Paper Code: LL.B. 305 Paper: Law of Evidence

I. Introduction and Relevancy

a. Evidence and its relationship with the substantive and procedural laws

b. Definitions – Facts, facts in issue, relevant, evidence proved, disproved, not proved, oral and documentary evidence (sec. 3)

c. Relevancy and admissibility

d. Doctrine of *res gestae*(Sec. 6,7,8,9)

e. Conspiracy (Sec. 10)

II. Statement – Admissions / Confessions and Dying Declarations

a. Admissions (secs. 17-23)

b. Confessions (secs. 24-30)

c. Dying Declarations (sec. 32)

III. Method of proof of facts

b. Presumptions (secs. 4, 41, 79-90, 105, 107, 108, 112, 113A, 114 and 114A)

c. Oral and documentary evidence (secs. 59-78)

d. Rules relating to Burden of proof (secs. 101-105)

e. Facts prohibited from proving

1. Estoppel (secs. 115-117)

2. Privileged Communications (secs. 122-129)

IV. Presumptions regarding discharge of burden of proof

a. Evidence by accomplice (sec. 133 with 114 (b))

b. Judicial notice (sec. 114)

c. Dowry Death (sec. 113 B)

d. Certain Offences (sec. 111 A)

UNIT-I

INTRODUCTION AND RELEVANCY

A. DEFINITIONS

a) Facts:

Factsmeans anything or state of things or relations of thing which can be perceived by senses (see, touch, taste, hear, and smell). Particular 'state of mind' is also a fact. Examples of facts:

1. Knife which is used for murder is a fact (things)
2. The blood of the victim on the sport or over the knife is facts (relation with the things i.e. knife)
3. Presence of victim and accused at the sport immediately before occurrence is also fact (state of things)
4. In case of murder through poisoning, pre-poisoning state condition of body and after poisoning condition of body of the victim is fact (State of things & relation of things) etc.

b) Facts in issue

It is defined under section 3 of IEA, which simply means those facts which can established right, duty, liabilities or obligations.

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.

Thus, in a dispute relating to possession of house, ownership would be fact in issue, since once the ownership is decided, who should have possession can easily be decided just by application of law. In criminal law, ingredients of an offence are 'facts in issue'. Say example, in case of murder, whether death is caused or not, whether death was caused with same intention as required by section 300 IPC or not? Whether accused is entitled for any right of private defense or not? These are 'facts in issue'. Example given in the IEA is:

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; (*will fix the liability* as required by section 300 IPC)

That A intended to cause B's death; (*will fix the liability* as required by section 300 IPC)

That A had received grave and sudden provocation from B; (*will reduce the liability* as provided in section 300 IPC)

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. (*will absolve from any liability* since it general exception to any offence and a very good defense)

c) Relevant facts:

Relevant facts are those facts which are so connected with the 'fact in issue' that it can explain, assert or deny existence of 'facts in issue'. However, it is to be noted here that every facts connected with 'facts in issue' is not relevant, unless the said fact is connected with 'facts in issue' in the same way as described in section 6-55 of IEA. Categories of relevant facts are:

1. Facts forming part of same transactions
2. Certain Statements like admission, confession or dying declarations
3. Earlier judgment pertaining to the said cause of action
4. Opinion of expert of facts disputed

5. Character of parties

d. Evidence proved, disproved and not 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 disproved when, after considering the matters before it, the Court believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

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

"Proved":
The English author, Cunn, gives the analogy of a merchant who receives information that the rate of exchange will vary, or a General who gets information about the movement of the enemy. The success of either will depend on his judging soundly when he ought to act on the assumption that what he hears is true, or when prudence bids him to assume it to be false.

If he waits for absolute certainty, he would never be able to act at all. Similarly, all that a judge needs to look for is such a high degree of probability that a prudent man, in any other similar transaction, would act on the assumption that such a thing was true.

"Matters before It":
The expression "matters before it" includes matters which do not fall within the definition of the term "evidence" (in S. 3 of the Act), as for instance, a fact orally admitted in Court or the result of a local investigation under the Civil Procedure Code. Therefore, in determining what is "evidence" other than evidence within the phraseology of the Act, the definition of 'evidence' must be read with that of 'proved'.

It would appear, therefore, that the Legislature intentionally refrained from using the word 'evidence' in this definition, but used instead the expression 'matters before it'. For instance, a fact may be orally admitted in Court. Such an admission would not come within the definition of the term 'evidence' as given in this Act.

