme Court in this appeal.

The Supreme Court observed that:

Among the illustrations appended to section 114 of the Evidence Act, the very first one is what concerns us in the present case "the Court may presume - that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession".

Taylor in his treatise on the Law of Evidence has this to say on the nature and scope of the presumption similar to the one contained in section 114(a):

"The possession of stolen property recently after the commission of a theft, is prima facie evidence that the possessor was either the thief, or the receiver, according to the other circumstances of the case, and this presumption, when unexplained, either by direct evidence, or by the character and habits of the possessor, or otherwise, is usually regarded by the jury as conclusive. The question of what amounts to recent possession varies according to whether the stolen article is or is not calculated to pass readily from hand to hand."

The Supreme Court held that, it is not the prosecution case, that the appellant carried any weapon with them or that the injuries were inflicted with that weapon. There is every possibility that one of the accused picked up the stone at that moment and decision to hit deceased in order to silence or immobilize that victim. If the idea was to murder him and take away the ornaments from his person there was really no need to forcibly snatch the ear rings before putting an end to the victim. It seems to us that there was no pre-mediated plan to kill the deceased, True common intention could spring up any moment and all the three accused might have decided to kill him instantaneously for whatever reason it be. While that possibility cannot be ruled out the possibility of one of the accused suddenly getting the idea of killing the deceased and in furtherance thereof picked up the stone lying at the spot and hitting the deceased cannot also be ruled out. Thus, two possibility confront us. When there is reasonable scope for two possibilities and the Court is not in position to know the actual details of the occurrence it is not safe to extend the presumption under section 114 so as to find that appellant guilty of the offence of murder with the aid of section 34, IPC. While drawing basis of recent possession of belongings of the victim with the accused, the Court must adopt a cautious approach and have an assurance from all angles that the accused not merely committed theft.

Thus, the Supreme Court set aside the conviction of the accused under section 302, IPC. The Supreme Court found the accused guilty of the offence punishable under section 394 read with section 34, IPC and accordingly convicted the accused under section 394 and sentence them to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs. 500 each and in default to undergo further imprisonment for a period of three months. The appeals are thus, partly allowed.

Haroom Hazi Case

In Haroom Haji Abdulla v. State of Maharashtra, MANU/SC/0060/1967 : AIR 1968 SC 832: 1968 Mad LJ (Cri) 591: (1968) 1 SCWR 243: 1968 SCD 391: 1968 Cr LJ 1017: 1968 (2) SCJ 534: (1968) 2 SCR 641: 1970 MPLJ 537: 1970 Mah LJ 604; the appellant Haroon is the sole appellant from a batch of 18 persons who were tried jointly before the Chief Presidency Magistrate, Esplanade Court, Bombay for offences under section 120B of the Indian Penal Code read with section 167(81) of the Sea Customs Act and certain offences under the Foreign Exchange Regulations Act, 1947.

Of the remaining accused who were convicted, Haroon alone is before us. His appeal to the High Court of Bombay was dismissed but he obtained special leave under Article 136 of the Constitution and brought this appeal.

The Supreme Court observed that:

No doubt both Bengali and Noor Mohammad retracted their statements alleging duress and torture. But these allegations came months later and it is impossible to heed them. The statements were, therefore, relevant. Both Bengali and Noor Mohammad were jointly tried with Haroon right to the end and all that remained to be done was to pronounce judgment. Although Bengali was convicted by the judgment, the case was held abated against him after his death.

The Supreme Court further held:

The law as to accomplice evidence is well settled. The Evidence Act, in section 133 provides that an accomplice is a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The effect of this provision is that the Court trying an accused may legally convict him on the single evidence, of an accomplice. To this there is a rider in illustration (b) to section 114 of the Act which provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This cautionary provision incorporates a rule of prudence because an accomplice, who betrays his associates, is not a fair witness and it is possible that

he may, to please the prosecution, weave false details into those which are true and his whole story appearing true, there may be no means at hand to sever the false from that which is true. The argument here is that the cautionary rule applies, whether there be one accomplice or more and that the confessing co-accused cannot be placed higher than an accomplice. Therefore, unless there is some evidence besides those implicating the accused in some material respect, conviction cannot stand. Reliance is placed in this connection upon the observations of the Judicial Committee in *Bhuboni Sahu v. Emperor*, a case in which a conviction was founded upon the evidence of an accomplice supported only by the confession of a co-accused. The Judicial Committee acquitting the accused observed:

The High Court has very searchingly examined the evidence of Kashinath and applied to it the checks which must always be applied to accomplice evidence before it is accepted. There is corroboration to the evidence of Kashinath in respect of Haroon from the confession of Bengali given independently and in circumstances which exclude any collusion or malpractice. Regard being had to the provision of section 133 of the Evidence Act, we do not think that we should interfere in this appeal by special leave, particularly as we hold the same opinion about the veracity of Kashinath.

Thus, the Supreme Court dismissed the appeal.

M.O. Shamsuddin Case

In *M.O. Shamsuddin v. State of Kerala*, MANU/SC/0677/1995 : (1995) 3 SCC 351: 1995 AIR SCW 2717; the two appellants on the file of the Enquiry Commissioner and Special Judge, Thrissor and they have been found guilty under section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act and under section 161 read with section 120B, IPC. C.K. Karunakaran was sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs. 1000 and in default to undergo simple imprisonment for a further period of two months for the offence under the Prevention of Corruption Act and to rigorous imprisonment for one year for the offence under section 161 read with section 120B, IPC.

M.O. Shamsuddin was sentenced to rigorous imprisonment for one year and to pay a fine of Rs. 500 and in default to undergo simple imprisonment for a further period of one month for the offence under the Prevention of Corruption Act and to rigorous imprisonment for one year for the offence under section 161 read with section 120B, IPC.

The Supreme Court observed that:

From the resume of various decisions the following principles are deducible. Section 133 of the Evidence Act, lays down that an accomplice is a competent witness against an accused person. The conviction based on such evidence is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, there is a rider in illustration (b) to section 114 of the Act, which provides that the Court may presume that the accomplice is unworthy of credit unless he is corroborated in material particulars. This presumption is in the nature of a precautionary provision incorporating the rule of prudence which is ingrained in the appreciation of accomplice's evidence. Therefore, the Courts should be guarded before accepting the accomplice's evidence and look for corroborating evidence. The discretion of the Court upon which the rule of corroboration rests, must be exercised in a sound and reasonable manner. Normally the Courts may not, act on an uncorroborated testimony of an accomplice but whether in a particular case it has to be accepted without corroboration or not would depend on an overall consideration of the accomplice's evidence and the facts and circumstances. However, if on being so satisfied the Court considers that the sole testimony of the accomplice is safe to be acted upon, the conviction can be based thereon. Even if corroboration as a matter of prudence is needed it is not for curing any defect in the testimony of the accomplice or to give validity to it but it is only in the nature of supporting evidence making the other evidence more probable to enable the Court to satisfy itself to act upon it.

The Court held that, whether corroboration is necessary and if so to what extent and what should be its nature depends upon the facts and circumstances of each case. In a case of bribe, the person who pays the bribe and those who act as intermediaries are the only persons who can ordinarily be expected to give evidence

about the bribe and it is not possible to get absolutely independent evidence about the payment of bribe. However, it is cautioned that the evidence of a bribe-giver has to be scrutinized very carefully and it is for the court to consider and appreciate the evidence in a proper manner and decide the question whether a conviction can be based upon it or not in those given circumstances.

Thus, the Supreme Court dismissed the appeal.

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Chapter 8

Estoppel

What do you mean by word 'estoppel'?

It has already been noted that under the Evidence Act, there are certain facts which need not be proved and there are some facts which cannot be proved because the Evidence Act, would not allow evidence of such facts. An estoppel is a principle, whereby a party is precluded from denying the existence of some state of facts which has formerly admitted. The foundation of the doctrine is that a person cannot approbate and reprobate at the same time; Purshottam v. Bhagwat Sharan, MANU/MP/0524/2002 : AIR 2003 MP 128. Under Indian Evidence Act, sections 115 to 117 based on the principle what is called "doctrine of estoppel".

Section 115 of the Act provides that:

115. Estoppel.-

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

Section 115 lays down that when one person has, either in word or by conduct, intentionally caused a person to believe to a thing to be true and to act upon such belief or to alter his position, neither he nor his representative in any suit or proceeding will be allowed to say that the representation was false. Estoppel is a principle of law by which a person is held bound by the representation, made by him or arising out of his conduct.

Estoppel: kinds of

Coke, who is the earliest and highest authority on the subject of estoppel and whose every word on the subject is persistently treasured and repeated in text-book, and judgment after judgment, down to the present day, classified estoppels into three kinds, viz., (i) estoppel by matter of record; (ii) estoppel by matter in writing; and (iii) estoppel by matter in pais. The first two are sometimes referred to as technical estoppels as distinguished from acquirable estoppels or estoppel in pais or pais.

The main ingredients of estoppel as defined in section 115 i.e., estoppel in pais are:

- (1) there must be some representation,
- (2) the representation must be made with the intention to be acted upon,
- (3) the representation must have been acted upon.

Essential conditions for the Application of section 115

Discuss the essential conditions for the applicability of section 115 of the Evidence Act?

The following eight conditions must be satisfied to bring a case within the scope of estoppel as defined in section 115; Chhaganlal Keshavlal Mehta v. Patel Narandas Haribhai, MANU/SC/0353/1981 : (1982) 1 SCC 223: AIR 1982 SC 121: 1982 UJ (SC) 120: 1982 All LR 108: 1982 (1) 23 Guj LR 325: 1982 Mah LR (SC) 108: 1982 BBCJ (SC) 119:

- (i) There must have been a representation by a person to another person, which may be in any form - a

declaration or an act or an omission.

(ii) Such representation must have been of the existence of a fact, and not of future promises or intention.

(iii) The representation must have been meant to have been relied upon.

(iv) There must have been belief on the part of the other party in its truth.

(v) There must have been some action on the faith of that declaration, act or omission. In other words, such declaration, etc., must have actually caused the other person to act on the faith of it and to alter his position to his prejudice or detriment.

(vi) The misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice.

(vii) The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. There can be no estoppel if such a person was aware of the true state of affairs or if he had means of such knowledge.

(viii) Only the person to whom the representation was made or for whom it was designed, can avail of the doctrine. The burden of proving estoppel lies on such person.

Representation - Necessary elements of

The representation to form the basis of an estoppel may be made either by (i) statement or by (ii) conduct and conduct includes negligence. Certain general propositions are, however, applicable whatever manner the representation may be made.

The focus of law of estoppel is the position in law of party who is induced to act. Thus a person who is estopped (i.e., person making the representation) may not have intention to deceive and may himself be acting under mistake or apprehension. The estoppel with nonetheless operate in such cases also; *Surat Chunder Dey v. Gopal Chander Laha*, (1892) 19 IA 203.

A representation may also arise from an "omission" to do an act which one's duty requires one to do. An estoppel will arise when the failure to perform one's duty has misled another and also the duty should be a kind of legal obligation. In *Mercantile Bank of India Ltd. v. Central Bank of India Ltd.*, (1938) AC 287; an omission to stamp the receipts was held sufficient to create an estoppel. Estoppel by negligence is based on the existence of a duty which the person estopped is owing to the person led into the wrong belief or to the general public of whom the person in one.

Estoppel by conduct may be active or passive. Estoppel by silence or acquiescence arises only when there is a duty to speak or disclose.

Reliance and Detriment

The condition necessary to create an estoppel is that the plaintiff altered his position on the basis of the representation and he would suffer a loss if the representor is allowed to resile from his statement. Detriment is a prerequisite of actionable promissory estoppel. Thus, a mere statement of a person that he would not assert his rights does not create an estoppel unless it is intended to be acted upon and is in fact acted upon; *Dr. Sida Nitinkumar Laxmankumar Laxmanbhai v. Gujarat University*, MANU/GJ/0172/1991 : AIR 1991 Guj 43: 1990 (2) Guj LH 471: 1990 (2) Guj LR 808: 1990 (6) Serv LR 551.

Where a Government license was granted to a person to establish saw mill and he spent huge sum of money acting on the grant and the Government subsequently changed policy refusing to grant any further licences, the Government was held bound to grant that particular licence, though the policy may be revised for the future; *Jyoti Das v. State of Assam*, MANU/GH/0007/1990 : AIR 1990 Gau 24: (1989) 1 Gua LR 63.

Promissory Estoppel

What is promissory estoppel?

Estoppel is a rule of equity. That rule has gained new dimensions in recent years with the recognition of an equitable doctrine of "Promissory Estoppel" by the Court in this country as well as England.

The doctrine was explained by the Court in the following terms "where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word."

The development of such a principle was easy in Britain and USA, where estoppel is a rule of equity, but in India, it is a rule of law embodied in

section 115, Evidence Act and terms of the section must be strictly complied with.

The concept of promissory estoppel differs from concept of estoppel as contained in section 115 in that representation in the latter is to an existing fact, while the former relates to a representation of future intention. But it has been accepted by the Supreme Court as "advancing the cause of justice".

A mere promise to make a gift will not create an estoppel. It would require a clear and unequivocal promise to import the doctrine into a matter. A leading institution intimated the sanction of a loan with a remark that it did not constitute a commitment on the part of the institution. Held there was no promise to found the doctrine of promissory estoppel; *Rabisankar Choudhury v. Orissa State Financial Corporation*, MANU/OR/0025/1992 : AIR 1992 Ori 93: 1991 (72) Cut LT 185.

The doctrine of promissory estoppel would be applicable where a representation has been made by the State in exercise of its power to exempt or abolish a commodity as taxable commodity. Such promise, however, must be made by the persons who have the power to implement the representation; *Tata Iron & Steel Co. Ltd. v. State of Jharkhand*, MANU/SC/0237/2005 : AIR 2005 SC 2871: 2005 AIR SCW 1781: 2005 (2) BLJR 1168: 2005 (2) JCR SC 235: JT 2005 (3) SC 582: (2005) 4 SCC 272: 2005 (4) SCJ 92: 2005 (5) SLT 121: (2005) 3 SCALE 431: 2005 (3) Supreme 199.

A man should keep his word. All the more so when the promise is a bare promise but is made with the intention that the other party should act upon it. Just as a contract is different from tort and from estoppel, so also in the sphere now under discussion premises may give rise to a different equity from another conduct.¹

The alteration of position by the party is the only indispensable requirement of the doctrine of promissory estoppel. It is not necessary to prove further any damage, detriment or prejudice to the party asserting the estoppel; *Delhi Cloth and General Mills Ltd. v. Union of India*, MANU/SC/0031/1987 : AIR 1987 SC 2414: JT 1987 (5) SC 35: 1987 (3) SCJ 328: (1987) 2 Cur CC 983. The plea is not maintainable in writ for first time; *Pramodbhai Bhulabhai Desai v. Officer on Special Duty No. 2, (Land Acquisition), Ahmedabad*, MANU/GJ/0068/1989 : AIR 1989 Guj 187: (1989) 30 Guj LR 194.

The principles of promissory estoppel attracted in the case of allotment of alternative plot to petitioner for land acquired from him. Building as per approved plan also put up deprivation by withdrawal of recommendation without opportunity and compensation was illegal; *Subhash Chandra Goel v. Secretary, Delhi Development Authority, Vikas Minar, I.P. Estate, New Delhi*, AIR 1985 Del 466.

Exceptions to the doctrine of estoppel

There are various exceptions to the doctrine of estoppel:-

- (1) No estoppel against a minor:- Where a minor represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him, then in an action founded on contract, the infant is

not estopped from setting up infancy as a plea. However, equity

1. Lord Denning: In his Article 'Recent Developments in the Doctrine of Consideration', (Modern Law Review, Vol. 15, p. 5.

demands that he should not retain a benefit which he had obtained by his fraudulent conduct.

(2)When true facts are known to both the parties:-Section 115 does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement (R.S. Maddanappa v. Chandramma, MANU/SC/0356/1965 : AIR 1965 SC 1812: (1965) 2 SCWR 644: 1966 (2) SCJ 310: (1965) 3 SCR 283).

(3)Fraud or negligence on the part of other party:-If the other party does not believe the representation but acts independently of such belief, or in cases where the person to whom representation is made is under a duty to make a further inquiry, the estoppel will not operate. Likewise, if there is a fraud on the part of the other party, which could not be detected by promisor with ordinary care, the estoppel will not operate.

(4)When both the parties plead estoppel:-If both the parties establish a case for application of estoppel, then it is as if the two estoppels cancel out and the Court will have to proceed as if there is no plea of estoppel on either side. Further, if both sides had laboured under a mistake however bona fide or genuine, the plea of estoppel may not be available.

(5)No estoppel on a point of law:-Estoppel refers only to a belief in a fact. If a person gives his opinion that law is such and such and another acts upon such belief, then there can be no estoppel against the former subsequently asserting that law is different. One cannot be estopped from challenging the effectiveness of something (e.g., partition deed) for want of law (e.g., registration). Representations under section 115 should be of facts not of law or opinion; Union of India v. K.S. Subramanian, MANU/SC/0546/1988 : AIR 1989 SC 662: 1989 Lab IC 1005: JT 1988 (4) SC 681: (1989) 1 Cur LR 82: (1989) 1 Cur LT 98: (1989) 58 FLR 199: (1989) 1 LLN 310: (1989) 1 ATLT 299.

(6)No estoppel against statute/sovereign Acts:-A rule of law cannot be nullified by resorting to the doctrine of estoppel. For example, where a minor has contracted by misrepresenting his age, he still can afterwards disclose his real age. It is a rule of law of contract that a minor is not competent to contract and that rule would be defeated if a minor not permitted to disclose his real age. Hence, there can be no estoppel against the provisions of a statute.

Case law

R.S. Maddanappa Case

In R.S. Maddanappa v. Chandramma, MANU/SC/0356/1965 : AIR 1965 SC 1812: (1965) 2 SCWR 644: 1966 (2) SCJ 310: (1965) 3 SCR 283, in a suit for possession of plaintiff's half share of certain properties, a decree was passed in favour of the defendant No. 1 (brother of plaintiff) with respect to the other half share. In appeal by the other defendants, it was contended that defendant No. 1 was estopped from claiming half share (deceased), because:-

- (i)he did not reply to a notice by the plaintiff asking him to join her in filing the suit,
- (ii)he wrote a letter to his step mother disclaiming interest in suit property, and
- (iii)he attested a will executed by his father disposing of suit properties.

The Supreme Court held that:-

- (i)the conduct in not replying to notice does not mean there was implied admission (or acquiescence) that he had not interest in properties, justifying an inference of estoppel,
- (ii)when the father (defendant No. 2) knew about true legal position that he was not the owner of properties and his possession was on behalf of plaintiff and defendant No. 1, the defendant No. 1's letter to step mother

could not have created an erroneous or mistaken belief in father's mind about his title to the suit properties.

(iii) similarly, the reason of conduct of defendant No. 1 in attesting his father's will could not justify an inference of estoppel.

Thus, in this case, as the facts are known to both the parties, the doctrine of estoppel cannot be invoked. Section 115 does not apply to a case where the statement relied upon is made to a person who knows the real facts and not misled by the untrue statement. Also, in the present case, there is no detriment to the other party by the actions of defendant No. 1.