Yet, it is a matter which the Court before whom the admission was made, would have to take into consideration, in order to determine whether the particular fact was proved or not. Similarly, the result of a local investigation under the Civil Procedure Code must be taken into consideration by the Court, though it is not 'evidence' within the definition given by the Act.

'Legal Proof' and 'Moral Conviction':
'Legal proof is to be distinguished from 'moral conviction'. Legal proof is neither more nor less than what is indicated by the definition of the word 'proved' in S. 3. Whatever may be the moral certainty in a case, unless it is legally proved to such an extent as would amount to legal proof, a judicial decision cannot be arrived at. So also, however morally convinced a judge may feel as to the truth of a particular fact, unless there is a legal proof of its existence, he cannot take it as proved.

e. Relevance and admissibility:

In civil proceedings in the common-law countries, evidence is both ascertained and simultaneously restricted by the assertions of the parties. If the allegations of one party are not disputed or contested by the other, or if the allegations are even admitted, then no proof is required. Proof would, in fact, be irrelevant. Evidence offered to prove assertions that are neither at issue nor probative of the matter at issue would also be irrelevant. The only evidence that is, therefore, relevant, is evidence that to some degree advances the inquiry and has a probative value for the decision. While continental European judges, in ordering the hearing of evidence or in deciding on evidence, indicate the facts to be proved and thereby strictly eliminate irrelevant facts, Anglo-American judges first give the parties an opportunity to furnish any evidence that they deem suitable. If, during the hearing of witnesses, irrelevant questions are put, they are rejected after the adversary has objected to them.

It has been said that relevance depends on logical considerations and that admissibility depends on the law. In contrast to civil law, the common law has developed a large number of rules governing the admissibility of evidence. Relevant evidence is not admissible, for example, if the witnesses are excluded from testifying because of incompetency, or if they are protected by privileges against self-incrimination, or in instances in which they would have to divulge confidential or professional communications that have a privileged status or government secrets, or, again, when the evidence is excluded by the rules against hearsay.

In criminal cases in civil-law countries, relevance relates to such questions that are so far removed from the case that they have no evidence value at all. Admissions and confessions do

not exclude further evidence. According to Anglo-American law, the accused may be a competent witness under the admissibility rules, but, in contrast to an ordinary witness, he has the privilege of not taking the witness stand. According to continental European law, the accused is neither a party nor a witness. He can be heard, but he cannot be forced to answer questions of fact. In general, Anglo-American rules of admissibility apply to criminal proceedings much as they apply to civil cases.

e) Doctrine of Res gestae

Iin English law all facts which are connected through 'part of the same transaction' they are called as evidence of 'res gestae', however in India such facts are codified from section 6 to section 11. Res Gestae in IEA are:

1. Facts forming part of same transaction (section 6)
2. Facts which are occasion, cause or effect of facts in issue (Section 7)
3. Facts suggesting Motive, preparation and previous or subsequent conduct (Section 8)
4. Facts necessary to explain or introduce relevant facts (section 9)
5. Things said or done by conspirator in reference to common design (Section 10)
6. When Facts not otherwise relevant become relevant because these facts make other facts in issue or any relevant fact either highly probable or highly improbable (section 11)

Facts forming part of same transactions (Section 6):

All facts which are connected with the 'facts in issue' due to:

1. Proximity of time
2. Proximity of place
3. Continuity of action
4. Community of purposes, whether happen at same time and place or different time and different place

Then, they are said be 'part of the same transactions'. For example

(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 is as to from 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.

Facts which are occasion, cause or effect of facts in issue (Section 7):

These facts are those which provide either occasion or cause or create effect over 'facts in issue'. For example in murder case, 'presence' of accused and victim at the place of occurrence at same time or accused 'having gun', at given time, or 'altercation between' accused and victim are the facts proving occasion, and thus they are relevant in this section. 'Firing' of bullet is cause of death, so 'firing' as such is a relevant fact; 'firing of bullet' may have effect of causing death or serious injuries, here injuries or death is effect of 'firing of bullet', so such injuries are relevant facts.

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.

Facts suggesting Motive, preparation and previous or subsequent conduct (Section 8):

Facts suggesting motive (say example previous fighting, property dispute, love affair, family dispute, business rivalry etc.) or preparation (say example just before the murder accused purchased a gun or bullets, or took training for shooting, or in case of forgery, he purchase few stamp papers to forged a sale deed etc) or conduct, whether previous or subsequent of the parties are also relevant (examples of previous conducts like, previous attempts, any fights; example of subsequent conduct such as being missing from house after committing murder, suspicious act of hiding himself or certain goods used for the offence etc.)

It is important to note that conducts of parties as well as their agents both are relevant in any suit or proceeding.

Illustrations

(a) A is tried for the murder of B.

The facts that, A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b) A sues B upon a bond for payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, it relevant.

(c) A is tried for the murder of B by poison.

The fact that, before the death of B,A procured poison similar to that which was administered to B, is relevant.

(d) The question is, whether a certain document is the will of A.

The facts that not long before the date of the alleged will A made inquiry into matters to which the provisions of the alleged will relate that he consulted vakils in reference to making the will, and that he caused drafts or other wills to be prepared of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts, either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favorable to himself, on that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

Generally, conduct does not include a bare statement, however, if such statement has affected the conduct of the parties, then not only such conduct but also statement both will be relevant. For example:

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

The facts that, after B was robbed, C said in A's presence – "the police are coming to look for the man who robbed B" and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B rupees 10,000.

The fact that, A asked C to lend him money, an that D said to C in A's presence and hearing "Advice you The Orient Tavern to trust A, for he owes B 10,000 rupees" and that A went away without making any answer, are relevant facts.

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

The facts that, A absconded after receiving a litter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which the complaint was made, are relevant.

The facts that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under section 32, clause 1, or as corroborative evidence under section 157.

f) CONSPIRACY:

Section 10 of Indian evidence act:

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. 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 1[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. Comments tc "Comments" Existence of conspiracy If prima facie evidence of existence of a conspiracy is given and accepted, the evidence of acts and statements made by anyone of the conspirators in furtherance of the common object is admissible against all; JayendraSaraswatiSwamigal v. State of Tamil Nadu, AIR 2005 SC 716. Object Section 10 has been deliberately enacted in order to make acts and statements of a co-conspirator admissible against the whole body of conspirators, because of the nature of crime; BadriRai v. State of Bihar, AIR 1958 SC 953. Significance of "common intention" The words "common intention" signify a common intention existing at the time when the thing was said, done or written by the one of them. It had noting to do with carrying the conspiracy into effect; Mirza Akbar v. Emperor, AIR 1940 PC 176.

Unit-II

Statements: Admission, Confessions & Dying Declaration (Section 17-32)

a) Admission:

According to section 31 of IEA, Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained. Admissions are those statements of made by the parties which are against their own interest. Why these statements are relevant is easy to appreciate. If some one is making statement against his own interest, then either he is insane or he is speaking truth, and if he is speaking truth, law must recognise that statement. For example when the question between A and B is, whether a certain deed is or is not forged? And A affirms that it is genuine, B that it is forged. Here, '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 con B Prove a statement by himself that the deed is gorged.

Since, admissions are made by parties against their own interest, during suit or proceeding, they are often proved by opposite party, except in 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 person under section 32 i.e. dying declaration
    1. For example 'A' the captain of a ship, is tried for casting the ship 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 statement, because they would be admissible between third parties, if he were dead under Section 32, Clause (2)

2. Another example would be where 'A' is accused of a crime committed by him at Calcutta. He produces a letter written by him, and dated at Lahore on that day, and bearing the Lahore post-mark of that day. Generally this letter will not be admissible as it is written by him only; however, this will be admissible because if A were dead it would be admissible under Section 32, Clause (2).
3. 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.
    1. A is accused of receiving stolen goods knowing them to be stolen. He officers 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.
4. An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.
    1. 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 coins as he doubted whether it was counterfeit or not, and that person did examine it and told him it was genuine. A may prove these facts because they are explanatory of conduct that he has no intention to possess any counterfeit coins and this is very must suggested by the fact the he as asked some one to examine the coin.

Who can make Admissions? (Section 18, 19 & 20 IEA)

Admissions can be made by:

a. Parties to the case

b. Authorised agents of parties, whether expressly authorised or authorised impliedly

c. In a Representation suit, the person who is representing others

- 'A' files a representation suit against government against torts of Nuisance. An admission made by A, would be binding all interested parties, if the statement was made when A was holding representative character.

d. Persons having any proprietary or pecuniary interest in the subject-matter of the proceeding

- A, a partner in a firm with B, files suit for possession of property against Z. B, makes an statement that A is fighting a wrong claim against B, would be relevant as he has pecuniary interest in the property and still making such comment.

e. Persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, and where statement was made during the continuance of such interest of the persons making the statements

- A files suit for recovery of 20, 000/- Rs against B, claiming that the house which he purchased from C was under mortgage with said amount in his name. A want to prove a statement given by C, which was made when house was owned by C, that house is under a mortgage for 20,000/- Rs, with A. Since, the statement was given when C was having possession of the house, this would be good piece of admission as he made statement against his own interest and now B is deriving his interest from the same house.

f. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit

- A undertakes to collect rent 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 owned B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

g. Admission by persons expressly referred to by party to suit

- The question is, whether a horse sold by A to B is sound A says to B "Go and ask CC knows all about it" C's statement is an admission.