Sanatan Gauda Case

'A' who had appeared in B.A. Examination of the University was declared pass and eligible for a degree. On the basis of the result 'A' appeared in Civil Services Exam, and qualified for the Interview. However, before the results, the University communicated to 'A' that his B.A. result was wrongly declared and that he had failed. A filed a writ petition against the University. Can the University adduce evidence to justify its revision of the result?

In *Sanatan Gauda v. Berhampur University*, MANU/SC/0199/1990 : AIR 1990 SC 1075: JT 1990 (2) SC 57; the Appellant passed his M.A. Examination in July 1981 securing more than 40 per cent of the total marks. Although he was admitted to the final year law classes, his results for the pre-law and inter-law examination were not declared. Hence, the appellant approached the Orissa High Court by a writ petition challenging the non-declaration of his result. The writ petition was dismissed by the High Court. Against the said decision the appellant filed the present appeal. By ad interim order, the appellant was permitted to continue his final year law course and to appear in the examination of the said course.

Issue

Whether the appellant was eligible to be admitted to the law course?

The Supreme Court observed that:

In the present case the Apex Court observed that the appellant while securing his admission in the Law College had admittedly submitted his mark-sheet along with the application for admission. The Law College had admitted him. He had pursued his studies for two years. The University had also granted him the admission card for the Pre-Law and intermediate law examinations. He was permitted to appear in the said examinations. He was also admitted to the final year of the course. It is only at the stage of the declaration of his results of the Pre-Law and Inter-Law examination that the University raised the objection to his so-called ineligibility to be admitted to the Law course. The University is, therefore, clearly estopped from refusing to declare the results of the appellant's examination or from preventing him from pursuing his final year course.

We are of the view that the University is not justified in refusing to declare the appellant's results of the Pre-Law and Intermediate Law examinations. The appeal, therefore, succeeds. The respondent-University is directed to declare the said results as well as the result of the Final examination if the appellant has appeared for the same. The appeal is allowed accordingly.

Mahaveer Oil Mills Case

In *State of Rajasthan v. Mahaveer Oil Industries*, MANU/SC/0292/1999 : AIR 1999 SC 2302: 1999 AIR SCW 2369: 1999 BRLJ 236: JT 1999 (3) SC 212: (1999) 4 SCC 357: 1999 (2) SCJ 306: 1999 (5) SRJ 308: 1999 (115) STC 29: (1999) 2 SCALE 708: 1999 (4) Supreme 322: 1999 (2) UJ (SC) 953; when new industry was set up on basis of Incentive Scheme from Government and by relying on promise of benefits held out by it, the Supreme Court held that the State Government was bound by the promise held out by it in such situation. But this does not preclude the State Government from withdrawing the benefit prospectively. Even during the period of Scheme, if the public interest, so requires. Even in the case the party had acted on promise if there is any supervening public interest which requires that the benefit be withdrawn or the same be modified that supervening public interest would prevail over promissory estoppel.

Estoppel by tenants and licensee

Sections 116 and 117 of the Evidence Act, are illustrative of the principle of estoppel laid down in section 115. These two sections deal with estoppels in specific cases.

Section 116 of the Act, provides for estoppel of a tenant as against his landlord and of a licensee as against his licensor in the following words:

116. Estoppel of tenant; and of licensee of person in possession.-

No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

From the reading of this section it is clear that section 116 deals with estoppel:

(i) between a tenant and his landlord; and

(ii) licensee and licensor.

Tenant cannot deny the title of landlord: "A tenant may not dispute the right of his landlord saying that he had nothing in the property". The section provides that a person who comes into an immovable property taking possession from a person whom he accepts as the landlord, is not permitted to say as against his landlord that he had no title to the property at the commencement of the tenancy. The ground of the doctrine is that in as much as the parties have approved that they should stand in the relation of landlord and tenant, and the one accordingly receives possession from the other and enters premises, so long as he continues in possession, he cannot be heard to deny the State of facts which he had agreed shall be taken as the basis of the arrangement; in other words he cannot set up that the landlord had no legal title. A tenant cannot deny the right of the person from whom he took the tenancy.

In *S.K. Sharma v. Mahesh Kumar Verma*, MANU/SC/0804/2002 : AIR 2002 SC 3294: 2002 Cr LJ 4318: 2002 AIR SCW 3827: JT 2002 (7) SC 222: (2002) 7 SCC 505: 2002 (4) SCJ 343: 2002 (5) SLT 344: 2002 (9) SRJ 313: (2002) 6 SCALE 522: 2002 SCC (Cri) 1804: 2002 (6) Supreme 530: 2002 (2) UJ (SC) 1443; the respondent was a railway servant. He was allotted premises in question as official residence. While he was holding the post of chief relation officer, it was held by Supreme Court the provision of section 138 of Railway Act can be invoked for evicting respondent upon his retirement even though railway administration has no proof that property was belonging to it. Since the respondent was estopped from alleging title of railway administration over premises in question in view of section 116 of the Evidence Act.

In *Rita Lal v. Raj Kumar Singh*, MANU/SC/0813/2002 : AIR 2002 SC 3341: 2002 AIR SCW 3887: JT 2002 (7) SC 296: MANU/SC/0813/2002 : (2002) 7 SCC 614: 2002 (5) SLT 385: 2002 (9) SRJ 283: (2002) 6 SCALE 564: 2002 (6) Supreme 487; the rent note was proved to be signed by tenant. Tenant admitted the title of landlord in his disposition made on oath in earlier judicial proceeding of plea of tenant denying the title of landlord in eviction suit raised for seeking leave to defend does not amount to raising triable issue as he was estopped from raising the same. Tenant would not be entitled to leave to defend.

Estoppel of acceptor of bill of exchange, bailee and licensee

Section 117 of the Act, provides that,

117. Estoppel of acceptor of bill of exchange, bailee or licensee.-

No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or licence commenced, authority to make such bailment or grant such

licence.

Explanation 1.-The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation 2.-If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

This section deals with further instances of estoppel by agreement. Under this section an acceptor of a bill of exchange cannot deny that the drawer had authority to draw such bill or to endorse it. But he may deny that the bill was really drawn. A bailee or licensee cannot deny that his bailor or licensor had, at the commencement of the bailment or licence, authority to make the bailment or grant the licence. But a bailee, if he delivers the goods bailed to a third person, may prove that such person had right to them as against the bailor.

Distinction between 'Estoppel' and 'Res judicata'

Estoppel	Res judicata
1.Estoppel prevents a person from saying one thing at one time and retreating from it another time.	1.Res judicata prevents the jurisdiction on the subject-matter already decided by competent Court on same issue, between same parties.
2.Estoppel is rule of equity.	2.Res judicata is rule of legal procedure.
3.Estoppel is based on rule of equity,justice and good consciences.	3.Res judicata is based on public policy.
4.Estoppel originates from representation or conduct of theparty.	4.The res judicata originates from decision of Court.
5.Estoppel prevents a person to rebut what has been represented by him.	5.Res judicata prevents the court to hear a case which has already been decided by court of competent jurisdiction.
6.Estoppel shuts the mouth of parties.	6.Res judicata shuts (prevents) jurisdiction of Court.
7.Rule of Estoppel is laid down under section 115 of Evidence Act, 1872.	7.The rule regarding res judicata is laid down under section 11 of C.P.C.1908.
8.Estoppel can be inferred from the conduct of the parties.	8.Res judicata is claimed on basis of previous decision of competent court.

Distinction between 'Estoppel' and 'Waiver'

Estoppel	Waiver
1.Estoppel is a rule of evidence and does not form basis for instituting a suit.	1.Waiver originates from contractual relationship and may give birth to occur of action.
2.The knowledge of reality or truth is not a factor or essential conditionfor claiming estoppel.	2.In case of waiver real facts or truth is known to both the parties.
3.In some circumstances the acquiescence amounts to estoppel.	3.In case of waiver same act or conduct is necessary together with acquiescence.

4. Estoppel is used as defence and not cause for bringing a suit. 4. Waiver may be cause to give rise a right.

Comparison of estoppel with other concepts

'Estoppel' and 'presumption'-An estoppel is a personal disqualification laid upon a person under peculiar circumstances from proving particular facts, whereas a presumption is a rule that a particular inference is to be drawn from particular facts, whoever proves them. In presumption, evidence to rebut it can be given, while in estoppel, the party is estopped from denying the truth.

'Estoppel and 'Conclusive Proof'-When a fact is conclusively proved, it is so against all the world. Estoppel operates only as a personal disability. In both, however, the very same fact cannot be denied (irrebuttable)

'Estoppel' and 'Admission'-Though in both admissions and estoppels there are statements, an admission does not ripen into an estoppel unless the person to whom the representation is made believes it and acts upon such belief, whereas in the case of mere admission evidence can be given to show that the admission was wrongly made.

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Chapter 9

Witnesses

"Witness" as Bentham said: "are the eyes and ears of justice. Hence, the importance and primary of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion; *Zahira Habibullah Sheikh v. State of Gujarat*, MANU/SC/1344/2006 : AIR 2006 SC 1367: 2006 Cr LJ 1694: 2006 AIR SCW 1340: (2006) 1 CCR 193: 2006 (34) OCR 43: MANU/SC/1344/2006 : (2006) 3 SCC 374: 2006 (5) SCJ 536: (2006) 3 SCALE 104: 2006 (2) Supreme 598.

This chapter deals with competence, compellability of privileges etc. of witness. Generally speaking, all persons are competent witnesses. A witness is compellable if he can lawfully be obliged to give evidence. The term 'witness' includes parties to the proceedings.

Who may testify

Who is a witness? Discuss the various types of witnesses?

Section 118 of the Evidence Act, contains the general rule as to the competency of witnesses; *Rameshwar S/o Kalyan Singh v. State of Rajasthan*, MANU/SC/0036/1951 : AIR 1952 SC 54: 1952 SCJ 46: 1952 Mad WN 150: 1952 Cr LJ 547: (1952) 1 Mad LJ 440: MANU/SC/0036/1951 : 1952 SCR 377: 1952 SCA 40. This section provides that:

118. Who may testify.-

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.-A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

This section does not bar any person to testify unless he is incapable of giving evidence or understanding the question put to him because of tender years, extreme old age, disease or any other cause of the same kind. Thus no person is particularly declared to be incompetent.

Competency of witness:-

Sections 118 to 121 and 133 deal with the competency of the persons who can appear as witnesses. Every person is competent to testify unless that he is not able to understand the questions put to him or to give rational answer to them. The disqualifying factors may be that he is too young a child, or too old a man or is suffering from disease of mind or of body. Even a lunatic is not declared to be incompetent unless his lunacy prevents him from understanding or answering questions.

Child witness:-

A child even of 6 or 7 years of age may be allowed to testify without any oath, if the Court is satisfied that they have capacity to give rational testimony. A child of tender years is a competent witness when such child is intellectually sufficiently developed to understand what he or she had seen afterwards to inform the Court about it. Before the evidence of a child may be recorded the Court must, by preliminary examination test his capacity to understand and to give rational answers and must form an opinion as to the competency of the witness.

In *State of Himachal Pradesh v. Prem Chand*, MANU/SC/1139/2002 : AIR 2003 SC 708: 2003 Cr LJ 872: 2003 AIR SCW 1: 2003 (1) Crimes 426: MANU/SC/1139/2002 : (2002) 10 SCC 518: 2003 (1) SLT 393: 2003 (2) SRJ 285: (2002) 9 SCALE 328: 2003 SCC (Cri) 175: 2003 (1) Supreme 393; the child witness clearly saw accused on two occasions whom

he knew to be his uncle. Holding identification parade is not of much significance in these cases. Sketch map of the cite prepared by investigating officer though admissible in evidence not hit by section 163, Cr. P.C. would not be of much use in absence of evidence adduced with reference to the same by witness. Evidence of child witness cannot be doubted on the ground of such sketch/map. Acquittal of accused was set aside.

Dumb Witnesses

Section 119 of the Act, provides for the 'dumb witnesses' in the following words:

119. Dumb witnesses.-

A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

The section applies to the cases of persons who are unable to speak due to physical deformity and also to the cases of witnesses who have taken a vow of silence. When a deaf-mute is a witness the Court will ascertain before he is examined that he possesses the requisite amount of intelligence, and that he understands the nature of an oath. A deaf-mute's evidence may be taken-

(a) by written questions to which he may reply in writing, or

(b) by means of signs.

Evidence of Prosecutrix in Rape Case

In an offence under section 376, Indian Penal Code, evidence of prosecutrix is enough. No corroboration is necessary; State of Maharashtra v. Chandraprakash Kewalchand Jain, MANU/SC/0122/1990 : AIR 1990 SC 658: 1990 Cr LJ 889: JT 1990 (1) SC 61.

Interested Witness

Relationship or the witnesses with the deceased is no ground for not acting upon that testimony if it is otherwise reliable in the sense that the witnesses were competent witness who could be expected to be near about the place of occurrence and could have seen what had happened.

It is now well-settled that the evidence of witness cannot be discarded merely on the ground that he is related witness or the sole witness, or both, if otherwise the same is found credible. The witness could be a relative but that does not mean to reject his statement in totality. In such a case it is the paramount duty of the Court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested sole witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the Court while scrutinizing the evidence of the interested sole witness. The prosecution's non-production of one independent witness who has been named in the FIR by itself cannot be taken to be a circumstance to discredit the evidence of the interested witness and disbelieve the prosecution case. It is well-settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the Court to place credence on the statement; Seeman alias Veeranam v. State by Inspector of Police, MANU/SC/0395/2005 : AIR 2005 SC 2503: 2005 Cr LJ 2618: 2005 AIR SCW 2705: 2005 (2) Crimes 222: JT 2005 (5) SC 555: (2005) 11 SCC 142: 2005 (5) SCJ 217: 2005 (4) SLT 556: 2005 (7) SRJ 62: (2005) 5 SCALE 194: 2005 SCC (Cri) 1893: 2005 (4) Supreme 84.

Parties to civil suit and their wives or husband etc.

Section 120 says that:

120. Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial.-

In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be

competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

According to this section, in a civil proceeding, the parties to the suit are competent witnesses. It follows that the plaintiff and defendant can give evidence against each other; *Onkar Chand v. Jagatamba Devi*, AIR 2003 (NOC) 124 (HP). Even, in the civil proceeding, the husband or wife of any party to the suit is a competent witness. Similarly, in a criminal proceeding against any person, the husband or wife of such person shall be a competent witness.

Judges and Magistrate as witness

Section 121 of the Act, provides that:

121. Judges and Magistrates.-

No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any question as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations

(a) A, on his trial before the Court of Sessions, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) A is accused before the Court of Sessions of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the superior Court.

(c) A is accused before the Court of Sessions of attempting to murder a police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

This section 121 provides some judicial privileges to the judges or Magistrate. A judge or Magistrate is a competent witness. But a judge or magistrate cannot be compelled except upon special order of a Higher Court, to give evidence about his conduct in relation to a case tried by him [illustration (a)] nor can be made to depose anything which he came to know as a Court in course of trial [illustration (b)]. The privilege cannot be claimed by such persons in respect of facts which they come to know not as Court in discharge of their duty but, which is observed by them as ordinary men [illustration (c)]. It must be borne in mind that the privilege given by their section is the privilege of the witness, if he waives such privilege, none else can raise an objection. Thus, if a Magistrate is summoned to depose about his conduct in respect of a case and he is ready to appear, nobody else can raise an objection.

Privileged communications

There are certain matters which a witness cannot either be compelled to disclose or even if the witness is willing to disclose, he will not be permitted to do so. Such matters are known as privilege communications.

Communication during marriage

Section 122 of the Act, restricts that:

122. Communications during marriage.-

No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Section 122 lays down that a wife or husband may not be compelled to divulge the communication of husband to wife

and the vice versa. According to the section any communication during the wedlock by the husband to his wife or by wife to her husband is prevented from being proved in a Court of Law. The statement of the accused to his wife that he would give her jewels and that he had gone to the house of the deceased is inadmissible; Ram Bharosey v. State of Uttar Pradesh, MANU/SC/0175/1954 : AIR 1954 SC 704: 1954 Cr LJ 1755.

The protection is not confined to cases where the communication sought to be given in the evidence is of a strictly confidential character. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record.

Protection when not available (Exceptions)

The privilege admits of certain exceptions also. It is not every communication which is exempt from disclosure. The exceptions are as follows:

(1) Acts apart from communications-The acts or conduct of spouses apart from communications are not protected under section 122. A wife can testify as to what her husband did on a certain occasion, though not as to what he said to her.

In Ram Bharosey v. State of Uttar Pradesh, MANU/SC/0175/1954 : AIR 1954 SC 704: 1954 Cr LJ 1755; the accused was on his trial for murdering a neighbour for the purpose of robbing some ornaments and then to present them to his wife. While presenting them to his wife he said that he had gone to the middle house (where the deceased lived), to get them. His wife then told the Court that she saw one early morning her husband coming down the roof. He then went inside the fodder store and had a bath. He put back the same clothes and came to her to present the things. Held that what the husband said to his wife was not admissible, but she could testify as to his conduct.

(2) Waiver of privilege-Waiver of privilege means, an evidence of a privileged communication can be given by a spouse with the consent of party who made the communication.

(3) Suit or criminal proceeding between the two spouses-As the basis of section 122 is to preserve mutual confidence, it is obvious that the section does not apply when the spouses are ranged on opposite side.

(4) Communication made before marriage or after its dissolution.

(5) Proof of communication by third person-Communications or conversations between husband and wife taking place in the presence of a third person, or when overheard by a third person, can be testified to by the third person (without putting any of the spouses in the witness-box). This is so because privilege under section 122 is that of the parties to marriage, and not of others.

Unpublished official records

In certain case the State has been given privilege not to produce certain documents which relate to the "affairs of the State". Discuss the law relating to it.

Section 123 provides that:

123. Evidence as to affairs of State.-

No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

A reading of section 123 indicates that in order to claim privilege there must be certain pre-requisite conditions:

(1) the document must be an unpublished official record,

(2) it should relate to the affairs of the State, and

(3) it can be admitted in evidence with the permission of the head of the department concerned, who shall give

or withhold such permission.

Unpublished.-

The privilege is not available in respect of document which are already published. The reason is simple wherein the matter is already published the question of secrecy does not occur. *State of Uttar Pradesh v. Raj Narain*, MANU/SC/0032/1975 : AIR 1975 SC 865: (1975) 1 Serv LR 541: (1975) 4 SCC 428: (1975) 3 SCR 333. It was held by Apex Court that it cannot be said that the Blue Book is a published document. Any publication of a part of a Blue Book which may be described as innocuous part of the document will not render the entire document a published one.

Object and basis of Maxim 'salus populi suprema lex' is the basis of section 123.-

As a result of section 123 a document which is material and relevant is allowed to be withheld from the Court and that undoubtedly constitutes a very serious departure from the ordinary rule of evidence.

The principle on which this departure is justified is the principle of the overriding and paramount character of public interest. A valid claim for privilege made under section 123 proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and that where a conflict arises between public interest and private interest, the latter must yield to the former. Care has however to be taken to see that interests other than the interest of the public do not masquerade in the garb of public interest and take undue advantage of the provisions of section 123. Subject to this reservation, the maxim salus populi suprema lex which means that regard for public welfare is the highest law, is the basis of the provisions contained in section 123.

Privilege when should be claimed.-

A privilege against the production of document should not be claimed under section 123 because it is apprehended that the document if produced would defeat the defence raised by the state. In *State of Punjab v. Sodhi Sukhdev Singh*, MANU/SC/0006/1960 : AIR 1961 SC 493: (1961) 1 SCA 434: 1961 Mad LJ (Cri) 731: 1961 (2) SCJ 691: (1961) 2 Mad LJ (SC) 203: (1961) 2 SCR 371; the Supreme Court laid down the following guidelines in this regard:

- (1) it is a matter for the authority to decide whether disclosure would cause injury to the public interest. However, the Court would enquire into the question whether evidence sought to be excluded from production relates to State affairs.
- (2) the Court is bound to hold a preliminary enquiry into the character of the document. For this purpose, it may call the collateral evidence. In no case, can the court inspect the document itself.
- (3) the Court can't enquire into the possible injury to the public interest.

This decision was overruled by the Supreme Court.

In *State of Uttar Pradesh v. Raj Narain*, MANU/SC/0032/1975 : AIR 1975 SC 865: (1975) 1 Serv LR 541: (1975) 4 SCC 428: (1975) 3 SCR 333; wherein, the defendant quoted certain parts of the 'Blue Book' an official document (relating to security arrangements of the Prime Minister), and its production as an evidence, as it was not an unpublished document. The Court held that the disclosure of certain portions does not render it published, such portions may have no concern with 'affairs of State'.

The Supreme Court, in this case, laid down some authoritative propositions:

- (i) Foundation of law behind section 123 and section 162 is injury to public interest.
- (ii) Public interest which demands evidence to be withheld must be weighed against public interest in the administration of justice that the Courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, evidence cannot be admitted.

(iii)The 'confidentiality' of the matter has to be decided by the Head of the Department. However, the Court can summon any document notwithstanding any object under section 162 and can discuss the admissibility (as an evidence), and can get the help of translators to decide whether the document relates to the 'affairs of State'.

(iv)If the Court is satisfied with the reasons cited in affidavit, matter ends there.

(v)If not, the Court may inspect the document and if it finds that any part of the document is innocuous (not related to affairs of State) it could order disclosure of such part while ordering of the disclosure of innocuous part, the Court must seal the other part whose disclosure is undesirable.

In R.K. Jain v. Union of India, MANU/SC/0291/1993 : AIR 1993 SC 1769: 1993 AIR SCW 1899: 1993 (25) ATC 464: 1993 (3) Com LJ SC 1: JT 1993 (3) SC 297: (1993) 4 SCC 119: 1993 SCC (L&S) 1128: (1993) 3 SCR 802: 1993 (4) SCT 181: 1993 (3) Serv LR 376; the Supreme Court reaffirmed the above views, by observing that the Court can 'see in camera' and that no 'privilege' is available against the court (in other words, Court can examine the documents). In this case, the appointment was in accordance with amended Rules. The merits of the appointee and reasons behind the amendment were not permitted to be examined in a public interest litigation.

Sources of information as to offences

Section 125 says that:

125. Information as to commission of offences.-

No Magistrate or Police officer shall be compelled to say whence he got any information as to the commission of any offence, and no Revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Explanation.-"Revenue officer" in this section means an officer employed in or about the business of any branch of the public revenue.

This section is intended to encourage people to give information about offences by protecting the source of information, for otherwise, no one would like to give such information. It is well-established that the police may suppress the identity of the informants in the interest of combating crime.

Explanation says 'Revenue officer' in this section means any officer employed in or about the business of any branch of the public revenue.

Section 125 lays down that when a police officer or a Magistrate starts a case he cannot be compelled to say as to who gave him the information that the offence was being committed, and similarly a revenue officer cannot be asked as to where he got the information.

Professional Communications

A professional communication means a confidential communication between a professional (e.g., lawyer) and his client made to the former in the course, and for the purpose, of his employment as such adviser. The privilege attaching to confidential professional disclosures is confined to the case of legal advisers, and does not protect those made to clergymen, doctors, etc.

Section 126 of the Act provides as under:

126. Professional communications.-

No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the

purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure-

A, a client, says to B, an attorney - "I wish to obtain possession of property by use of forged deed on which I request you to sue." Is the communication made by A barred by law or expressly prohibited by law from disclosure? Decide.

(1) Any such communication made in furtherance of any illegal purpose;

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

Is the communication made by A barred by law or expressly prohibited by law from disclosure? Decide.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation.-The obligation stated in this section continues after the employment has ceased.

Illustrations

(a) A, a client, says to B, an attorney-"I have committed forgery, and I wish you to defend me".

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an attorney-"I wish to obtain possession of property by the use of a forged deed on which I request you to sue".

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

The main ingredients of section 126 are:

No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to-

(i) disclose any communication made to him by or on behalf of his client, or any advice given by him to his client in the course and for the purpose of his employment.

(ii) state the contents or conditions of any document with which he has become acquainted in the course and for the purpose of his employment:

Provided that nothing in this section shall not be protected from disclosure-

(1) any such communication made in furtherance of any illegal purpose,

(2) any fact observed by barrister, etc. in the course of employment showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact

by or on behalf of his client.

Legal practitioner not to disclose communication-By reason of the complexity of law, litigation can only be properly conducted by professional men. A litigant, in order to get a correct legal opinion and to make his vakil or pleader fully conversant with the facts of his case, has to make a clean breast.

A man of legal profession, is forbidden from disclosing without his client's consent (1) any communication made to him in course of and for the purpose of his employment, or (2) the contents of conditions of any document which came to his knowledge in the course of and for the purpose of his employment; or (3) any advice by him to his client in the course of and for the purpose of such employment.

In *N. Yovas v. Immanuel Jose*, MANU/KE/0001/1996 : AIR 1996 Ker 1: 1995 (2) Civ LJ 815: 1995 (2) DMC 296: 1996 (1) Hindu LR 312: 1996 (3) ICC 60: ILR 1995 (2) Ker 338: 1995 (1) Ker LJ 417: 1995 (1) Ker LT 626; the advocate of the opposite party was summoned as witness to prove: (1) that one of the plaintiffs sent a letter to him after the commencement of legal proceeding between the same party, (2) to prove that the said advocate suggested some compromise proposal to the plaintiff. The Kerala High Court held that the refusal to issue the summon to advocate was proper.

English and Indian Law-

The Law relating to professional communications between a legal practitioner and client is the same in India as in England with the exception that in England the words 'criminal purpose' are used for the words 'illegal purpose' used in section 126.

The rule is limited to legal adviser-

Legal advisers alone are within the rule. Barristers, attorneys, pleader, vakil and mukhtars are all prevented from disclosing the communication. No privilege attaches to communication to an attorney or pleader consulted as a friend and not as an attorney or pleader.

During the existence of the relationship-

The bar does not apply to communications made before the relationship came into existence or after it has ceased. But if the communication is made during the existence of the relationship the privilege does not get terminated by the termination of the litigation or the death of the parties.

Party's lawyer as a witness-

A party's counsel or lawyer is competent to depose for his client in the same case. But if he knew or had reason to believe that he might be an important witness, he should not have accepted the brief. It is unprofessional on the lawyer's part to cross-examine a witness as to facts within the lawyer's personal knowledge. Except for the ends of justice, a lawyer should avoid testifying court on behalf of his client. But he cannot be compelled to disclose confidential communications. The fact that he is the party's lawyer should not deprive that party of its lawyer's evidence in the case. The lawyer should retire from the case and then depose.

The privilege under section 126 is subject to few exceptions-

(1) Communications made in furtherance of illegal purpose (Proviso 1) - such communications are not protected [illustration (b)]

(2) Crime or Fraud since employment began (Proviso 2) - If a lawyer finds in the course of his employment that any crime or fraud has been committed since the employment began, he can disclose such information. [Illustration (c)]

(3) Disclosure with express consent of client - Waiver of privilege.

(4) Information falling into hands of third person - If the communication is overheard by a third person, he may be compelled to disclose it. The prohibition works against the lawyer but not against any other person.

(5) Lawyer's suit against client - If the lawyer himself sues the client for his professional services, he may disclose so much of the information as is relevant to the issue.

The bar of section 126 is partially lifted by section 129, when a client offers himself as a witness, he may be compelled to disclose such communication as may appear to the Court necessary to be known in order to explain any evidence which he has given, but not others.

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Chapter 10

Examination of witness

Order of producing witness

The order in which witnesses are to be produced is generally regulated by the law relating to civil and criminal procedure and, if on a particular point there is no provision, the matter shall be determined by the Court in the exercise of its discretion. The order in which witnesses are to be examined is to be decided by the party leading his evidence. Section 135 of the Act, provides the aforesaid principle in the following words:

135. Order of production and examination of witnesses.-

The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

In *Zahira Habibulla H. Sheikh v. State of Gujarat*, AIR 2004 SC 3114: 2004 Cr LJ 2050: 2004 AIR SCW 2325: 2004 (2) Crimes 213: MANU/SC/0322/2004 : (2004) 4 SCC 158: 2004 (3) SLT 91: (2004) 4 SCALE 375: 2004 SCC (Cri) 999: 2004 (3) Supreme 210: 2004 (2) UJ (SC) 1041 the Supreme Court held that non-examination of witness on ground that witness was untraceable was not justifiable and unusual conduct by prosecutor ought to be seriously taken note by Court.

Judge to decide admissibility of evidence

Section 136 of the Act provides that:

136. Judge to decide as to admissibility of evidence.-

When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced.

(c) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its

discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

Examination-in-chief

Section 137 of the Act, provides for the three stages of examination of witness in the following words:

137. Examination-in-chief.-

The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.-

The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.-

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Examination-in-chief

Every witness is first examined by the party who has called him, this is known as the examination-in-chief. Generally, this is done by the parties or their advocates questioning their witnesses and eliciting from them answers which build up the story set for in the plaint or written statement or by the prosecutor or defence respectively.

The object of examination-in-chief is to elicit the truth, to prove the facts which bear upon the issue in favour of the party calling the witness.

The witness can give evidence of fact only; and no evidence of law.

In *Gopal Saran v. Satyanarayan*, MANU/SC/0195/1989 : AIR 1989 SC 1141: 1989 MPRCJ 53: (1989) 3 SCC 56; it was held that party is not subjecting to cross-examination in spite of order of Court. It is not safe to rely on examination-in-chief.

In case of *Abuthagir v. State Rep. by Inspector of Police, Madurai*, MANU/SC/0968/2009 : AIR 2009 SC 2797: 2009 Cr LJ 3987: 2009 AIR SCW 4248: 2009 (2) ALD(CRL) 562: 2009 (3) Cur Cr R 304: 2009 (3) Mad LJ (Cri) 1016: (2009) 7 SCALE 585 it was held that delay in plausible explanation for delay in examination of witness was not ground to doubt the veracity of prosecution case.

Cross-examination

The order of examination of witness as laid down in section 138 of the Act. When the party calling a witness has finished the examination-in-chief, then witness is cross-examined by opposite party. Cross-examination, if properly conducted, is one of the most-useful and efficacious means of discovering the truth.

The purpose of cross-examination is, eliciting suppressed fact and to impeach the credit of a witness.

Cross-examination is not confined to matter proved in examination-in-chief, but it must be confined to relevant facts, the slightest examination-in-chief even for formal proof gives right to the cross-examiners to put questions about the whole of his case.

Effect of not cross-examining.-When a fact is stated in examination-in-chief and there is no cross-examination on that

point naturally it leads to the inference that the other party accepts the truth of the statement.

But there are five exceptions to this rule: (1) where the witness had notice before hand, (2) where the story itself is of an incredible or romantic character, (3) where the non-cross-examination is from the motive of delicacy, (4) where counsel indicates that he is not cross-examining to save time, (5) where, several witnesses are examined on the same points all need not be cross-examined.

Effect of witness's not presenting for cross-examination.-If a witness after being examining-in-chief does not appear to subject him to cross-examination his evidence becomes valueless and cannot be looked into.

Re-examination of witness:

The purpose of re-examination of witness is only to get clarifications of some doubts created in cross-examination. One cannot supplement examination-in-chief by way of a re-examination. Totally new facts cannot be introduced which have no concern with cross-examination; Pannayar v. State of Tamil Nadu, by Inspector of Police, MANU/SC/1462/2009 : AIR 2010 SC 85.

Re-examination

The party who called the witness may, if he likes and if it be necessary, re-examine him. The re-examination must be confined to the explanation of matters arising in cross-examination. The proper purpose of re-examination is by asking questions as may be proper to draw forth an explanation or meaning of expressions used by the witness in cross-examination, if they are doubtful.

New matters may, however, be introduced by permission of the Court, and if that is done, the adverse party has right to cross-examine the witness on that point.

Distinction between examination-in-chief, cross-examination and re-examination

Examination-in-chief	Cross-Examination	Re-Examination
1. Examination-in-chief is the examination of witness by a person calling him.	1. Cross examination is examination of witness by opposite party.	1. Re-examination is examination of witness to remove inconsistency which may have arisen during examination-in-chief and cross-examination.
2. The order of examination-in-chief is first.	2. The cross-examination is second in order.	2. The order of re-examination is last.
3. The purpose of examination-in-chief is to take such testimony for which he is called by party.	3. The purpose of cross-examination is to test the veracity of witness by impeaching his credit.	3. The purpose of re-examination is to remove inconsistency which may have arisen during examination-in-chief and cross-examination.
4. No leading question may be asked in examination-in-chief without permission of court.	4. Leading question can be asked freely in cross-examination.	4. Leading question cannot be asked in re-examination and no new matter should be introduced in re-examination without permission of Court.
5. Examination-in-chief is part and parcel of a judicial proceeding.	5. Cross-examination is most essential for extracting the truth and is essential part of judicial proceeding.	5. Re-examination is not necessary it is not essential part of judicial proceedings.

Order of Examination

The preceding section defines the various stages of examination of witness. Section 138 of the Act, lays down the order in which a witness is to be examined.

Section 138 says:

138. Order of examinations.-

Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.-

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Section 138 provides for that, both examination-in-chief and cross-examination must relate to relevant facts, but it is not necessary that cross-examination should be confined to the matters testified by the witness in examination-in-chief; *Salagram v. Emperor*, MANU/UP/0059/1936 : AIR 1937 All 171.

In *Sukhwant Singh v. State of Punjab*, MANU/SC/0305/1995 : AIR 1995 SC 1601: 1995 AIR SCW 2521: (1995) 3 SCC 367; it was held that, tendering a witness for cross-examination without examination-in-chief is not permissible.

Direction of re-examination.-

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if, new matter is; by permission of the Court, introduced in re-examination, the adverse party may further cross-examination upon that matter.

Cross-examination of person called to produce a document

Section 139 of the Act provides that:

139. Cross-examination of person called to produce a document.-

A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

According to this section, a person may be summoned to produce a document without being summoned to give evidence. And any person summoned to produce a document may comply the order only by sending the document. Such witnesses will not be cross-examined unless and until they give some oral statement.

In *Parmeshwari Devi v. State*, MANU/SC/0174/1976 : AIR 1977 SC 403: 1976 Cr LR (SC) 553: 1977 Cr LJ 245: MANU/SC/0174/1976 : (1977) 1 SCC 169: 1977 SCC (Cri) 74: 1977 BBCJ (SC) 72: (1977) 1 SCWR 423: (1977) 2 SCR 160 the Supreme Court held that even if a person produces the document for which a summons had been issued to him section 139 clearly provides that he does not thereby become a witness by the mere fact that he produced it and he could not be cross-examined unless and until he is called as a witness.

Question by party to his own witness

Section 154 says that:

154. Question by party to his own witness.-

(1) The Court may, in its discretion, permit the person who calls a witness to put any question to him

which might be put in cross-examination by the adverse party.

(2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness.

Section 154 allows a party, with the permission of the court to cross-examine his own witness in the same way as the adverse party. Such cross-examination means that he can be asked (a) leading question under section 143, (b) questions relating to his previous statement in writing under section 145, and (c) questions which tend to test his veracity, to discover who he is and what is his position in life or to shake his credit under section 146.

Adverse or hostile witness:-

As seen before under this section the party calling a witness may, with the permission of the Court, put leading question and cross-examine him. It frequently happens that a witness who has been called in the expectation that he will speak to the existence of a particular state of facts, pretends that he does not remember those facts or deposes entirely different to what he was expected to depose. In such cases the question arises whether by the conduct of the witness the party producing him is entitled to cross-examine.

Such witness have sometimes been called 'adverse', 'unfavourable' or 'hostile' witness.

An adverse witness is one who does not give in evidence what the party calling him wished him to give.

The distinction must be drawn between 'true witness' and 'hostile witness'. If the exhibition of hostile witness is sole test declaring witness adverse, the object would be frustrated in many cases. A shrewd and composed witness might be concealing his real sentiment or hostile attitude give unfavourable evidence and make statement contrary to the facts known to him merely giving unfavourable evidence cannot also be enough to declare the witness hostile because he might be telling truth which might go against party calling him.

A hostile witness is described as one who is not desirous of telling the truth at the instance of party to prove a particular fact, who fails to prove such fact or proves an opposite fact; *Sat Paul v. Delhi Administration*, MANU/SC/0203/1975 : AIR 1976 SC 294: 1975 Cr LR (SC) 597: 1976 Cr LJ 295: MANU/SC/0203/1975 : (1976) 1 SCC 727: 1976 SCC (Cri) 160: 1976 MPLJ 206: ILR 1976 Kant 720: (1976) 2 SCR 11: (1976) 3 Cr LT 121.

In case of *Mallappa Siddappa Alakanur v. State of Karnataka*, MANU/SC/1120/2009 : AIR 2009 SC 2959: 2009 AIR SCW 4726: 2009 (3) All Cr R 2412: 2009 (3) Crimes 230: 2009 (6) Kant LJ 177: (2009) 9 SCALE 159, in FIR the witness stated that when he went near land in question accused persons attached boy and committed his murder. During his evidence, however, he stated that accused persons had already assaulted and murdered deceased before he and his son reached spot. He had also very specifically stated that he had not seen accused persons cutting neck of deceased. It was held by the court that this was no reason to declare him hostile.

Enmity of witness

It is well-settled principle of law that enmity is a double edged sword. It can be a ground for false implication. It also can be ground for assault. Therefore a duty is cast upon the Court to examine the testimony and inimical witnesses with due caution and diligence; *Rama Shish Rai v. Jagdish Singh*, MANU/SC/0976/2004 : AIR 2005 SC 335: 2005 Cr LJ 669: 2004 AIR SCW 6713: 2004 (4) Crimes 306: JT 2004 (10) SC 594: 2005 (30) OCR 82: (2005) 10 SCC 498: 2005 (1) SCJ 143: 2004 (6) SLT 748: (2004) 9 SCALE 473: 2005 SCC (Cri) 1611: 2004 (8) Supreme 54.