Admission can be made both in civil proceeding as well as in criminal proceedings. For example, if during a criminal trial for murder, accused admit his presence at place or occurrence or admit that weapon use for committing offence belongs to him etc., then such facts need not to be proved. It is because of this reason it is stated that 'facts admitted need not to be proved.'

B)Confession (Section 24-30)

Confession is that type of admission in criminal matter where accused admits guilt in its absolute terms, leaving prosecution to prove nothings. In other words, confession of guilt in its entirety may be termed as confession.

Lord Atkin in Pakla Narayan Swami v. Emperor (AIR 1941 PC 39) provided interesting example of confession. If accused admit the guilt which highly inclupatory and says that he had stabbed the victim to death through his knife, and admit the knife as well, it is still not confession because prosecution would have to prove whether or not act of accused is covered by any private defense or protected under any general exception such as unsoundness of mind.

Rule regarding Admissibility of Confession—

- According to section 24 of IEA, No confession given by an accused person would be relevant if it given in a criminal proceeding, and it was given under any inducement, threat or promise, with reference to the charge against the him, and such inducement, threat or promise was given by a person in authority in relation to that case 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 proceeding against him.
- It must be noted that until all elements of section 24 are there, no such confession could be rejected. Say example, even if there is threat or promise, but it was not related to the consequence (like spiritual threat) or not coming out from the authority in proceeding, then if confession is made, it will be relevant.

- A, an accused was threaten by a priest as to spiritual consequences, unless he confess, and accordingly accused makes confession, here only few elements of section 24 are there and not all, so this confession is admissible.
- The best example of cases where all elements mentioned in section 24 is present is when a police officer arrest any accused. It because of this reason that any confession made to a police officer is inadmissible by section 25 of IEA.
- Only coercive confessions are made inadmissible. However, if the accused want to confess voluntarily, then code of criminal procedure prescribes such procedure in section 164(3), and a Magistrate, when satisfied that accused is making confession voluntarily, he may record the same, and that is often used as substantial piece of evidence against the accused. If the confession is made through this process, it is called as judicial confession. Any confession made otherwise to any other person, such as friend, stranger etc. is called as Extra Judicial Confession. An extra judicial confession is legal and valid.
- It is difficult to rely upon the extra judicial confession as the exact words or even the words as nearly as possible have not been reproduced. Such statement cannot be said to be voluntary so the extra judicial confession has to be excluded from the purview of consideration for bring home the charge; C.K. Raveendran v. State of Kerala, AIR 2000 SC 369.

Exception to Rules of Confession—

- The first exception to rule of confession is provided in section 27 of IEA. It provides that when any fact is deposed to as 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*. For example if accused says that "I killed B, and I can show you the place where I have buried the knife"…in this statement, police, if discover the 'knife' then the fact that it was discovered at the instance of accused may be proved.
- The condition necessary to bring the section 27 into operation is that the discovery of a fact in a consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of the information as

relates distinctly to the fact thereby discovered may be proved; PulukuriKottaya v. Emperor, AIR 1947 PC 119.

- If such a confession as is referred to in Section 24 is made after the impression caused by any inducement, threat or promise has, in the opinion of the Court been fully removed it is relevant.
- Section 29 provides that Confession otherwise relevant not to become irrelevant because of promise of secretary etc. Say for example B asked A, an accused of murder to make confession to him and he (B) promises that he will not disclose it to any one. Since, it is extra judicial confession which is admissible, it will not be held inadmissible only because there was a promise of its secrecy.
- Section 30 of IEA provides that when a confession is given by one accused, and the same was proved, it can be used against the co-accused if he is tried together in the same case during the joint trial. However, as per Illustration (b) of Section 114 of IEA, such confession should not be relied until the same is proved with material corroboration. Why corroboration is important in this case? Let's examine. A committed murder of B with the help and conspiracy of X, Y and Z. all four were put on joint trial. During trial, X became approver and made confession. Now, since, he is also a co-accused, as per law, i.e. section 30 r/w 133 (Section 133 defines that accomplice/approver is a good witness) his statement is good evidence against all others accused. Rule of logic suggest that if X can ditch his closest friend like A, Y and Z, he must be very shrewd person and, what is guarantee that he will tell truth now. So, illustration (b) of section 114 provides rule of logic or rule of prudence that such testimony should not be relied on until corroborated in material particular i.e. through other evidence.

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 trail 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". The statement may not be taken into consideration by the Court against A as B is not being jointly tried.

c) Dying Declaration:

Generally, no statement given by any person can be used as evidence, until he comes to the court and testified on oath as to veracity of his statement. The reason behind this rule is that court cannot rely on a statement which is just a hearsay or rumor. What someone said, who know better than the person who made that statement, and until he comes to court, his statement should not be considered. However, in those cases where calling that person to court would be futile because either he exist no more or live at some place from where he could not be brought to the court, and he made certain statement which is so relevant to the case, then as a matter of public policy the same must be allowed to be proved. Let's take an example. A killed B. before his death, B made certain statement to doctor as to cause of his death i.e. who causes those injuries. Now, as matter of general rule, his statement should not be proved since a dead man cannot be brought to the court to testify something on oath. It is also a fact that no body knows better as to cause of his death other than he. In such case, public policy allows that such statement may be admissible subject to certain strict rules.

A statements, written or verbal, 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.

(2) Or is made in course of business – When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods securities or property of any kind; or of a document used in commerce written or signed by him or of the date of a letter or other document usually dated, written or signed by him.

(3) Or against interest of maker – When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true it would expose him or would have exposed him to criminal prosecution or to a suit for damages.

(4) Or gives opinion as to public right or custom, or matters of general interest – When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest of the existence of which if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

(5) Or relates to existence of relationship – When the statement relates to the existence of any relationship [1]by blood, marriage or adoption between persons as to whose relationship [1]by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) Or is made in will or deed relating to family affairs – When the statement relates to the existence of any relationship [1]by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on

which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) Or in document relating to transaction mentioned in section 13, Clause (a). – When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, Clause (a).

(8) Or is made by several persons and express feelings relevant to matter in question – When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

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.

(b) The question is as to the date of A's birth. An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day. A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned, in Calcutta , for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day. A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land. A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is, whether A and B were legally married. The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h) The question is, what was the cause of the wreck of a ship. A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way. A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banya in the ordinary course of his business is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B. A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A. A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married. An entry in a memorandum-book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

- Evidence given by a witness in a judicial proceeding is relevant for the purpose of proving a particular fact in later stage of the same judicial proceeding, when the witness cannot be found or is dead

Public Entries, documents & Judgment of the Court:

- Section 35 provides that entry in public record or an electronic record made in performance of official duty is relevant for example it has been held regarding proof about legitimacy of child that the Birth Certificate proceeding on the basis of Baptism Certificate, containing fact that Baptism record was read and checked before the god parents and signed by person along with god parents, such certificate is valid. Thus, Birth Certificate proceeding on basis of Baptism Certificate, legally recognised legitimacy; Luis Caetano Viegan v. Esterline Mariana R.M.A. Da'Costa, AIR 2003 SC 630.
- Section 36 provides that statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Central Government or any State Government, as to matters usually represented or stated in such maps, charts, or plans are themselves facts.
- According to Section 37, When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

- Section 40 provides that the existence of any judgment etc which by law prevents any court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is, whether such Court ought to take cognizance of such suit or to hold such trail.
- A final judgment or order or decree of a Competent Court, in exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or to take away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing not as against any specified person but absolutely, is relevant when the existence of any legal character, or the title of any such person to any such thing, is relevant.
- Judgments, orders or decrees other than those mentioned in Section 41, are relevant if they relate to matters of a public nature relevant to the inquiry; nut such judgments, orders or decrees are not conclusive proof of that which they state.
- judgments, orders or decrees other then those mentioned in Sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant, under some other provision of this Act.

Illustrations

(a) A and B separately sue C for a libel which reflects upon each of them C in each case says that the matter alleged to libelous is true and the circumstances are such that it is probable true in each case, or in neither. A obtains a decree against C for damages on the ground that C filed The Orient Tavern make out his justification. The fact is irrelevant as between B and C.

(b) A prosecutes B for adultery with C, A's wife. B denies that C is A's wife, but the court convicts B of adultery. Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. CC says that she never was A's wife. The judgment against B is irrelevant as against C.