Question tending to corroboration

Section 156 of the Act provides that:

156. Questions tending to corroborate evidence of relevant fact, admissible.-

When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would

corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

When the evidence of a witness requires to be corroborated, he may be questioned, apart from the main event, as to any circumstances which he observed at or near to the time or place where the main fact happened. The Court may permit this kind of question if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness with reference to the relevant fact.

Former statement as corroboration

Section 157 of the Act says that:

157. Former statements of witness may be proved to corroborate later testimony as to same fact.-

In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

In *Ramprasad v. State of Maharashtra*, MANU/SC/0365/1999 : AIR 1999 SC 1969: 1999 Cr LJ 2889: 1999 AIR SCW 1657: 1999 (3) Crimes 96: JT 1999 (4) SC 74: 1999 (17) OCR 181: (1999) 5 SCC 30: 1999 (7) SRJ 39: (1999) 3 SCALE 623: 1999 SCC (Cri) 651: 1999 (5) Supreme 554; the Supreme Court observed that the section 157 of Evidence Act, permits of proof of any former statement by a witness relating to the same fact before any authority legally competent to investigate the fact but its use is limited to corroboration of the testimony of witness.

In *Sashi Jena v. Khadal Swain*, MANU/SC/0106/2004 : AIR 2004 SC 1492: (2004) 4 SCC 236: 2004 Cr LJ 1394: 2004 AIR SCW 819: 2004 (2) Crimes 153: JT 2004 (2) SC 339: 2004 (27) OCR 747: 2004 (2) SLT 650: 2004 (3) SRJ 507: (2004) 2 SCALE 348: 2004 SCC (Cri) 1077: 2004 (2) Supreme 140; it was held by the Supreme Court that, the former statement of witness could be used to corroborate only his own evidence at the trial and not that of any other witnesses.

In *Ramashray Yadav v. State of Bihar*, MANU/SC/2514/2005 : AIR 2006 SC 201: 2006 Cr LJ 133: 2005 AIR SCW 5710: 2005 (4) Crimes 214: JT 2005 (9) SC 437: (2005) 13 SCC 468: 2006 (1) SCJ 678: 2006 (1) SRJ 153: (2005) 9 SCALE 229: 2006 SCC (Cri) 267: 2005 (7) Supreme 528, it was held by the Supreme Court that if the testimony of witness who had reached immediately after incident had happened and to whom brother of deceased had narrated, incident and the role played by accused persons lend complete. Corroboration with other witness and was admissible as evidence.

Refreshing memory

Section 159 of the Act allows that:

159. Refreshing memory.-

A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.-Whenever a witness may refresh his

memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

In *State of Karnataka v. K. Yarappa Reddy*, MANU/SC/0633/1999 : AIR 2000 SC 185: 2000 Cr LJ 400: 1999 AIR SCW 4276: 1999 (3) Crimes 171: JT 1999 (8) SC 10: (1999) 8 SCC 715: 1999 (10) SRJ 172: (1999) 6 SCALE 330: 2000 SCC (Cri) 61: 1999 (8) Supreme 496; it was held by the Supreme Court that, when Investigating Officer wanted to check up his records as he could not remember without refreshing his memory in his examination-in-chief then objection by defence was untenable.

In *Sodhi Pindi Das v. Emperor*, AIR 1938 Lah 629, it had been held that it was essential that the witness must state orally before the Court that although he had no specific recollection of the facts themselves, he was sure that the facts were correctly recorded in the document.

In England the Law of evidence has been changed and many of such documents in respect of refreshing memory made directly admissible (Phipson on Evidence, 10th Edn., Ch. 22).

It is not necessary that a witness should specifically state that he has no specific recollection of the facts and that he is sure that the facts were correctly recorded in the document, before the document can be used; *Kanti Prasad Jayshanker Yagnik v. Purshottamdas Ranchhoddas Patel*, MANU/SC/0263/1969 : AIR 1969 SC 851: (1969) 3 SCR 400.

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Chapter 11

Problems and Solutions on the Indian Evidence Act, 1872

Q. 1. Sadhu Ram and Raju are jointly on their trial for the murder of one Jitender. During the trial, it is proved that Raju said, "Sadhu Ram and I killed Jitender". One Rakesh who is known as a friend of Sadhu Ram, also said during the trial that "Sadhu Ram, Raju and I killed Jitender". There is also evidence to show that Rakesh too was involved in the murder.

State whether the statements made by Raju and Rakesh can be taken into consideration as against Sadhu Ram and also against Raju and Rakesh themselves?

Ans. Section 30 of the Evidence Act, provides that when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who make such confession.

Thus in the instant problem the confession of Raju can be taken into consideration as against Sadhu Ram and Raju as they are tried jointly. But the confession made by Rakesh may not be taken into consideration by the Court as he is not tried jointly with Sadhu Ram and Raju. (Illustration to section 30)

But it is to be noted that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, nor can it be called in aid to supplement evidence and in no case can it be used to fill-up the gaps in the prosecution evidence; *Indra Mohan v. State of Assam*, 1982 Cr LJ (NOC) 127 (Gau).

Q. 2. Ratan Seth was murdered in open daylight in his jewellery shop in the College Road of Faridpur Town. One Pravin was alleged to have committed the murder. During the trial of Pravin in the aforesaid murder case, the prosecution produced, among others, Sanjay as a witness who deposed that at the time of the incident he was going through the College Road on his by-cycle and when he saw a gathering of people in front of the jewellery shop of Ratan Seth, he enquired from one Babin who was present there and is also known to him as to what has happened. Then Babin informed Sanjay that just few minutes ago Pravin has murdered Ratan Seth and ran away thereafter.

State whether the statement of Sanjay is admissible as an evidence against Pravin? Give reasons supporting your answer.

Ans. No, the statement of Sanjay cannot be admitted as an evidence against Pravin because section 60 of the Evidence Act provides that oral evidence must, in all cases, be direct, that is to say, if it relates to a fact which could be seen, it must be the evidence of a witness who says he saw it.

Here in the instant case, whatever Sanjay had deposed was told to him by Babin and Sanjay himself did not see Pravin murdering Ratan Seth. This type of evidence is called hearsay evidence and such evidence is not admissible as evidence.

Thus when a witness testifies as to the information having been given to him by another and the latter is not examined, the testimony of the witness is not admissible being hearsay; *State (Collector, Central Excise) v. Papas Kumar Shome*, 1985 Cr LJ 871: 1984 (2) Crimes 190: 1984 (58) Cut LT 127: 1985 (5) ECC 23: MANU/OR/0209/1984 : 1984 (18) ELT 278 (Ori).

Q. 3. Naresh is accused of defaming Abhinav by publishing a statement. Is the fact that on a previous occasion also Naresh defamed Ramesh by publishing a defamatory statement relevant?

Ans. Yes, as per section 14 of the Evidence Act, the fact is relevant.

Section 14 of the Evidence Act provides that facts showing the state of mind like intention, ill-will etc. are relevant. Further, Explanation 1 of this section states that existence of state of mind should not be general but regarding a

particular matter which is in question.

In the present problem, the act of Naresh of defaming Ramesh by publishing a statement on a previous occasion, shows the ill-will on the part of Naresh towards Ramesh. It proves Naresh's intention to harm Ramesh's reputation by the particular publication in question. Thus this fact is relevant under section 14 read with Explanation 1.

Q. 4. Bablu, an accused of an offence of murder stated before a police officer that, "the knife by which I killed Ramesh has been hidden by me in the field, which I can show." On this information the police officer discovers the said knife from the field, on which human blood is detected. Is the statement given by the accused admissible in evidence? Whether any part of such statement is admissible in evidence? Give reasons supporting your answer.

Ans. Section 25 of the Evidence Act provides that no confession made to a police officer shall be proved as against a person accused of any offence. Section 26 provides that no confession made by any person whilst he is in the custody of a police officer shall be proved as against such person, unless it should be made in the immediate presence of a Magistrate.

However, section 27 of the Evidence Act lays down that when any fact is discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information as relates distinctly to the fact thereby discovered, may be proved. Whether it amounts to a confession or not. Thus under section 27, an information which even if amounted to a confession and was made to a police officer under any circumstances, so much of the information as strictly relates to the discovery of facts is admissible as evidence. In *Bodh Raj v. State of Jammu and Kashmir*, AIR 2002 SC 316: AIR 2002 SC 3164: 2002 Cr LJ 4664: 2002 AIR SCW 3655: 2002 (4) Crimes 182: MANU/SC/0723/2002 : (2002) 8 SCC 45: 2002 (4) SCJ 128: 2002 (5) SLT 111: 2002 (8) SRJ 477: (2002) 6 SCALE 266: 2003 SCC (Cri) 201: 2002 (6) Supreme 132, it was held that the exact information given by the accused which leads to discovery of the incriminating article may be proved against such person and such information can become the basis of convicting the accused. In *Delhi Administration v. Balakrishnan*, MANU/SC/0093/1971 : AIR 1972 SC 3: 1972 Cr LJ 1: 1972 (1) SCJ 347: 1972 Mad LJ (Cri) 205: MANU/SC/0093/1971 : (1972) 4 SCC 659, the apex Court held that a statement even by way of confession made in the police custody which distinctly relates to facts discovered is admissible in evidence against the accused.

In the instant problem, the portion of the statement, "the knife by which I killed Ramesh" is admissible in evidence.

Q. 5. Gautam gives his house on lease to Amar on 3-7-2005 by a written and registered lease deed comprising its terms. The lease deed was in possession of Amar. After a few months Amar stopped paying rent to Gautam. Thereafter Gautam filed a suit for arrears of rent and for ejectment. Gautam alleges that the tenancy was from month to month and that the rent was fixed at Rs. 3200 per month. On the other hand Amar contends that the tenancy ran from year to year and the rent was settled between the parties to be Rs. 20,000 per year. During the proceeding Amar said that the original lease deed which was in his possession is lost.

Whether oral evidence as to the contents of the lease deed will be admissible in the instant case?

Whether any other evidence as to the contents of the lease deed is necessary to produce for proving the contentions?

Ans. Section 91 of the Evidence Act provides that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the term of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible.

Section 65(c) provides that secondary evidence may be given of the existing condition or contents of a document 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.

Thus in the instant problem oral evidence as to the contents of the lease deed is not admissible as evidence, under

section 91 of the Evidence Act, because the term of the lease was reduced to writing and for proving the contents thereof, the lease deed must be produced in original.

Secondly, as the lease deed which was in possession of Amar is lost, the secondary evidence as to the contents thereof can be produced by taking recourse to section 65(c) of the Act and Gautam may obtain a certified copy of the lease deed from the Registration Department and produce the same as secondary evidence in the Court.

Q. 6. Srinivasan was facing his trial on the charge of murdering one Krishna Kant Reddy. The prosecution produces one Gopalaswami as one of the witnesses who deposed that he saw Srinivasan running away from the place of occurrence with a blood stained sword in his hand and there were also spots of blood in the clothes of Srinivasan. The defence counsel suspected that Gopalaswami was lying, because he knew Gopalaswami to be a dishonest person and that he was removed from the job on the ground of dishonesty.

Therefore, during cross-examination of the said Gopalaswami, the defence Counsel in order to nullify the credibility of the evidence given by Gopalaswami, puts to him a question that whether he was not removed from his job for dishonesty.

In reply, Gopalaswami denied. The defence Counsel then proceeds to show evidence that he is so dismissed.

State, whether such evidence will be admissible in order to prove Gopalaswami as a liar and dishonest man and thereby reduce the credibility of the evidence given by him? Support your answer with appropriate provision of law.

Ans. No, the evidence produced by the defence Counsel to show that Gopalaswami is a dishonest man is not admissible as evidence under section 153 of the Evidence Act.

Section 153 of the Act provides that when a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him, but if he answers falsely, he may afterwards be charged with giving false evidence.

This section is based on the principle that, if questions are allowed to be asked merely to discredit a witness by injuring his character, it will result in the introduction of matters altogether foreign to the enquiry, and that if controversy about the matters so introduced is allowed, the court would be occupied with deciding not the merits of the case but merits of the witness and, thus the suit might be indefinitely protracted. (Batuk Lal, Law of Evidence).

Q. 7. Anil married Sudipa on 12-1-05. After about 5 months of their marriage on 25-6-05, Sudipa gave birth to a child. Who is legally the father of the child?

Ans. Section 112 of the Evidence Act provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Thus under section 112 of the Act the point of time of birth of the child is made the deciding factor in determining the legitimacy of the child and not the time of conception; Palani v. Sethu, MANU/TN/0712/1924 : AIR 1924 Mad 677. Under section 112 of the Act, the presumption of legitimacy is conclusive even if birth takes place so soon after marriage that the child must have been begotten before it. In such a case the marriage in spite of the fact of pregnancy is considered as an acknowledgement that the child to be born is the husband's.

Thus in the instant problem Anil is legally the father of the child.

Q. 8. On 3-5-2000, Ramakant took the house "Prakash Villa", on rent from one Hariram and since then Ramakant was residing there and has been paying rent regularly. On 26-3-2002, Ramakant came to know that Hariram has no title to the house "Prakash Villa" because of the following facts:-

(a) Hariram is the son of the second wife Smt. Rani of Prakash and Prakash was the owner of the said house "Prakash Villa". The marriage of Rani took place with Prakash during the life time and without the consent of his first wife and as such the marriage was null and void.

(b)After the death of Prakash in 7-4-1995, Hariram was in occupation of the house "Prakash Villa". Which was neither donated nor bequeathed by any Will to Hariram.

Thereafter, Ramakant stopped paying rent to Hariram, but continued to stay in "Prakash Villa". Hariram filed a suit for eviction of Ramakant on the ground of default of payment of rent. Ramakant contended that as Hariram is not the legal owner of the house, he is neither entitled to receive rent nor entitled to evict Ramakant.

Will Ramakant succeed? Give reasons supporting your answer.

Ans. No, Ramakant will not succeed because section 116 of the Evidence Act lays down that no tenant of immovable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property.

In *Bilas Kunwar v. Desraj Ranjit Singh*, AIR 1915 PC 96, the Privy Council observed that a tenant who has been let into possession cannot deny his landlord's title, however, defective it may be, so long as he has not openly restored possession by surrender to his landlord. Similar view has been expressed by the Supreme Court in many cases. In a very recent case *Bhogadi Kannababu v. Vuggina Pydamma*, MANU/SC/2687/2006 : (2006) 5 SCC 532: AIR 2006 SC 2403: 2006 AIR SCW 3052: 2006 (2) Cur CC 293: 2006 (3) JCR SC 101: MANU/SC/2687/2006 : (2006) 5 SCC 532: 2006 (6) SCJ 414: 2006 (6) SRJ 236: (2006) 5 SCALE 642: 2006 (4) Supreme 329, the Supreme Court held that even if the landlord does not have any title to the rented property, he can maintain an application for eviction and obtain a decree/order of eviction on the ground of default in payment of rent and sub-letting.

Q. 9. Anant, a client says to Pushpita, an Advocate, that he has committed rape on a girl named Rakhi and wishes to be defended by her. Pushpita says to Anant that he has committed the most serious crime under IPC and in her view capital punishment should be awarded to a rapist and that she will give evidence against him. During trial Pushpita appears as witness to give evidence against Anant regarding commission of rape. Should the Court record Pushpita's evidence? Give reasons and also refer to relevant provisions, if any, under the Evidence Act.

Ans. No, the court must not record the evidence of Pushpita against Anant, because section 126 of the Evidence Act lays down that no barrister, attorney, pleader or vakil shall at any time be permitted to disclose any communication made to him by his client during the course and for the purpose of his professional employment.

In the present case Anant communicated to Pushpita regarding the rape committed by him on Rakhi, during the course and for the purpose of employment of Pushpita as his counsel. Therefore under section 126 of the Evidence Act, Pushpita must not be allowed to give evidence against Anant. Here it is immaterial that in view of the Advocate (i.e. Pushpita), the offence of rape is a serious crime under IPC and capital punishment should be awarded to a rapist.

Q. 10. Raghbir Prasad died leaving behind his widow Smt. Narayani. They had no children. Few months after the death of Raghbir Prasad, one Vineet files a suit against Smt. Narayani for declaration that he is the owner of half the property left by Raghbir Prasad being his adopted son. Smt. Narayani denies the factum of adoption.

State on whom the onus of proof lies? Whether the onus lies on Smt. Narayani to show that Vineet was not adopted by Raghbir Prasad or whether the same lies on Vineet to show that he was so adopted by Raghbir Prasad? Support your answer with appropriate provisions of law.

Ans. Section 101 of the Evidence Act lays down that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

In the present case, it is Vineet who asserts that he was adopted by Raghbir Prasad and by reason of such adoption, he became entitled to half of the property of late Raghbir Prasad. Therefore, the onus of proof lies on Vineet to show that he was adopted by Raghbir Prasad and not on Smt. Narayani to show that he was not so adopted by the said Raghbir Prasad.

Q. 11. In a criminal case involving 49 Accused persons and 56 prosecution witnesses, the majority of witness did not depose some accused persons. And some of the charges were proved and majority of charges was not

corroborated. But all the circumstantial evidence were present along with fact and circumstances of the case to prove guilty of all accused persons.

State logically what type of view and observations can be made by the Court. Such a situation to prosecute or not to prosecute 49 accused persons in the same case?

Ans. In a case before a court, the Court concerned takes a lenient view of all the facts, circumstances and evidence corroborating the charges framed by police and allegations made in F.I.R. etc., in a Criminal Case. Then it comes to conclusion on the basis of both criminal laws and constitutionalism keeping in mind the justice to parties.

In this case, the different juridical. Senses and issues are required to be examined by the Court concerned.

Normally, it is not in practice to consider each and every individual evidence available. Hence the court has to make an exception in this case since it involves certain alleged odious deeds of few individuals.

In order to import full and impartial justice the exception is must. Further the criminal jurisprudence entails that a thorough appereceation of records needs to be done in order to do a complete justice.

Again in a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its credibility. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence it most caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all witnesses. It is also fact that in criminal jurisprudence the evidence has to be evaluated on the touch stone of consistency. Such consistency is the keyword for upholding the conviction of accused.

In case of Suraj Singh v. State of Uttar Pradesh, (2008) 11 SCR 286: AIR 2009 SC (Supp) 631, may be referred here in this case. Where the court observed that:

"The evidence must be tested for its inherent consistency and the inherent probability of the story, consistency with the account of other witness is held to be creditworthy. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

Hence on all these grounds in this case of insolvency of large number of accused and large number of witness, the court has to prosecute only the accused person, all the facts and circumstance have been proved in the scale of corroborative evidence of the witnesses and at the same time to acquit to them against whom, the benefit of doubt supports and allegations are not proved in full and final extent.