(c) A prosecuted B for stealing a cow, from him, B is convicted. A, afterwards, sues C for cow. Which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against A,C,B's son murders A in consequence. The existence of the judgment is relevant, as showing motive for a crime.

(e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under Section 8 as showing the motive for the fact in issue.

- Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Section 40,41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Unit-III-

METHOD OF PROOF OF FACTS

a) Presumptions:

Presumptions are inferences which are drawn by the court with respect to the existence of certain facts. When certain facts are presumed to be in existence the party in whose favor they are presumed to exist need not discharge the burden of proof with respect to it. This is an exception to the general rule that the party which alleges the existence of certain facts has the initial burden of proof but presumptions do away with this requirement.

Presumptions can be defined as an affirmative or negative inference drawn about the truth or falsehood of a fact by using a process of probable reasoning from what is taken to be granted. A presumption is said to operate where certain fact are taken to be in existence even there is no complete proof. A presumption is a rule where if one fact which is known as the primary fact is proved by a party then another fact which is known as the presumed fact is taken as proved if there is no contrary evidence of the same. It is a standard practice where certain facts are treated

in a uniform manner with regard to their effect as proof of certain other facts. It is an inference drawn from facts which are known and proved. Presumption is a rule which is used by judges and courts to draw inference from a particular fact or evidence unless such an inference is said to be disproved.

Presumptions can be classified into certain categories:

- Presumptions of fact.
- Presumptions of law.
- Mixed Presumptions.

Presumptions of fact are those inferences which are naturally and logically derived on the basis of experience and observations in the course of nature or the constitution of the human mind or springs out of human actions. These are also called as material or natural presumptions. These presumptions are in general rebuttable presumptions.

Presumptions of law are those inferences which are said to be established by law. It can be subdivided into rebuttable presumptions of law and irrebuttable presumptions of law. Rebuttable Presumptions of law are those presumptions of law which hold good until they are disproved by evidence to the contrary. Irrebuttable Presumptions of Law are those presumptions of law which are held to be conclusive in nature. They cannot be overturned by any sort of contrary evidence however strong it is.

Mixed Presumptions are certain inferences which can be considered as observations of law due to their strength or importance. These are also known as presumptions of mixed law and fact and presumptions of fact recognized by law.

Section 4 of the Indian Evidence Act deals with three categories of presumptions

- Discretionary Presumptions
- Mandatory Presumptions

- Conclusive Proof

The Sections of the Indian Evidence Act which deal with Discretionary Presumptions relating to documents are sections 86, 87, 88, 90 and 90-A. These Presumptions are those in which the words may presume are used in the sections and the words may presume is used signifies that the courts of law have discretion to decide as to whether a presumption is allowed to be raised or not. In the case of such presumptions the courts of law will presume that a fact is proved unless and until it is said to be disproved before the court of law or it may call for proof of a fact brought before it. The Sections of the Indian Evidence Act which deal with Mandatory Presumptions are Section 79, 80, 80-A, 81, 82, 83 85 and 89. These Presumptions are those in which the words shall presume is used. In case of such presumptions the courts of law will presume that a fact before it is proved until and unless it is disproved. The words shall presume signify that the courts have to mandatorily raise a presumption and such a presumption which is raised shall be considered to be proved unless and until the presumption is said to be disproved and there is no discretion left to the court therefore there is no need for call of proof in this case. It is like command of the legislature to the court to raise a presumption and the court has no choice but to do it. The similarity between discretionary and mandatory presumptions is that both are rebuttable presumptions.

Conclusive Proof is defined under Section 4 that one fact is said to be conclusive proof of another fact when the court shall on the proof of a certain fact regard another fact to be proved and the court shall not allow any evidence which shall to be given for the purpose of disproving such a fact. Conclusive Proof is also known as Conclusive Evidence. It gives certain facts an artificial probative effect by law and no evidence shall be allowed to be produced which will combat that effect. It gives finality to the existence of a fact which is sought to be established. This generally occurs in cases where it is in the larger interest of society or it is against the governmental policy. This is an irrebuttable presumption.

The general rule about burden of proof is that it lies on the party who alleges the fact to prove that the fact exists. But a party can take advantage of the presumptions which are in his favor. If the prosecution can prove that the conditions of a presumption are fulfilled and such a

presumption is of rebuttable nature then the burden of prove to rebut it is always on the party who wants to rebut it.