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Table of Cases

A

A. Raghavamma v. A. Chenchamma, MANU/SC/0250/1963 : AIR 1964 SC 136: (1964) 1 SCA 593: (1964) 2 SCR 933	125
Abdul Razak Murtaza Dafadar v. State of Maharashtra, MANU/SC/0091/1969 : AIR 1970 SC 283: 1969 (2) SCJ 870: 1969 Mad LJ (Cri) 862: 1970 Cr LJ 373: (1970) 1 SCA 535: (1970) 1 SCR 551: 1970 MPLJ 932: 1970 Mah LJ 747	12
Abdulla Mohammed Pagarkar v. State (Union Territory of Goa, Daman and Diu), (1980) 3 SCC 110: AIR 1980 SC 499: 1980 Cr LJ 220: 1980 All Cr C 302: 1980 SCC (Cri) 546: 1979 Cr App R (SC) 349: 1979 Cr LR (SC) 683: (1980) 1 SCR 604	125
Abuthagir v. State Rep. by Inspector of Police, Madurai, MANU/SC/0968/2009 : AIR 2009 SC 2797: 2009 Cr LJ 3987: 2009 AIR SCW 4248: 2009 (2) ALD(CRL) 562: 2009 (3) Cur Cr R 304: 2009 (3) Mad LJ (Cri) 1016: (2009) 7 SCALE 585	172
Aghnoo Nagesia v. State of Bihar, MANU/SC/0079/1965 : AIR 1966 SC 119: (1965) 2 SCA 367: (1965) 2 SCWR 750: 1966 Cr LJ 100: 1966 MPLJ 49: 1966 (1) SCJ 193: 1966 SCD 243: (1966) 1 SCR 134	72
Akbar Sheikh v. State of West Bengal, MANU/SC/0746/2009 : (2009) 7 SCC 415	45
All India Anna Dravida Munnetra Kazhagam v. L.K. Tripathi, MANU/SC/0509/2009 : AIR 2009 SC 1314: 2009 AIR SCW 2424: 2009 (2) Cur Cr R 659: 2009 (5) Mad LJ 782: 2009 (2) Rec Cr R 658: MANU/SC/0509/2009 : (2009) 5 SCC 417: (2009) 4 SCALE 547: 2009 (2) SCC (Cri) 673	8, 11
All India Anna Dravida Munnetra Khazagam v. State Election Commissioner, AIR 2007 (NOC) Mad 1801	27
Allah Baksh v. Crown, 1951 FCR 193	80
Ambika Prasad Thakur v. Ram Ekbal Rai, AIR 1966 SC 605: (1966) 1 SCA 35: 1966 BLJR 147: 1966 SCD 485: (1966) 1 SCR 758	55
Amrit Banaspati Co. Ltd. v. Union of India, MANU/SC/0249/1995 : AIR 1995 SC 1340	127
Andhra Pradesh State Road Transport Corporation, Hyderabad v. P. Venkaiah, MANU/SC/0676/1997 : (1997) 10 SCC 128: AIR 1997 SC 2600: 1997 AIR SCW 2556: JT 1997 (5) SC 362: 1997 (2) LACC 35: 1997 (2) Land LR 257: 1997 (2) SCJ 35: (1997) 3 SCR 1054: (1997) 4 SCALE 154: 1997 (4) Supreme 606	110
Appu alias Ayyanar Padayachi v. State, MANU/TN/0177/1971 : AIR 1971 Mad 194: 1970 Mad LW (Cri) 239:(1971) 2 Mad LJ 53: 1971 Mad LJ (Cri) 432: 1971 Cr LJ 615	33
Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd., MANU/SC/0169/1984 : AIR 1985 SC 330: (1985) 1 SCC 260: 1985 (1) Land LR 443: 1985 SCC (Tax) 75: (1985) 1 Andh LT 257: 1985 UJ (SC) 368: (1985) 58 Comp Cas 145: (1985) 2 SCR 190	104
Avadh Kishore Dass v. Ram Gopal, MANU/SC/0003/1978 : AIR 1979 SC 861: 1979 UJ (SC) 251: (1979) 4 SCC 790	55
Awadesh v. State of Uttar Pradesh, MANU/SC/0077/1995 : AIR 1995 SC 375: JT 1994 (7) SC 694: (1995) 1 SCC 200:1994 AIR SCW 4572: 1994 (3) Crimes 283: 1995 (2) Cur Cr R 16: 1994 SCC (Cri) 1676	32

B

Badri Rai v. State of Bihar, MANU/SC/0047/1958 : AIR 1958 SC 953: 1958 Cr LJ 1434: 1959 Mad LJ (Cri) 25:1958 All LJ 909: 1959 SCJ 117: 1959 SCA 315: MANU/SC/0047/1958 : 1959 SCR 1141	41
Bai Hira Devi v. Official Assignee of Bombay, MANU/SC/0001/1958 : AIR 1958 SC 448: 1958 SCJ 766:(1958) 2 Andh WR (SC) 108: 60 Bom LR 932: (1958) 2 MLJ (SC) 108: 1959 SCA 136: MANU/SC/0001/1958 : 1958 SCR 1384	122
Bal Krishna Das Agrawal v. Radha Devi, MANU/SC/0173/1989 : AIR 1989 SC 1966	92
Balakishan A. Devidayal v. State of Maharashtra, MANU/SC/0112/1980 : AIR 1981 SC 379: 1980 Cr LJ 1424: 1980 SC Cr R 421: 1980 Cr LR (SC) 588: (1981) 1 APLJ (SC) 17: 1980 BBCJ (SC) 131: MANU/SC/0112/1980 : (1980) 4 SCC 600: 1981 SCC (Cri) 62: (1981) 1 SCR 875	62
Balaram Agasti v. Ramesh Chandra Mohanty, MANU/OR/0005/1973 : AIR 1973 Ori 13	120
Baljeet Singh v. State of Haryana, MANU/SC/0159/2004 : AIR 2004 SC 1714: 2004 AIR SCW 1230: 2004 (2) Crimes 285:JT 2004 (3) SC 93: (2004) 3 SCC 122: 2004 (2) SLT 320: 2004 (3) SRJ 561: (2004) 2 SCALE 632: 2004 SCC (Cri) 692: 2004 (2) Supreme 279	139
Balmokand v. Emperor, AIR 1915 Lah 16	39
Balram Singh v. State of Punjab, MANU/SC/0393/2003 : AIR 2003 SC 2213: 2003 AIR SCW 2656: 2003 (3) Crimes 43:JT 2003 (4) SC 569: (2003) 11 SCC 286: 2003 (3) SLT 601: (2003) 4 SCALE 561: 2004 SCC (Cri) 149: 2003 (3) Supreme 749	34
Bami Bewa v. Krushna Chandra Swain @ Gochhayat, MANU/OR/0246/2003 : AIR 2004 Ori 14: 2004 (1) CLR 105: 2004 (1) Civil Court C 543	99
Bapu Rao v. State of Maharashtra, AIR 1968 SC 855	82
Basant Singh v. Janki Singh, MANU/SC/0284/1966 : AIR 1967 SC 341: 1967 BLJR 27: 1967 All LJ 1: (1967) 1 SCWR 125:1967 (1) SCJ 476: 1967 SCD 399: (1967) 1 SCR 1	55
Basanti v. State of Himachal Pradesh, MANU/SC/0285/1987 : (1987) 3 SCC 227: AIR 1987 SC 1572: 1987 Cr LJ 1869: 1987 (1) Supreme 542: JT 1987 (2) SC 281: 1987 SCC (Cri) 483: 1987 Cr LR (SC) 302: 1987 All Cr C 442	27
Bhagbaticharan v. Emperor, (1893) 60 Cal 719	58
Bhagirathi v. State of Andhra Pradesh, MANU/MP/0009/1959 : AIR 1959 MP 17	67
Bhagwan Dass v. State, MANU/SC/0037/1957 : AIR 1957 SC 589: 1957 Cr LJ 889: 1957 SCJ 515: 1957 MPC 564: 1957 SCC 308: 1957 SCA 836: 1957 BLJR 678: 1957 All LJ 722	82
Bhagwan Swarup Lal Bishan Lal v. State of Maharashtra, AIR 1965 SC 682: (1964) 2 SCR 378: 1964 (2) SCJ 771: (1965) 1 Cr LJ 608	39, 40
Bharat Singh v. Mst. Bhagirathi, MANU/SC/0362/1965 : AIR 1966 SC 405: 1966 SCD 153: (1966) 1 SCWR 222:1966 (2) SCJ 53: (1966) 1 SCR 606	56
Bhogadi Kannababu v. Vuggina Pydamma, MANU/SC/2687/2006 : (2006) 5 SCC 532: AIR 2006 SC 2403: 2006 AIR SCW 3052: 2006 (2) Cur CC 293: 2006 (3) JCR SC 101: MANU/SC/2687/2006 : (2006) 5 SCC 532: 2006 (6) SCJ 414: 2006 (6) SRJ 236: (2006) 5 SCALE 642: 2006 (4) Supreme 329	183
Bhuboni Sahu v. Emperor	147
Bilas Kunwar v. Desraj Ranjit Singh, AIR 1915 PC 96	183
Binay Kumar Singh v. State of Bihar, MANU/SC/0088/1997 : AIR 1997 SC 322: 1997 Cr LJ 362: 1997 AIR SCW 78: JT 1996 (10) SC 79: 1997 (12) OCR 374: (1997) 1 SCC 283: 1997	43

SCC (Cri) 333

Bipin Shantilal Panchal v. State of Gujarat, AIR 2001 SC 1158: 2001 Cr LJ 1254: 2001 AIR SCW 841: 2001 (1) Crimes 288: JT 2001 (3) SC 120: (2001) 3 SCC 1: 2001 (1) SCJ 460: 2001 (3) SRJ 437: (2001) 2 SCALE 167: 2001 SCC (Cri) 417: 2001 (2) Supreme 65: 2001 (1) UJ (SC) 573	23
Biswanath Prasad v. Dwarka Prasad, MANU/SC/0006/1973 : (1974) 1 SCC 78: AIR 1974 SC 117: 1974 SCD 134:1974 (1) SCJ 564: (1974) 2 SCR 124	56
Bodh Raj v. State of Jammu and Kashmir, MANU/SC/0723/2002 : AIR 2002 SC 3164: 2002 Cr LJ 4664: 2002 AIR SCW 3655: 2002 (4) Crimes 182: MANU/SC/0723/2002 : (2002) 8 SCC 45: 2002 (4) SCJ 128: 2002 (5) SLT 111: 2002 (8) SRJ 477: (2002) 6 SCALE 266: 2003 SCC (Cri) 201: 2002 (6) Supreme 132	180
Boyse v. Roosbarough, 6 HLC 42	37
Brain v. White Raven and Furnem Junction Ry., (1850) 3 HLC 1	2
Brijbasi Lal Shrivastava v. State of Madhya Pradesh, MANU/SC/0090/1979 : AIR 1979 SC 1080: 1979 Cri LR (SC) 123: 1979 Cur LJ (Cri) 162: 1979 UJ (SC) 314: 1979 Cr LJ 913: 1978 Serv LC 160: MANU/SC/0090/1979 : (1979) 4 SCC 521	59
Buridi v. Venkata, MANU/AP/0398/2010 : AIR 2010 AP 172	138
Butterley Co. v. New Hucknall Colliery Co., (1909) 1 Ch 37	3

C

C.P. Agarwal v. P.O., Labour Court, MANU/SC/0906/1997 : (1996) 11 SCC 97: AIR 1997 SC 3655: 1997 Lab IC 1496: 1997 AIR SCW 1338: JT 1996 (9) SC 729: 1997 (3) LLJ 788: 1997 (2) LLN 7: 1997 SCC (L&S) 370: 1997 (1) Supreme 288: 1997 (1) UJ (SC) 284	109
Calcutta Municipal Corpr. v. Pawan Kamar, MANU/SC/0011/1999 : AIR 1999 SC 738	21
Chandrakant Ratilal Mehta v. State of Maharashtra, 1993 Cr LJ 2863: 1993 (3) Bom CR 99	45
Chandramathi v. Pazhetti Balan, MANU/KE/0014/1982 : AIR 1982 Ker 68: (1982) 1 DMC 256	137
Chet Ram v. Manjoor Hasan, AIR 1954 AP 441	129
Chhaganlal Keshavlal Mehta v. Patel Narandas Haribhai, MANU/SC/0353/1981 : (1982) 1 SCC 223: AIR 1982 SC 121: 1982 UJ (SC) 120: 1982 All LR 108: 1982 (1) 23 Guj LR 325: 1982 Mah LR (SC) 108:1982 BBCJ (SC) 119:	151
Chhotanney v. State of Uttar Pradesh, MANU/SC/0246/2009 : AIR 2009 SC 2013: 2009 AIR SCW 1680: 2009 (3) ALJ 106: 2009 (64) All Cr C 920: 2009 (75) All Ind Cas 58: 2009 (2) Crimes 139: 2009 (43) OCR 54:(2009) 3 SCALE 171	10
Chunni Lal v. State of Uttar Pradesh, MANU/SC/0422/2010 : AIR 2010 SC 2467	32
Commissioner of Customs, New Delhi v. M/s C-Net Communication India Pvt. Ltd., AIR 2007 SC (Supp) 957	10

D

Dannu Singh v. Emperor, 25 Cr PC 574	79
Darshan Singh v. Gujjar Singh, MANU/SC/0007/2002 : AIR 2002 SC 606: 2002 AIR SCW 201: JT 2002 (1) SC 11: 2002 (1) Land LR 287: MANU/SC/0007/2002 : (2002) 2 SCC 62: 2002 (1) SCJ 208: 2002 (1) SLT 119: 2002 (2) SRJ 424: (2002) 1 SCALE 70: 2002 (1) Supreme 36	135

Daubart v. Merryll Dow Pharmaceutical Inc., 113 Sct 2786 (1993)	10
Delhi Administration v. Balakrishnan, MANU/SC/0093/1971 : AIR 1972 SC 3: 1972 Cr LJ 1: 1972 (1) SCJ 347: 1972 Mad LJ (Cri) 205: MANU/SC/0093/1971 : (1972) 4 SCC 659	181
Delhi Cloth and General Mills Ltd. v. Union of India, MANU/SC/0031/1987 : AIR 1987 SC 2414: JT 1987 (5) SC 35: 1987 (3) SCJ 328: (1987) 2 Cur CC 983	153
Delhi Development Authority v. Durga Chand Kaushish, MANU/SC/0329/1973 : AIR 1973 SC 2609: 1973 Ren CR 708: MANU/SC/0329/1973 : (1973) 2 SCC 825: (1973) 2 SCWR 642	9, 14
Dr. Sida Nitinkumar Laxmankumar Laxmanbhai v. Gujarat University, MANU/GJ/0172/1991 : AIR 1991 Guj 43: 1990 (2) Guj LH 471: 1990 (2) Guj LR 808: 1990 (6) Serv LR 551	152
Dwijesh v. Naresh, MANU/WB/0056/1945 : AIR 1945 Cal 492	23

E

E. v. Bhagwandas Tulsidas, 47 Bom LR 997	23
Earabhadrapa v. State of Karnataka, AIR 1983 SC 446	13
Emperor v. Har Piari, MANU/UP/0201/1926 : AIR 1926 All 737	59
Emperor v. Jagia, MANU/BH/0098/1938 : AIR 1938 Pat 308	64
Emperor v. Mallangowda, (1917) 19 Bom LR 683	64
Emperor v. Nanua, MANU/UP/0042/1940 : AIR 1941 All 145	34
Emperor v. Shafi Ahmad, (1929) 31 Bom LR 515	16

F

Fagnu Bhoi v. State of Orissa, 1992 Cr LJ 1808: 1992 (1) Cr LC 405: 1992 (1) Crimes 10: 1991 (72) Cut LT 702	143
Fakhruddin v. State of Madhya Pradesh, AIR 1967 SC 1326: (1967) 1 SCWR 449: 1967 All LJ 303: 1967 Jab LJ 441: 1967 Cr LJ 38: (1967) 2 SCA 135: 1967 (2) SCJ 885: 1967 MPWR 38	97
Forest Range Officer v. P. Mohammed Ali, MANU/SC/0037/1994 : AIR 1994 SC 120: 1993 AIR SCW 3754: 1993 (2) Crimes 415: JT 1993 (3) SC 222: (1993) 3 SCR 497: 1993 SCC (Cri) 1070: (1993) Supp 3 SCC 627	90
Fuljari Lal v. Ram Sarup, AIR 1953 MB 177	105

G

Ganesh K. Gulve v. State of Maharashtra, MANU/SC/0694/2002 : AIR 2002 SC 3068: 2002 AIR SCW 3528: 2002 (4) Crimes 92: JT 2002 (6) SC 337: (2002) 7 SCC 71: 2002 (5) SLT 24: 2002 (8) SRJ 386: (2002) 6 SCALE 422: 2002 SCC (Cri) 1589: 2002 (6) Supreme 45: 2002 (2) UJ (SC) 1318	93
Gangabai v. Chhabubai, MANU/SC/0385/1981 : (1982) 1 SCC 4: AIR 1982 SC 20: 1982 UJ (SC) 1: (1982) 1 APLJ (SC) 1: 1982 MPLJ 1: (1982) 1 SCR 1176: (1982) 14 Lawyer 48: (1982) 2 SCWR 53	118
Gentela Vijayavardhan Rao v. State of Andhra Pradesh, MANU/SC/0719/1996 : AIR 1996 SC 2791: 1996 Cr LJ 4151: 1996 AIR SCW 3555: 1996 (3) Crimes 197: JT 1996 (7) SC 491: (1996) 6 SCC 241: 1996 (3) SCJ 247: 1996 SCC (Cri) 1290	28
Gopal Saran v. Satyanarayan, MANU/SC/0195/1989 : AIR 1989 SC 1141: 1989 MPRCJ 53: (1989) 3 SCC 56	172

Goutam Kundu v. State of West Bengal, MANU/SC/0345/1993 : AIR 1993 SC 2295: 1993 Cr LJ 3233: 1993 AIR SCW 2325: 1993 (2) Crimes 481: JT 1993 (3) SC 443: (1993) 3 SCC 418: 1993 (3) SCJ 206: (1993) 3 SCR 917: 1993 SCC (Cri) 928	137, 144
Govind Narain v. State of Rajasthan, MANU/SC/0374/1993 : AIR 1993 SC 2457: 1993 Cr LJ 2598: 1993 AIR SCW 2179: 1994 (1) APLJ 52: 1994 APLJ (Cri) 150: 1993 JT (Supp) 522: 1993 SCC (Cri) 1012: (1993) Supp 3 SCC 343	80
Gulzar Ali v. State of Himachal Pradesh, MANU/SC/0911/1998 : (1998) 2 SCC 192	93
Gurbachan Singh v. Satpal Singh, MANU/SC/0034/1990 : AIR 1990 SC 209: 1990 Cr LJ 562: JT 1989 (4) SC 38: 1989 Marriage LJ 602	138

H

Hadu v. State of Orissa, MANU/OR/0067/1950 : AIR 1951 Ori 53	34
Haider v. State of Maharashtra, MANU/SC/0290/1979 : (1979) 4 SCC 600	60
Hales v. Kerr, (1908) 2 KB 601	3
Harbans Lal v. State of Haryana, MANU/SC/0113/1993 : AIR 1993 SC 819: 1993 Cr LJ 75: 1992 AIR SCW 3303: 1992 (3) Crimes 758: 1993 East Cr C 109: 1992 JT (Supp) 7: 1993 (1) Mah LR 90: 1992 (3) SCJ 362: 1994 SCC (Cri) 130: (1993) Supp 4 SCC 641	78
Haroom Haji Abdulla v. State of Maharashtra, MANU/SC/0060/1967 : AIR 1968 SC 832: 1968 Mad LJ (Cri) 591: (1968) 1 SCWR 243: 1968 SCD 391: 1968 Cr LJ 1017: 1968 (2) SCJ 534: (1968) 2 SCR 641: 1970 MPLJ 537: 1970 Mah LJ 604	146
Haryana Seeds Development Corporation Ltd. v. Sadhu, MANU/SC/0123/2005 : AIR 2005 SC 2023: 2005 AIR SCW 1208: JT 2005 (2) SC 592: (2005) 3 SCC 198: 2005 (2) SCJ 267: 2005 (2) SLT 569: 2005 (4) SRJ 112: (2005) 2 SCALE 270: 2005 (2) Supreme 169	92
Hasmattullah v. State of Madhya Pradesh, MANU/SC/0518/1996 : (1996) 4 SCC 391 (401): AIR 1996 SC 2076:1996 AIR SCW 2498: JT 1996 (5) SC 295: 1996 Jab LJ 406: 1996 (3) SCJ 113: 1996 (2) UJ (SC) 478	107
Hawkins v. Powells, (1911) 1 KB 988	15
Hunt v. Swyney, 33 PAC 854	36

I

Indra Mohan v. State of Assam, 1982 Cr LJ (NOC) 127 (Gau)	179
Ishwar Das Jain (dead) through L.R. v. Sohan Lal (dead) through L.R., MANU/SC/0747/1999 : AIR 2000 SC 426:1999 AIR SCW 4573: JT 1999 (9) SC 305: MANU/SC/0747/1999 : (2000) 1 SCC 434: 2000 (1) SCJ 197: 2000 (1) SRJ 247: (1999) 7 SCALE 277: 1999 (10) Supreme 27: 2000 (1) UJ (SC) 666	113

J

Jagannath v. Ram Chandra, MANU/UP/0154/1952 : AIR 1952 All 408	99
Jagjit Singh v. State of Haryana, MANU/SC/5473/2006 : AIR 2007 SC 590: 2007 AIR SCW 158: 2007 (5) All MR 16 (NOC):MANU/SC/5473/2006 : (2006) 11 SCC 1: (2006) 13 SCALE 335	11
Javed Alam v. State, (2009) 8 SCALE 68	27
Jaya Ram v. State of Tamil Nadu, AIR 1976 SC 791	82

Jayawant Dattatray Suryarao v. State of Maharashtra, MANU/SC/0710/2001 : (2001) 10 SCC 109: 2002 Cr LJ 226: 2001 AIR SCW 4717: 2002 (1) Crimes 31: JT 2001 (9) SC 605: 2001 (5) SCJ 180: (2001) 8 SCALE 36: 2002 SCC (Cri) 897: 2001 (8) Supreme 362	75
Jesu Asir Singh v. State, MANU/SC/7830/2007 : AIR 2007 SC 3015: 2007 Cr LJ 4310: 2007 AIR SCW 5472: 2007 (57) All Ind Cas 12: 2007 (3) Chand Cr C 111: 2007 (3) Crimes 333: 2007 (4) JCC 2629: 2007 (4) Rec Cr R 38: (2007) 10 SCALE 110	20
Jyoti Das v. State of Assam, MANU/GH/0007/1990 : AIR 1990 Gau 24: (1989) 1 Gua LR 63	152

K

K. Ramachandra Reddy v. Public Prosecutor, MANU/SC/0127/1976 : AIR 1976 SC 1994: 1976 Cr LR (SC) 286: 1976 Cr LJ 1548: MANU/SC/0127/1976 : (1976) 3 SCC 618: 1976 SCC (Cri) 473: 1976 SC Cr R 366: (1976) 2 APLJ (SC) 39: 1977 (1) SCJ 36: 1976 Supp SCR 542	80
K.M. Rajendran v. Arul Prakasham, MANU/TN/0284/1998 : AIR 1998 Mad 336: 1998 (4) Cur CC 286: 1998 (2) Mad LJ 423: 1998 (2) Mad LW 225: 1999 (1) Arb LR 227	119
Kake Singh alias Surendra Singh v. State of Madhya Pradesh, MANU/SC/0160/1981 : AIR 1982 SC 1021: 1981 SCC (Cri) 645: 19981 Cr App R (SC) 319: 1982 Cr LR (SC) 8: 1982 Cr LJ 986: 1982 Chand Cr C 64 (SC): 1981 Supp SCC 25	80
Kalu Mirza v. Emperor, ILR 37 Cal 91 : 11 Cr LJ 23	43
Kalyan Singh v. Chhoti, MANU/SC/0258/1989 : AIR 1990 SC 396: JT 1989 (4) SC 439	110
Kamla v. State of Punjab, MANU/SC/0086/1993 : AIR 1993 SC 374: 1993 Cr LJ 68: 1992 AIR SCW 3420: 1992 (3) Crimes 1088: 1993 (1) DMC 4: JT 1992 (6) SC 707: 1993 (6) OCR 92: (1993) 1 SCC 1: 1992 (3) SCJ 449: 1993 SCC (Cri) 1: 1993 (1) UJ (SC) 89	80
Kamti Devi v. Posh Ram, MANU/SC/0335/2001 : (2001) 5 SCC 311: AIR 2001 SC 2226: 2001 AIR SCW 2100: 2001 (3) Civ LJ 523: JT 2001 (1) SC (Supp) 87: 2001 (4) SCJ 147: 2001 (6) SRJ 345: (2001) 4 SCALE 195: 2001 SCC (Cri) 892: 2001 (4) Supreme 78	10
Kansa Behera v. State of Orissa, MANU/SC/0240/1987 : AIR 1987 SC 1507: 1987 Cr LJ 1852: JT 1987 (3) SC 193: MANU/SC/0240/1987 : (1987) 3 SCC 480: 1987 Cr LR (SC) 389: (1987) 2 Cr LC 350: 1987 SCC (Cri) 601: 1987 All WC 1239	59
Kanti Prasad Jayshanker Yagnik v. Purshottamdas Ranchhoddas Patel, MANU/SC/0263/1969 : AIR 1969 SC 851:(1969) 3 SCR 400	178
Kanya Ram Vira Singh v. Manipur Drivers Association, AIR 1957 Manipur 9	97
Kapoor Singh Rana v. State of Delhi, 1 (2006) CCR 558 (DB)	26
Kashmira Singh v. State, AIR 1965 J&K 37: 1964 Kash LJ 267: (1965) 1 Cr LJ 554	27
Khushal Rao v. State of Bombay, MANU/SC/0107/1957 : AIR 1958 SC 22: 1958 Cr LJ 106: 1957 MPC 813: 1958 SCJ 198: 1958 All LJ 91: 1958 Mad LJ (Cri) 100: 1958 Jab LJ 175: 1958 SCC 28: 1958 SCR 552:1959 SCA 281	81, 82, 85
Kishanlal v. State of Rajasthan, MANU/SC/0481/1999 : AIR 1999 SC 3062: 1999 Cr LJ 4070: 1999 AIR SCW 2998: 1999 (4) Crimes 103: JT 1999 (6) SC 41: 1999 (17) OCR 457: (2000) 1 SCC 310: 1999 (9) SRJ 90: (1999) 5 SCALE 31: 2000 SCC (Cri) 182: 1999 (7) Supreme 386:1999 (2) UJ (SC) 1284	84
Kusa v. State of Orissa, MANU/SC/0150/1980 : (1980) 2 SCC 207: AIR 1980 SC 559: 1980 Cr LJ 408: 1980 SCC (Cri) 389: 1980 Cr LR (SC) 200: 1980 SC Cr R 315	79, 83

L

Lakhmi v. Haider, 3 CWN 268	19
Lal Chand Marwari v. Mohant Ramrup Gir, AIR 1926 PC 9	135
Lal Singh v. State of Gujarat, MANU/SC/0017/2001 : AIR 2001 SC 746: 2001 Cr LJ 978: 2001 AIR SCW 389: 2001 (1) Crimes 115: JT 2001 (1) SC 410: (2001) 3 SCC 221: 2001 (1) SCJ 236: (2001) 1 SCALE 284: 2001 SCC (Cri) 473: 2001 (1) Supreme 78: 2001 (1) UJ (SC) 608	64
Lallubhai Devchand Shah v. State of Gujarat, MANU/SC/0130/1971 : AIR 1972 SC 1776: 1972 Cr LJ 828	81
Laxman Naik v. State of Orissa, MANU/SC/0264/1995 : AIR 1995 SC 1387: 1995 Cr LJ 2692 (SC): 1995 AIR SCW 2057:1994 (1) Crimes 806: JT 1994 (2) SC 39: (1994) 3 SCC 381: (1994) 2 SCR 94: 1994 SCC (Cri) 656: 1994 (1) UJ (SC) 645	7
Laxman v. State of Maharashtra, MANU/SC/0707/2002 : AIR 2002 SC 2973: 2002 Cr LJ 4095: 2002 AIR SCW 3479: 2002 (4) Crimes 42: MANU/SC/0707/2002 : (2002) 6 SCC 710: 2002 (4) SCJ 52: 2002 (5) SLT 49: (2002) 6 SCALE 135: JT 2002 (6) SC 313: 2002 (5) Supreme 557: 2002 (2) UJ (SC) 1363	89
Limbaji v. State of Maharashtra, MANU/SC/0792/2001 : AIR 2002 SC 491: 2002 Cr LJ 590: 2002 AIR SCW 22: 2002 (1) Crimes 63: JT 2001 (2) SC (Supp) 79: (2001) 10 SCC 340: 2001 (5) SCJ 229: 2002 (1) SLT 1: 2002 (2) SRJ 235: (2001) 8 SCALE 522: 2002 SCC (Cri) 1044: 2001 (8) Supreme 722: 2002 (1) UJ (SC) 307	145
Lokeman Shah v. State of West Bengal, MANU/SC/0245/2001 : AIR 2001 SC 1760: 2001 Cr LJ 2196: 2001 AIR SCW 1646: 2001 (2) Crimes 212: JT 2001 (4) SC 520: (2001) 5 SCC 235: (2001) 3 SCALE 297: 2001 SCC (Cri) 829: 2001 (3) Supreme 305: 2001 (2) UC 33	16

M

M. Narasimha Rao v. State of Andhra Pradesh, AIR 2001 SC 318	15
M.C. Verghese v. T.J. Ponnann, MANU/SC/0054/1968 : (1969) 1 SCC 37: AIR 1970 SC 1876: 1968 Ker LT 904: 1970 Cr LJ 1651: 1970 SC Cr R 198: (1969) 2 SCR 692: 1970 (2) SCJ 353: 1970 Mad LJ (Cri) 630	73
M.O. Shamsuddin v. State of Kerala, MANU/SC/0677/1995 : (1995) 3 SCC 351: 1995 AIR SCW 2717	148
M.S. Narayana Menon alias Mani v. State of Kerala, MANU/SC/2881/2006 : (2006) 6 SCC 39: AIR 2006 SC 3366: 2006 Cr LJ 4607: 2006 AIR SCW 4652: 2006 (3) Crimes 117: 2006 (35) OCR 43: 2006 (8) SRJ 275: (2006) 6 SCALE 393: 2006 SCC (Cri) 30: 2006 (5) Supreme 547:2006 (2) UC 1289	21
Magan Bihari Lal v. State of Punjab, MANU/SC/0105/1977 : AIR 1977 SC 1091: 1977 Cr LJ 711:94 1977 UJ (SC) 235: 1977 Pun LJ (Cri) 87: MANU/SC/0105/1977 : (1977) 2 SCC 210: 1977 SCC (Cri) 313: 1977 SC Cr R 203:(1977) 2 SCR 1007	

N

N. Sri Rama Reddy v. V.V. Giri, MANU/SC/0333/1970 : AIR 1971 SC 1162: 1970 Ker LT 390: 1970 SCD 646: 1970 UJ (SC) 604: (1971) 1 SCA 394: 1971 (1) SCJ 483: (1971) 1 SCR 399	11, 20
N. Yovas v. Immanueal Jose, MANU/KE/0001/1996 : AIR 1996 Ker 1: 1995 (2) Civ LJ 815: 1995 (2) DMC 296: 1996 (1) Hindu LR 312: 1996 (3) ICC 60: ILR(ker) 1995 (2) KER 338: 1995 (1) Ker LJ 417: 1995 (1) Ker LT 626	168
Nandam Mohanamma v. Markonda Narasimha Rao, MANU/AP/0447/2005 : AIR 2006 AP 8: 2006 AIHC 662: 2006 (1) ALJ (NOC) 145: 2005 (5) Andh LD 296: 2006 (1) Rent LR 510	9

Narain Singh v. State of Haryana, MANU/SC/0095/2004 : AIR 2004 SC 1616: 2004 Cr LJ 1409: 2004 AIR SCW 902: 2004 (1) Crimes 398: 2004 (2) JCJR 126: JT 2004 (2) SC 327: 2004 (27) OCR 680: 2004 (2) SLT 171: 2004 (3) SRJ 411: (2004) 2 SCALE 251: 2005 SCC (Cri) 185: 2004 (1) Supreme 909	81
Neelkantan v. Mallika Begum, MANU/SC/0062/2002 : AIR 2002 SC 827: 2002 AIR SCW 490: JT 2002 (1) SC 433: 2002 (1) Mad LJ 166: MANU/SC/0062/2002 : (2002) 2 SCC 440: 2002 SCFBRC 154: 2002 (1) SLT 548: 2002 (3) SRJ 506: (2002) 1 SCALE 512: 2002 (1) Supreme 369	127
Nika Ram v. State of Himachal Pradesh, MANU/SC/0193/1972 : AIR 1972 SC 2077: (1973) 1 SCR 428: ILR 1974 HP 187	63
Nishi Kant Jha v. State of Bihar, MANU/SC/0060/1968 : AIR 1969 SC 422: 1969 2 SCR 1033: ILR 48 Pat 9	58
Magraj Patodia v. R.K. Birla, (1970) 2 SCC 889: AIR 1971 SC 1295: 1970 UJ (SC) 905: (1971) 2 SCR 118	45
Mahabir Prasad Verma v. Dr. Surinder Kaur, MANU/SC/0217/1982 : AIR 1982 SC 1043: (1982) 2 SCC 258: (1982) 1 Rent LR 591: 1982 UJ (SC) 394: (1982) 1 Ren CR 615: 1982 (1) SCJ 362: (1982) 2 Ren CJ 205: 1982 East LR 309	44
Malaya Kumar Ganguly v. Sukumar Mukherjee, MANU/SC/1416/2009 : AIR 2010 SC 1162	111
Malkiat Singh v. State of Punjab, 1970 Cr LJ 750: MANU/SC/0534/1969 : AIR 1970 SC 713: 1970 (1) SCJ 473:(1989) 2 SCR 663: 1970 MLJ (Cri) 246 (SC)	33
Mallappa Siddappa Alakanur v. State of Karnataka, MANU/SC/1120/2009 : AIR 2009 SC 2959: 2009 AIR SCW 4726: 2009 (3) All Cr R 2412: 2009 (3) Crimes 230: 2009 (6) Kant LJ 177: (2009) 9 SCALE 159	175
Maneklal Mansukhbhai v. Hormutsji Jamshedji Ginwalla and Sons, MANU/SC/0037/1950 : AIR 1950 SC 1: 1949 FLJ 398:1949 FCR 484: (1950) 1 MLJ 752: 1950 MWN 767: 1950 ALJ 369: MANU/SC/0037/1950 : 1950 SCR 75: 1950 SCJ 317:(1950) 2 MLJ 344	112
Md. Serajuddin v. Md. Abdul Khaliq, MANU/GH/0491/2003 : AIR 2004 Gau 126: 2003 (3) Gau LT 696: 2005 (1) Gau LR 299	120
Mercantile Bank of India Ltd. v. Central Bank of India Ltd., (1938) AC 287	152
Mir Nagvi Askari v. C.B.I., MANU/SC/1412/2009 : AIR 2010 SC 528	108
Mirza Akbar v. Emperor, MANU/PR/0037/1940 : AIR 1940 PC 176	41
Mohanlal Gangaram Gehani v. State of Maharashtra, MANU/SC/0090/1982 : AIR 1982 SC 839: 1982 Cr LJ 630: (1982) 2 APLJ (SC) 15: 1982 Cr LR (SC) 77: MANU/SC/0090/1982 : (1982) 1 SCC 700: 1982 SCC (Cri) 334: 1982 Mah LR (SC) 117: 1982 Mad LJ (Cri) 431: 1982 (1) SCJ 380	80
Mohd. Zahid v. State of Tamil Nadu, MANU/SC/0407/1999 : AIR 1999 SC 2416: 1999 Cr LJ 3699: 1999 AIR SCW 2556: 1999 (3) Crimes 137: JT 1999 (5) SC 5: (1999) 6 SCC 120: 2000 (2) SCJ 226: (1999) 4 SCALE 173: 1999 SCC (Cri) 1066: 1999 (6) Supreme 145: 1999 (2) UJ (SC) 1294 (SC)	92, 96
Mohmed Inayatullah v. State of Maharashtra, MANU/SC/0166/1975 : AIR 1976 SC 483: 1975 Cr LR (SC) 567:(1976) 1 SCC 828: 1976 Cr LJ 481: 1976 SCC (Cri) 199: 1976 (1) SCJ 517: (1976) 1 SCR 715	66
Muktia Singh v. State of Punjab, MANU/SC/0047/2009 : AIR 2009 SC 1854: 2009 Cr LJ 1744: 2009 AIR SCW 1475: 2009 (64) Al ICr C 694: 2009 (74) All Ind Cas 22: 2009 (1) Cal	8

LJ 304: 2009 (1) Chand Cr C 286: 2009 (2) Cur Cr R 239: 2009 (2) Mad LJ (Cri) 956: (2009)
1 SCALE 655

Mulcahy v. R	38
Mulla v. State of Uttar Pradesh, MANU/SC/0091/2010 : AIR 2010 SC 942	37
Murari Lal v. State of Andhra Pradesh, AIR 1980 SC 531: 1980 Cr LJ 396: (1980) 1 SCC 704: 1980 SCC (Cri) 330: 1980 Cr LR (SC) 168: 1980 Mad LW (Cri) 88: (1980) 2 SCR 249	93
Murli alias Denny v. State of Rajasthan, MANU/SC/0136/1994 : AIR 1994 SC 610: 1994 Cr LJ 1114:1994 AIR SCW 378: 1995 SCC (Cri) 57: (1995) Supp 1 SCC 39	61
Musheer Khan @ Badshah Khan v. State of Madhya Pradesh, MANU/SC/0065/2010 : AIR 2010 SC 762	6, 36, 37, 65, 92
Muthuswamy v. State, AIR 1954 SC 47	70

O

Om Prakash v. State of Uttar Pradesh, MANU/SC/0205/1959 : AIR 1960 SC 409: 1960 Cr LJ 514	71
Onkar Chand v. Jagatamba Devi, AIR 2003 (NOC) 124 (HP)	162
Oriental Fire and General Insurance Company Ltd. v. Bondili Sitharam Singh, MANU/AP/0045/1995 : AIR 1995 AP 268: 1995 (1) ACC 540: 1996 ACJ 242: 1995 (1) APLJ 232: 1995 (1) Andh LT 696: 1995 (2) TAC 488	142