PRESUMPTIONS RELATING TO DOCUMENTS

Discretionary presumptions are those presumptions where the discretion is left to the court whether or not to raise the presumption. The provisions in which the words "may presume" are used are discretionary presumptions. The discretionary presumptions relating to documents are provided under Sections 86, 87, 88, 90 and 90-A of the Indian Evidence Act. Section 86 lays down the principle that the court may make a presumption relating to the genuineness and accuracy of a certified copy of a judicial record of any foreign country if the said document is duly certified in accordance with the rules which are used in that country for certifying copies of judicial records. The presumption under this section is permissive and imperative in nature and hence should be complied with. But the court has the discretion to decide whether the presumption should be raised or not. If there is no certificate under this section then a foreign judgment is not admissible as evidence in court. But this does not mean that it excludes other proof. It is not necessary that the foreign judgment should have already been admitted as evidence so as to give rise to this presumption .

The presumption under Section 87 is related to the authorship, time and place of the book or map or chart and not related to accuracy or correctness of facts contained in the book, map or chart. The accuracy of the information in the map, book or chart is not conclusive but in the absence of contrary evidence it is presumed to be accurate. The accuracy of the information in a map or a chart depends on the source of information. The age of the publication is also not important the court can refer to any publication as long as it is relevant to the suit brought before it.

The presumption under Section 88 is based on the principle that the acts of official nature are performed in a regular manner. Under this section the court accepts hearsay statement as evidence about the identity of the message which was delivered. The requirement under this section that no presumption shall be made with regard to the person who has delivered the message for the purpose of transmission is mandatory and should be necessarily complied with.

This presumption only operates if the message has been delivered to the addressee otherwise the message is not held to be proved. This presumption applies only those messages which are transmitted to the addressee through the telegraphic office. This presumption also applies to radio messages .

The form which is given to the post office by the sender of the message is the original of the telegram and not the form given by the post office to the addressee. Either the original copy must be submitted before the court by a post office official or proof of its destruction must be given before copy can admitted as secondary evidence before the court under this section.

According to Section 88 there is only a presumption that the message received by the addressee corresponds to the message delivered for transmission to the telegraph office and there is no presumption as to the person who delivered the said message for transmission. But the proof relating to the authorship of the message is not direct but of a circumstantial nature. The content of the message read in context with the chain of correspondence is proof relating to the authorship of the message.

Section 88-A is similar to Section 88 in structure and it is like an extension of Section 88 which deals with the transmission of electronic message. According to this section the court may presume that an electronic message forwarded by the originator through an electronic mail server to be addressee to whom the message purports to be addressed corresponds with the message with the message as fed into his computer for transmission but the court shall not make any presumption as to the person by whom the message is sent. The terms "addressee" and "originator" given in this section can be defined by looking into Clauses (b) and (za) of Subsection (1) of Section 2 of the Information Technology Act of 2000.

Section 90 deals with presumption relating to ancient documents or documents which are 30 years old. The basis of Section 90 is the principle of convenience and necessity. The basic objective of this section is to reduce any difficulties faced by persons who want to prove the handwriting, execution and attestation of ancient documents for establishing their case.

Under this section the court may make the following presumptions with respect to ancient documents: a) the signature and every part of handwriting of such a person and b) that the document was duly executed and attested by the person it is supposed to be executed and attested. The presumption under this section does not apply to other aspects of the document like its contents or its authenticity.

The presumption under this section applies to all the documents which come under the definition given under Section 3 of the Indian Evidence Act. It applies to books of accounts, testamentary documents, private and public documents. This presumption does not apply to anonymous documents.

For the presumption under Section 90 to be applicable the following conditions have to be fulfilled:

The document should be proved or purported to be 30 or more years old. There must be some evidence or at least a prima facie case should be made out to support that the document is 30 years old. This is however a rebuttable presumption. Ancient documents can be read as evidence without any formal proof. The period of 30 years is commuted from the date of the execution of the document to the date on which it is put as evidence.

The document should be produced from proper custody. It can be proved that document is produced from proper custody either by giving evidence to prove the fact or show that the person who produced it was the depository of the document.

The document should be original and not certified copies or registered copies. If an original document is not produced before the court and no reason is given for the non production of the original documents the certified copies are not admissible before the court. However if a copy of a document can be admitted as secondary evidence under Section 65 and is produced from proper custody and is over thirty years old then signature which authenticates the document may be presumed as genuine but this does prove the execution of the document. Certified copies are admissible if the original document is in the possession of the opposite party. Certified copies are also admissible to prove contents of the original if the original copy is lost.