P

P.V. Radhakrishna v. State of Karnataka, AIR 2003 SC 2859: 2003 Cr LJ 3717: 2003 AIR SCW 3587: 2003 (3) Crimes 180: JT 2003 (6) SC 84: (2003) 6 SCC 443: 2003 (4) SLT 603: (2003) 5 SCALE 438: 2003 SCC (Cri) 1679: 2003 (2) UC 1269	87
Paka Venkaiah v. Taduri Buchi Reddy, AIR 2005 (NOC) 31 (AP)	125
Pakalo Narain Swami v. King Emperor, MANU/PR/0001/1939 : AIR 1939 PC 47	57, 58, 71
Palani v. Sethu, MANU/TN/0712/1924 : AIR 1924 Mad 677	182
Palvinder Kaur v. State of Punjab (I), MANU/SC/0038/1952 : AIR 1952 SC 354: 1952 Cr LJ 154: 1952 SCJ 545: MANU/SC/0038/1952 : 1953 SCR 94: 1953 SCA 226: 1953 Mad WN 418: ILR 1953 Punj 107	58, 1, 71
Pandurang Jivaji Apte v. Ramchandra Gangadhar Ashtekar, (dead) by LRs, (1981) 4 SCC 596: AIR 1981 SC 2235	142
Pannayar v. State of Tamil Nadu, by Inspector of Police, MANU/SC/1462/2009 : AIR 2010 SC 85	172
Paramhansa Jadab v. State of Orissa, MANU/OR/0057/1964 : AIR 1964 Ori 144: (1963) 5 OJD 372: 1964 (1) Cr LJ 680: 31 Cut LT 17	62
Parmeshwari Devi v. State, MANU/SC/0174/1976 : AIR 1977 SC 403: 1976 Cr LR (SC) 553: 1977 Cr LJ 245: (1977) 1 SCC 169: 1977 SCC (Cri) 74: 1977 BBCJ (SC) 72: (1977) 1 SCWR 423: (1977) 2 SCR 160	174

Patel Hiralal Joitaram v. State of Gujarat, MANU/SC/0669/2001 : (2002) 1 SCC 22: AIR 2001 SC 2944: 2001 AIR SCW 4411: 2002 (1) Crimes 94: JT 2001 (9) SC 282: 2002 Mad LJ (Cri) 184: 2001 (5) SCJ 342: 2001 (10) SRJ 501: (2001) 7 SCALE 440: 2002 SCC (Cri) 1: 2001 (8) Supreme 23: 2002 (1) UJ (SC) 237	88
Pawan Kumar v. State of Haryana, MANU/SC/0167/2001 : (2001) 3 SCC 628: AIR 2001 SC 1324: 2001 Cr LJ 1679: 2001 AIR SCW 1111: 2001 (2) Crimes 1: JT 2001 (3) SC 475: 2001 (2) SCJ 507: 2001 (4) SRJ 207: (2001) 2 SCALE 440: 2001 SCC (Cri) 594: 2001 (2) Supreme 335: 2001 (1) UJ (SC) 749	139
Prakash Chand v. State of Delhi, 1979 Cr LJ 329	34
Pramodbhai Bhulabhai Desai v. Officer on Special Duty No. 2, (Land Acquisition), Ahmedabad, MANU/GJ/0068/1989 : AIR 1989 Guj 187: (1989) 30 Guj LR 194	153
Pratap Singh v. State of Punjab, MANU/SC/0272/1963 : AIR 1964 SC 72	20
Preetam Singh v. State of Madhya Pradesh, MANU/SC/0120/1997 : AIR 1997 SC 445: 1996 Cr LJ 4458: 1996 AIR SCW 3829: 1996 (3) All Cr LR 642: 1996 (2) Cr CJ 630: (1996) 10 SCC 432: (1996) 3 SCR 939: 1996 SCC (Cri) 1343	63
Prem Thakur v. State of Punjab, MANU/SC/0097/1982 : AIR 1983 SC 61: 1983 Cr LJ 155: 1983 UJ (SC) 3: MANU/SC/0097/1982 : (1982) 3 SCC 462: 1982 Cr LR (SC) 499: 1983 SCC (Cri) 88: (1983) 1 Crimes 141: 1983 (1) SCJ 221: (1983) 1 SCR 822	7
Prithvi Singh v. State of Uttar Pradesh, 2001 Cr LJ 4424: 2001 All LJ 1993: 2001 (43) All Cr C 457: 2002 (1) All Cr LR 182: 2001 (2) All Cr R 1572: 2002 (1) Rec Cr R 477 (All)	101
Pulukuri Kottaya v. Emperor, AIR 1947 PC 67	65, 74
Purshottam v. Bhagwat Sharan, MANU/MP/0524/2002 : AIR 2003 MP 128	150
Pyare Lal Bhargava v. State of Rajasthan, MANU/SC/0152/1962 : AIR 1963 SC 1094: 1963 All LJ 459: 1963 BLJR 407: 1963 SCD 341: (1963) 2 Cr LJ 178: 1963 SUPP 1 SCR 689	58, 69

Q

Quammaral Islam v. S.K. Kanta, MANU/SC/0417/1994 : AIR 1994 SC 1733: 1994 AIR SCW 1598: 1994 Bom CJ 746: 1994 (2) Civ LJ 83: JT 1994 (1) SC 452: (1994) 1 SCR 210: 1994 (3) SCC (Supp) 5	45
Queen v. Bahar Ali Khan, 15 WR (Cr) 46	32
Queen v. Sorob Roy, 5 WR (Cr) 28	32
Queen-Empress v. Abdullah, (1885) 7 All 385 (FB)	34, 8
Queen-Empress v. Babu Lal, (1884) ILR 6 All 509	60

R

R. Jankiraman v. State, 1 (2006) SLT 50	117, 118
R. v. Abdullah, (1885) ILR 7 All 385	34
R. v. Foster, 172 ER 1261: (1834) 6 C&C 325	27
R. v. Lester, ILR (1817) 20 Bom 165	64
R. v. Navroji Dadahai, 9 Bom HCR 358	67

R. v. Pike, (1829) 3 CLP 598	80
R. v. Poncho, ILR 7 Cal 671	23
R. v. Wilson, (1967) 2 QB 406 (CA)	59
R. v. Woodcock, (1789) I Leach 500	77
R. Venkatesan v. State, 1980 Cr LJ 41	45
R.K. Jain v. Union of India, MANU/SC/0291/1993 : AIR 1993 SC 1769: 1993 AIR SCW 1899: 1993 (25) ATC 464: 1993 (3) Com LJ SC 1: JT 1993 (3) SC 297: (1993) 4 SCC 119: 1993 SCC (L&S) 1128: (1993) 3 SCR 802: 1993 (4) SCT 181: 1993 (3) Serv LR 376	166
R.M. Malkani v. State of Maharashtra, MANU/SC/0204/1972 : AIR 1973 SC 157: 1973 Cr LJ 228: 1973 Mah LJ 92: 1973 MPLJ 224: MANU/SC/0204/1972 : (1973) 1 SCC 471: 1973 SCC (Cri) 389: (1973) 2 SCWR 776	20, 44
R.S. Maddanappa v. Chandramma, MANU/SC/0356/1965 : AIR 1965 SC 1812: (1965) 2 SCWR 644: 1966 (2) SCJ 310: (1965) 3 SCR 283	154
Rabisankar Choudhury v. Orissa State Financial Corporation, MANU/OR/0025/1992 : AIR 1992 Ori 93: 1991 (72) Cut LT 185	153
Raghav Prapanna Tripathi v. State of Uttar Pradesh, MANU/SC/0127/1962 : AIR 1963 SC 74: (1963) 1 Cr LJ 70: (1963) 3 SCR 239	6
Rahim Khan v. Khurshid Ahmed, MANU/SC/0274/1974 : AIR 1975 SC 290: (1975) 2 SCC 660: 1975 (2) SCJ 178	9
Raj Kumar Rajindra Singh v. State of Himachal Pradesh, MANU/SC/0322/1990 : AIR 1990 SC 1833	121
Ram Baba v. State of Uttar Pradesh, AIR 2010 SC 2143	37
Ram Behari v. State of Bihar, MANU/SC/0302/1998 : AIR 1998 SC 1850	19
Ram Bharosey v. State of Uttar Pradesh, MANU/SC/0175/1954 : AIR 1954 SC 704: 1954 Cr LJ 1755	163, 64
Ram Bihar Yadav v. State of Bihar, MANU/SC/0302/1998 : AIR 1998 SC 1850: 1998 Cr LJ 2515: 1998 AIR SCW 1647: 1998 (2) Crimes 254: JT 1998 (3) SC 290: (1998) 4 SCC 517: 1998 (2) SCJ 253: (1998) 2 SCR 1097: (1998) 3 SCALE 200: 1998 SCC (Cri) 1085: 1998 (4) Supreme 178	24
Ram Narain v. State of Uttar Pradesh, MANU/SC/0153/1973 : AIR 1973 SC 2200: 1973 Cr LJ 1187: 1973 SCD 479: MANU/SC/0153/1973 : (1973) 2 SCC 86: 1973 SCC (Cri) 752: (1973) 1 SCWR 675: 1973 MPLJ 674	94
Ram Nath Madhoprasad v. State of Madhya Pradesh, MANU/SC/0101/1953 : AIR 1953 SC 420: 1953 Cr LJ 1772	81
Ram Singh v. Col. Ram Singh, (1985) Supp SCC 611: MANU/SC/0176/1985 : AIR 1986 SC 3: 1985 Suppl (2) SCR 399	45
Rama Shish Rai v. Jagdish Singh, MANU/SC/0976/2004 : AIR 2005 SC 335: 2005 Cr LJ 669: 2004 AIR SCW 6713: 2004 (4) Crimes 306: JT 2004 (10) SC 594: 2005 (30) OCR 82: (2005) 10 SCC 498: 2005 (1) SCJ 143: 2004 (6) SLT 748: (2004) 9 SCALE 473: 2005 SCC (Cri) 1611: 2004 (8) Supreme 54	176
Ramashray Yadav v. State of Bihar, MANU/SC/2514/2005 : AIR 2006 SC 201: 2006 Cr LJ 133: 2005 AIR SCW 5710: 2005 (4) Crimes 214: JT 2005 (9) SC 437: (2005) 13 SCC 468: 2006 (1) SCJ 678: 2006 (1) SRJ 153: (2005) 9 SCALE 229: 2006 SCC (Cri) 267: 2005 (7)	177

Supreme 528

Ramesh Chandra Agrawal v. Regency Hospital Ltd., MANU/SC/1641/2009 : AIR 2010 SC 806 7, 92

Rameshwar S/o Kalyan Singh v. State of Rajasthan, MANU/SC/0036/1951 : AIR 1952 SC 60
54: 1952 SCJ 46: 1952 Mad WN 150: 1952 Cr LJ 547: (1952) 1 Mad LJ 440:
MANU/SC/0036/1951 : 1952 SCR 377: 1952 SCA 40

Ramprasad v. State of Maharashtra, MANU/SC/0365/1999 : AIR 1999 SC 1969: 1999 Cr LJ 80,
2889: 1999 AIR SCW 1657: 1999 (3) Crimes 96: JT 1999 (4) SC 74: 1999 (17) OCR 181: 176
(1999) 5 SCC 30: 1999 (7) SRJ 39: (1999) 3 SCALE 623: 1999 SCC (Cri) 651: 1999 (5)
Supreme 554

Ranganayaki v. State by Inspector of Police, MANU/SC/0889/2004 : AIR 2005 SC 418: 32
2004 AIR SCW 6613: 2004 (4) Crimes 179: 2004 (4) Cur Cr R 208: JT 2004 (9) SC 464:
2004 (29) OCR 804: MANU/SC/0889/2004 : (2004) 12 SCC 521: 2004 (6) SLT 417: (2004)
8 SCALE 734: 2004 (7) Supreme 350

Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, MANU/SC/0268/2005 : AIR 10
2005 SC 2277: 2005 Cr LJ 2533: 2005 AIR SCW 2215: 2005 (2) Crimes 168: 2005 (2) Cur
Cri R 92: JT 2005 (4) SC 123: MANU/SC/0268/2005 : (2005) 5 SCC 294: 2005 (3) SCJ 697:
2005 (3) SLT 545: (2005) 3 SCALE 774: 2005 SCC (Cri) 1057: 2005 (3) Supreme 679

Raoji v. State of Maharashtra, (1994) SC LJ 1 (SC) 79

Ratan Gond v. State of Bihar, MANU/SC/0054/1958 : AIR 1959 SC 18: 1959 Cr LJ 108: 59,
1959 BLJR 1: 1959 All LJ 35: 1959 MPC 46: 1959 SCJ 222: 1959 All Cr R 118: 79
MANU/SC/0054/1958 : 1959 SCR 1336

Rattan Singh v. State of Himachal Pradesh, MANU/SC/0177/1997 : AIR 1997 SC 768: 1997 29,
Cr LJ 833: 1997 AIR SCW 587: 1996 (4) Crimes 282: 1997 (13) OCR 57: 86
MANU/SC/0177/1997 : (1997) 4 SCC 161: 1996 (4) SCJ 628: 1997 SCC (Cri) 525

Rattan v. Queen, (1971) 3 WLR 9301 27

Ravi v. State of Tamil Nadu, (2004) 10 SCC 776 81

Rita Lal v. Raj Kumar Singh, MANU/SC/0813/2002 : AIR 2002 SC 3341: 2002 AIR SCW 157
3887: JT 2002 (7) SC 296: MANU/SC/0813/2002 : (2002) 7 SCC 614: 2002 (5) SLT 385:
2002 (9) SRJ 283: (2002) 6 SCALE 564: 2002 (6) Supreme 487

Roop Kumar v. Mohan Thedani, MANU/SC/0276/2003 : (2003) 6 SCC 595: AIR 2003 SC 123
2418: 2003 AIR SCW 2425: (2003) 3 SCR 292: 2003 (3) SLT 80: 2003 (7) SRJ 81: (2003) 3
SCALE 611: 2003 (3) Supreme 296

S

S. Saktivel (dead) Rep. by L.R. v. M. Venugopal Pillai, MANU/SC/0499/2000 : AIR 2000 SC 120
2633: 2000 AIR SCW 2849: JT 2000 (9) SC 345: MANU/SC/0499/2000 : (2000) 7 SCC 104:
2000 (3) SCJ 212: 2000 (8) SRJ 53: (2000) 5 SCALE 517: 2000 (5) Supreme 450

S.H. Jhabwala v. Emperor, MANU/UP/0371/1933 : AIR 1933 All 690 39,
40

S.J. Ebenezer v. Velayudhan, MANU/SC/0887/1998 : AIR 1998 SC 746: 1998 AIR SCW 449: 126
1998 (1) All CJ 535: 1998 (2) Mad LJ 50: 1998 (1) Ren CJ 138: MANU/SC/0887/1998 :
(1998) 1 SCC 633: 1998 SCFBR 95: (1997) 7 SCALE 635: 1997 (10) Supreme 539: 1998
(1) UJ (SC) 249

S.K. Sharma v. Mahesh Kumar Verma, MANU/SC/0804/2002 : AIR 2002 SC 3294: 2002 Cr LJ 157

4318: 2002 AIR SCW 3827: JT 2002 (7) SC 222: (2002) 7 SCC 505: 2002 (4) SCJ 343: 2002 (5) SLT 344: 2002 (9) SRJ 313: (2002) 6 SCALE 522: 2002 SCC (Cri) 1804: 2002 (6) Supreme 530: 2002 (2) UJ (SC) 1443	
S.P. Anand v. Registrar General, Madhya Pradesh High Court, MANU/MP/0405/2008 : AIR 2009 MP 1: 2008 (3) Jab LJ 361: 2008 (4) MPHT 279: 2008 (3) MPLJ 596: 2008 (4) Rec Civ R 780: 2008 (4) SCT 352	27
S.R. Ramaraj v. Special Court, MANU/SC/0600/2003 : AIR 2003 SC 3039: 2003 Cr LJ 3863: 2003 AIR SCW 3962: 2003 (4) Crimes 83: MANU/SC/0600/2003 : (2003) 7 SCC 175: 2003 (5) SLT 52: 2003 (9) SRJ 333: (2003) 6 SCALE 508: 2003 (6) Supreme 508: 2004 (1) UJ (SC) 207	29
Sahoo v. State of Uttar Pradesh, AIR 1966 SC 40: (1965) 2 SCA 292: 1965 SCD 809: (1965) 2 SCWR 484: 1966 Cr LJ 68: 1966 MPLJ 533: 1966 (2) SCJ 172: (1965) 3 SCR 86	56, 70
Sakatar Singh v. State of Haryana, AIR 2004 SC 2570: (2004) 11 SCC 291: 2004 Cr LJ 2076: 2004 AIR SCW 2388: 2004 (3) Crimes 1: 2004 (3) SLT 257: 2004 (5) SRJ 213: (2004) 4 SCALE 529: 2004 (3) Supreme 661	106
Salagram v. Emperor, MANU/UP/0059/1936 : AIR 1937 All 171	174
Samar v. Budhu, MANU/BH/0294/1937 : AIR 1937 Pat 463	98
Sanatan Gauda v. Berhampur University, MANU/SC/0199/1990 : AIR 1990 SC 1075: JT 1990 (2) SC 57	155
Santa Singh v. State of Punjab, MANU/SC/0167/1976 : AIR 1956 SC 526: 1956 Cr LJ 930	43
Sara Veeraswami v. Talluri Narayyan, AIR 1946 PC 32	122
Sardar Sardul Singh Caveeshar v. State of Maharashtra, AIR 1965 SC 682: (1965) 1 Cr LJ 608: (1964) 2 SCR 378: 1964 (2) SCJ 771	40
Saroj Kumar v. Emperor, MANU/WB/0011/1932 : AIR 1932 Cal 474	43
Sashi Jena v. Khadal Swain, MANU/SC/0106/2004 : AIR 2004 SC 1492: (2004) 4 SCC 236: 2004 Cr LJ 1394: 2004 AIR SCW 819: 2004 (2) Crimes 153: JT 2004 (2) SC 339: 2004 (27) OCR 747: 2004 (2) SLT 650: 2004 (3) SRJ 507: (2004) 2 SCALE 348: 2004 SCC (Cri) 1077: 2004 (2) Supreme 140	176
Sat Paul v. Delhi Administration, MANU/SC/0203/1975 : AIR 1976 SC 294: 1975 Cr LR (SC) 597: 1976 Cr LJ 295: MANU/SC/0203/1975 : (1976) 1 SCC 727: 1976 SCC (Cri) 160: 1976 MPLJ 206: ILR 1976 Kant 720: (1976) 2 SCR 11: (1976) 3 Cr LT 121	175
Sattamma v. Ch. Bhikshapati Goud, MANU/AP/0360/2010 : AIR 2010 AP 166	8, 113
Seeman alias Veeranam v. State by Inspector of Police, MANU/SC/0395/2005 : AIR 2005 SC 2503: 2005 Cr LJ 2618: 2005 AIR SCW 2705: 2005 (2) Crimes 222: JT 2005 (5) SC 555: (2005) 11 SCC 142: 2005 (5) SCJ 217: 2005 (4) SLT 556: 2005 (7) SRJ 62: (2005) 5 SCALE 194: 2005 SCC (Cri) 1893: 2005 (4) Supreme 84	162
Selvi v. State of Karnataka, MANU/SC/0325/2010 : AIR 2010 SC 1974	65
Sethu v. Palani, ILR (1925) 49 Mad 523	137
Shabir Mohamad Syed v. State of Maharashtra, MANU/SC/0948/1997 : (1997) 11 SCC 499: AIR 1997 SC 3808: 1997 Cr LJ 4416: 1997 AIR SCW 3724: JT 1997 (8) SC 1: 1997 (3) SCJ 157: 1998 SC Cr R 33: 1997 SCC (Cri) 1226	82
Shahnaz Shaharyari alias Shirin Sha-haryari, Nagpur v. Dr. Vijay Yeshwant Gawande, Bombay, MANU/MH/0005/1995 : AIR 1995 Bom 30: 1996 (1) Bom CR 473	142

Sharda v. State of Rajasthan, MANU/SC/1894/2009 : AIR 2010 SC 408	77
Shashi Kumar Banerjee v. Subodh Kumar Banerjee, MANU/SC/0278/1963 : AIR 1964 SC 529	94
Shatrughan v. State of Madhya Pradesh, 1993 Cr LJ 120	143
Shidharth Vashist @ Manu Sharma v. State (NCT of Delhi), MANU/SC/0268/2010 : AIR 2010 SC 2352	34
Shiv Kant Pandey v. Ishwari Singh, MANU/RH/0033/1997 : AIR 1997 Raj 155	109
Shivappa v. State of Karnataka, MANU/SC/0189/1995 : AIR 1995 SC 980: 1995 AIR SCW 956: (1995) 2 SCC 76	58
Sidhartha Vashista @ Manu Sharma v. State (N.C.T. of Delhi), MANU/SC/0268/2010 : AIR 2010 SC 2352	128, 42
Sodhi Pindi Das v. Emperor, AIR 1938 Lah 629	177
Somawanti v. State of Punjab, MANU/SC/0034/1962 : AIR 1963 SC 151: (1963) 1 SCA 548: 1963 (2) SCJ 85: (1963) 2 Mad LJ (SC) 18: (1963) 2 Andh WR (SC) 18: (1963) 33 Comp Cas 745:(1963) 2 SCR 774	9, 15, 143
Sri Chand Gupta v. Gulzar Singh, MANU/SC/0022/1992 : AIR 1992 SC 123: (1992) 1 SCC 143: 1991 AIR SCW 2813: 1992 (1) All Rent Cas 353: 1992 (19) All LR 242: 1992 (46) DLT 6: JT 1991 (6) SC 532:1992 (1) UJ (SC) 90	50
State (Collector, Central Excise) v. Papas Kumar Shome, 1985 Cr LJ 871: 1984 (2) Crimes 190: 1984 (58) Cut LT 127: 1985 (5) ECC 23: MANU/OR/0209/1984 : 1984 (18) ELT 278 (Ori)	180
State Bank of India (Successor to the Imperial Bank of India) v. Shyama Devi,MANU/SC/0360/1978 : AIR 1978 SC 1263: 1978 UJ (SC) 514: (1978) 3 SCC 399	126
State of Assam v. Mafizuddin Ahmed, AIR 1983 SC 274: 1983 Cr LJ 426: 1983 All Cri C 60: MANU/SC/0153/1983 : (1983) 2 SCC 14: 1983 Cr LR (SC) 163: 1983 (1) Crimes 380: 1983 SCC (Cri) 325: (1983) 1 Cr LC 394: 1983 UP Cr R 148	81
State of Bihar v. P.P. Sharma, MANU/SC/0542/1992 : AIR 1991 SC 1260: 1991 Cr LJ 1438: 1991 AIR SCW 1034: 1991 (2) Crimes 113: JT 1991 (2) SC 147: (1991) 2 SCR 1: 1992 SCC (Cri) 192: (1992) Supp 1 SCC 222	141
State of Gujarat v. Mohammed Atik, MANU/SC/0267/1998 : (1998) 4 SCC 351: 1998 SCC (Cri) 936: AIR 1998 SC 1686: 1998 Cr LJ 2251: 1998 AIR SCW 1453: 1998 (2) Crimes 92: JT 1998 (3) SC 60: (1998) 2 SCR 664: (1998) 2 SCALE 633: 1998 (3) Supreme 488	40
State of Haryana v. Manoj Kumar, MANU/SC/0161/2010 : AIR 2010 SC 1779	142
State of Himachal Pradesh v. Prem Chand, MANU/SC/1139/2002 : AIR 2003 SC 708: 2003 Cr LJ 872: 2003 AIR SCW 1: 2003 (1) Crimes 426: MANU/SC/1139/2002 : (2002) 10 SCC 518: 2003 (1) SLT 393: 2003 (2) SRJ 285:(2002) 9 SCALE 328: 2003 SCC (Cri) 175: 2003 (1) Supreme 393	161
State of Karnataka v. David Razario, MANU/SC/0800/2002 : AIR 2002 SC 3272: 2002 Cr LJ 4127: 2002 AIR SCW 3798:JT 2002 (7) SC 283: (2002) 7 SCC 728: 2002 (4) SCJ 326: 2002 (5) SLT 400: 2002 (9) SRJ 352: (2002) 6 SCALE 500.2: 2002 SCC (Cri) 1852: 2002 (6) Supreme 491	74
State of Karnataka v. K. Yarappa Reddy, MANU/SC/0633/1999 : AIR 2000 SC 185: 2000 Cr LJ 400: 1999 AIR SCW 4276: 1999 (3) Crimes 171: JT 1999 (8) SC 10: (1999) 8 SCC 715: 1999 (10) SRJ 172: (1999) 6 SCALE 330: 2000 SCC (Cri) 61: 1999 (8) Supreme 496	177

State of Karnataka v. Shariff, MANU/SC/0049/2003 : AIR 2003 SC 1074: 2003 Cr LJ 1254: 2003 AIR SCW 600: 2003 (2) Crimes 144: JT 2003 (2) SC 15: 2003 (25) OCR 72: (2003) 2 SCC 473: (2003) 1 SCR 572: (2003) 1 SCALE 469: 2003 SCC (Cri) 561: 2003 (2) Supreme 16: 2003 (1) UC	679
State of Madhya Pradesh v. Bhim Mohd., 2002 Cr LJ 1906	32
State of Madhya Pradesh v. Dharendra Kumar, MANU/SC/1029/1997 : AIR 1997 SC 318: 1997 AIR SCW 74: 1996 (4) Crimes 195: JT 1996 (10) SC 93: 1997 (1) Jab LJ 215: 1997 (1) Raj LW 38: MANU/SC/1029/1997 : (1997) 1 SCC 93: 1997 SCC (Cri) 54	32, 104
State of Madhya Pradesh v. Jiyalal, MANU/SC/1474/2009 : AIR 2010 SC 1451	142
State of Maharashtra v. Chandraprakash Kewalchand Jain, MANU/SC/0122/1990 : AIR 1990 SC 658: 1990 Cr LJ 889: JT 1990 (1) SC 61 161	
State of Maharashtra v. Praful B. Desai, MANU/SC/0268/2003 : AIR 2003 SC 2053: 2003 Cr LJ 2033: 2003 AIR SCW 1885: 2003 (2) Crimes 237: JT 2003 (3) SC 382: (2003) 4 SCC 601: (2003) 3 SCR 244: 2003 (2) SLT 824: (2003) 3 SCALE 554: 2003 SCC (Cri) 815: 2003 (3) Supreme 19: 2003 (2) UJ (SC) 769 11	
State of Maharashtra v. Som Nath Thapa, MANU/SC/0451/1996 : AIR 1996 SC 1744: 1996 Cr LJ 2448: 1996 AIR SCW 1977: 1996 (2) Crimes 64: JT 1996 (4) SC 615: (1996) 4 SCC 659: 1996 SCC (Cri) 820	11
State of Maharashtra v. Wasudeo Ramchandra Kaidalwar, MANU/SC/0249/1981 : (1981) 3 SCC 199: AIR 1981 SC 1186: 1981 Cr LJ 884: (1981) 2 Serv LR 68: 1981 Cr LR (SC) 390: 1981 SCC (Cri) 690	126
State of Punjab v. Barkat Ram, MANU/SC/0021/1961 : AIR 1962 SC 276: (1962) 1 Cr LJ 217: (1962) 2 SCA 321: (1962) 3 SCR 338	59, 61
State of Punjab v. Sodhi Sukhdev Singh, MANU/SC/0006/1960 : AIR 1961 SC 493: (1961) 1 SCA 434: 1961 Mad LJ (Cri) 731: 1961 (2) SCJ 691: (1961) 2 Mad LJ (SC) 203: (1961) 2 SCR 371	165
State of Punjab v. Sucha Singh, MANU/SC/0103/2003 : AIR 2003 SC 1471	33
State of Rajasthan v. Mahaveer Oil Industries, MANU/SC/0292/1999 : AIR 1999 SC 2302: 1999 AIR SCW 2369: 1999 BRLJ 236: JT 1999 (3) SC 212: (1999) 4 SCC 357: 1999 (2) SCJ 306: 1999 (5) SRJ 308: 1999 (115) STC 29: (1999) 2 SCALE 708: 1999 (4) Supreme 322: 1999 (2) UJ (SC) 953	156
State of Rajasthan v. Mahavir alias Mahavir Prasad, MANU/SC/0475/1998 : (1999) 1 SCC 199: AIR 1998 SC 3041: 1998 Cr LJ 4064: 1998 AIR SCW 2900: JT 1998 (5) SC 274: 1998 (2) SCJ 664: (1998) 4 SCALE 365: 1998 SCC (Cri) 819: 1998 (6) Supreme 223	43
State of Tamil Nadu v. Nalini, MANU/SC/0945/1999 : (1999) 5 SCC 253: 1999 SCC (Cri) 691: AIR 1999 SC 2640: 1999 Cr LJ 3124: 1999 AIR SCW 1889: 1999 (2) Crimes 59: JT 1999 (4) SC 106: 1999 (2) SCJ 451: 1999 (6) SRJ 25	40
State of Uttar Pradesh v. Raj Narain, MANU/SC/0032/1975 : AIR 1975 SC 865: (1975) 1 Serv LR 541:(1975) 4 SCC 428: (1975) 3 SCR 333	165
State of Uttar Pradesh v. Ravindra Prakash Mittal, 1992 Cr LJ 3693: MANU/SC/0402/1992 : AIR 1992 SC 2045: 1992 AIR SCW 2417: 1992 (2) Cr CJ 85: 1992 (2) Crimes 664: 1992 (2) Cur Cr R 71:JT 1992 (3) SC 114: (1992) 3 SCC 300: 1992 (2) SCJ 549: (1992) 2 SCR 815: 1992 SCC (Cri) 642 (SC)	6
Subhash Chandra Goel v. Secretary, Delhi Development Authority, Vikas Minar, I.P. Estate, New Delhi, AIR 1985 Del 466	153

Subhra Mukherjee v. Bharat Coking Coal Ltd., MANU/SC/0162/2000 : AIR 2000 SC 1203: 2000 AIR SCW 865: JT 2000 (3) SC 55: (2000) 3 SCC 312: 2000 SCFBR 230: 2000 (4) SRJ 45: (2000) 2 SCALE 259: 2000 (5) Supreme 88	125
Sukhar v. State of Uttar Pradesh, VIII (1999) SLT 270	28
Sukhram v. State of Maharashtra, MANU/SC/3346/2007 : (2007) 7 SCC 502: AIR 2007 SC 3050: 2007 Cr LJ 4327: 2007 AIR SCW 5520: 2007 (3) Crimes 354: (2007) 10 SCALE 60: 2007 (3) SCC (Cri) 426: 2007 (5) Supreme 926	33
Sukhwant Singh v. State of Punjab, MANU/SC/0305/1995 : AIR 1995 SC 1601: 1995 AIR SCW 2521: (1995) 3 SCC 367	174
Sunderlal Kanaiyalal Bhatija v. State of Maharashtra, MANU/SC/0223/2010 : AIR 2010 SC 1666	60
Suraj Singh v. State of Uttar Pradesh, (2008) 11 SCR 286: AIR 2009 SC (Supp) 631	184
Surajdeo Oza v. State of Bihar, MANU/SC/0269/1979 : AIR 1979 SC 1505: 1979 SCC (Cri) 519: 1979 UJ (SC) 412: 1979 Cr LR (SC) 368: 1979 Cr LJ 1122: 1979 All Cri R 359: 1979 Cr LR (SC) 570	79
Surat Chunder Dey v. Gopal Chander Laha, (1892) 19 IA 203	152

T

Tata Iron & Steel Co. Ltd. v. State of Jharkhand, MANU/SC/0237/2005 : AIR 2005 SC 2871: 2005 AIR SCW 1781: 2005 (2) BLJR 1168: 2005 (2) JCR SC 235: JT 2005 (3) SC 582: (2005) 4 SCC 272: 2005 (4) SCJ 92: 2005 (5) SLT 121: (2005) 3 SCALE 431: 2005 (3) Supreme 199	153
Tribhuvan Nath v. State of Maharashtra, AIR 1973 SC 450: 1972 Cr LJ 1277: 1972 SCD 571: MANU/SC/0277/1972 : (1972) 3 SCC 511: 1972 SCC (Cri) 604	40
Tukaram S. Dhigole v. Manikrao Shivaji Kokate, MANU/SC/0086/2010 : AIR 2010 SC 965	12, 44, 114
Tushar Roy v. Sukla Roy, 1993 Cr LJ 1659: 1993 (1) All Cr LR 313: 1992 Cal Cr LR 401: 1992 (2) CHN 327: 1992 (3) Crimes 1014: 1993 (1) Cur Cr R 642: 1992 Mat LR 377 (Cal)	137

U

Union of India v. K.S. Subramanian, MANU/SC/0546/1988 : AIR 1989 SC 662: 1989 Lab IC 1005: JT 1988 (4) SC 681: (1989) 1 Cur LR 82: (1989) 1 Cur LT 98: (1989) 58 FLR 199: (1989) 1 LLN 310: (1989) 1 ATLT 299	154
Union Territory of Goa v. Boaventura D'Souza, MANU/SC/0175/1993 : AIR 1993 SC 1199: 1993 Cr LJ 181: 1992 AIR SCW 3357: 1993 (2) Rec Cr R 702: 1993 SCC (Cri) 999: (1993) Supp 3 SCC 305	130
Unit Trust of India v. Garware Polyester Ltd., MANU/SC/0375/2005 : AIR 2005 SC 2520: 2005 AIR SCW 2798: 2005 CLC 668: JT 2005 (5) SC 300: MANU/SC/0375/2005 : (2005) 10 SCC 682: 2005 (4) SCJ 258: 2005 (4) SLT 442: 2005 (6) SRJ 413: (2005) 5 SCALE 54: 2005 (4) Supreme 359	20
Urgeu Sherpa v. State of Sikkim, (1985) 1 SCC 278	81

V

Vali Isa Mahmed v. State, MANU/GJ/0063/1963 : AIR 1963 Guj 135: (1962) 3 Guj LR 1052: 1963 (1) Cr LJ 755	67
Varand v. Emperor, AIR 1944 Sind 137	81
Vasa Chandrasekhar Rao v. Ponna Satyanarayana, AIR 2000 SC 2138: 2000 Cr LJ 3175: 2000 AIR SCW 2200: 2000 (2) Crimes 328: JT 2000 (6) SC 465: (2000) 6 SCC 286: 2000 (6) SRJ 314: (2000) 4 SCALE 635: 2000 SCC (Cri) 1104: 2000 (4) Supreme 173	27
Veera Ibrahim v. State of Maharashtra, MANU/SC/0514/1976 : (1976) 2 SCC 302: AIR 1976 SC 1167: 1976 SCC (Cri) 278: 1976 Cr LJ 860: 1976 Cr LR (SC) 165: (1976) 3 SCR 672	71
Victoria Xavier v. Greater Cochin Development Authority, AIR 1993 Ker 95: ILR 1992 (2) Ker 603: 1992 (1) Ker LJ 609: 1992 (1) Ker LT 613: 1994 LACC 347	15
Vijaya Singh v. State of Uttar Pradesh, AIR 1990 SC 1450	17
Vikram Singh v. State of Punjab, MANU/SC/0062/2010 : AIR 2010 SC 1007	64
Vinayak v. State of Maharashtra, MANU/SC/0136/1984 : AIR 1984 SC 1793: (1984) 4 SCC 441: 1984 SCC (Cri) 605	69
Vinod Chaturvedi v. State of Madhya Pradesh, (1984) 2 SC 354: MANU/SC/0137/1984 : AIR 1984 SC 911: 1984 Cr LJ 814: MANU/SC/0137/1984 : (1984) 2 SCC 350: 1984 SCC (Cri) 250: 1984 (1) Crimes 733: 1984 Cur Cri J 128: 1984 Cr LR (SC) 202: (1984) 1 Cr LC 417	119
W	
Wennhak v. Morgan and Wife, (1888) 20 QBD 635	73
Wilayat Khan v. State, MANU/SC/0068/1951 : AIR 1953 SC 122: 1953 Cr LJ 662: ILR (1953) 1 All 189	94
Y	
Yunis alias Kariya etc. v. State of Madhya Pradesh, MANU/SC/1116/2002 : AIR 2003 SC 539: 2003 Cr LJ 817: 2002 AIR SCW 5169: 2003 (2) Crimes 281: MANU/SC/1116/2002 : (2003) 1 SCC 425: 2002 (7) SLT 303: 2003 (2) SRJ 73: (2002) 9 SCALE 245: 2003 SCC (Cri) 341: 2003 (2) Supreme 899	32
Yusufalli Esmail Nagree v. State of Maharashtra, MANU/SC/0092/1967 : AIR 1968 SC 147: (1967) 70 Bom LR 76 (SC)	20, 45
Z	
Zahira Habibulla H. Sheikh v. State of Gujarat, AIR 2004 SC 3114: 2004 Cr LJ 2050: 2004 AIR SCW 2325: 2004 (2) Crimes 213: MANU/SC/0322/2004 : (2004) 4 SCC 158: 2004 (3) SLT 91: (2004) 4 SCALE 375: 2004 SCC (Cri) 999: 2004 (3) Supreme 210: 2004 (2) UJ (SC) 1041	170
Zahira Habibullah Sheikh v. State of Gujarat, MANU/SC/1344/2006 : AIR 2006 SC 1367: 2006 Cr LJ 1694: 2006 AIR SCW 1340: (2006) 1 CCR 193: 2006 (34) OCR 43: MANU/SC/1344/2006 : (2006) 3 SCC 374: 2006 (5) SCJ 536: (2006) 3 SCALE 104: 2006 (2) Supreme 598	160
Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, MANU/SC/0277/1975 : AIR 1975 SC 1788: MANU/SC/0277/1975 : (1976) 2 SCC 17: 1975 Supp SCR 281	20