This presumption applies only in the case of proving the signature and the handwriting of the document. If the documents do not have a signature then the presumption under Section 90 does not apply to it. The definition of signature under this section includes thumb impressions if there is no evidence to the contrary. However the signature under this section does not include seals because seals do not fall within the definition of signature given in the General Clauses Act.

However there are certain causes which weaken the presumption under Section 90 are:

The court may presume the genuineness of the document if it more than 30 years and produced from proper custody. The presumption is weakened by circumstances which raise doubts authenticity of the document. When the genuineness of the document is disputed the court has to consider external and internal evidence related to it in order to decide whether there was proper execution and signature.

When the document is suspicious on the face of it the court need not presume that the document was executed by the person purported to have executed it.

Section 90-A is similar to Section 90 of the Indian Evidence Act in structure and is like an extension of Section 90 which applies to electronic records which are 5 years old. According to this section if any electronic record purporting or proved to be 5 years old is produced from custody which the court in the particular case considers proper the court may presume that the electronic signature which purports to be the electronic signature of any particular person was so affixed by him or authorized by him in this behalf.

The explanation to this section states that the electronic records are said to be in proper custody if they are in the place in which and under the care of the person with whom they naturally be but no custody is said to be improper if it is proved to have a legitimate origin or the circumstances of the case are such as to render such an origin probable.

b) Expert opinion

Law of evidence allows a person –who is a witness to state the facts related to either to a fact in

issue or to relevant fact, but not his inference. It applies to both criminal law and civil law. The opinion of any person other than the judge by whom the fact has to be decided as to the existence of the facts in issue or relevant facts are as a rule, irrelevant to the decision of the cases to which they relate for the most obvious reasons- for this would invest the person whose opinion was proved with the character of a judge. The rule however, is not without its exceptions. "If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns".

The expert witness is, thus, an exception to the exclusionaryrule and is permitted to give opinion evidence. The Judge is not expected to be an expert in all thefields-especially where the subject matters involves technical knowledge. He is not capable ofdrawing inference from the facts which are highly technical. In these circumstances he needs thehelp of an expert- who is supposed to have superior knowledge or experience in relation to thesubject matter. This qualification makes the latter's evidence admissible in that particular casethough he is no way related to the case. Because an expert has an advantage of a particularknowledge vis-à-vis a judge who is not equipped with the technical knowledge and hence notcapable of drawing an inference from the facts presented before him.

Who is an expert?

An expert is a person who devotes his time and study to a special branch of learning.
The Courts in India in theirjudgment described an expert as a person who has acquired special knowledge, skill orexperience in any art, trade or profession. Such knowledge need not be imparted by anyUniversity. He might have acquired such knowledge by practice, observation or careful study. Theexpert operates in a field beyond the range of common knowledge. 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, the opinions upon that point of persons especially skilled in such foreign law, science or art (or in questions as to identity of handwriting) or finger impressions are relevant facts6. Such persons are called experts. To sum up an expert is one who is skilled in any particularart, trade or profession being possessed of peculiar knowledge concerning the same.

Expert as a witness:

The phrase expert testimony is not applicable to all species of opinion evidence. A witness is not giving expert testimony who without any special knowledge simply testifies as to the impressionsproduced in his mind. Question of common knowledge such as whether the hammering of the steelplates with hammers weighing 10 kg cause noise or not does not need an expert. Expert evidenceis often sought in the matters of handwriting, age, on weather, general conduct of a business etc. Aperson having special knowledge of the value of land by experience though not by any professioncan be treated as an expert.

The Cases in which Expert Evidence can be admitted:

The Supreme Court of New Hampstead has classified the cases under three heads and declared that experts may give opinions on the following:

1. Questions of science, skill or trade or other subjects.
2. When the subject matter of enquiry is of such a nature that inexperienced persons are not likelyto form a correct judgment over it without assistance.
3. When the subject matter of investigation so far as it partakes of the nature of a science as to mean a course of previous habit or a study in the attainment of knowledge of it .

Expert Evidence in Indian Evidence Act:

Expert evidence is covered under Ss.45-51 of Indian Evidence Act. S.45 of the Act allows that when the subject matter of enquiry partakes of science or art as to require the course of previous habit or study and in regard to which inexperienced persons are unlikely to form correct judgment.

Therefore the opinion of persons having special knowledge of the subject – matter of the enquiry

and described as experts is made relevant. However, whether a particular person is a competent witness or not is to be proved in the Court of Law before his testimony is admitted. Thecompetency of an expert is a preliminary question before the Judge. An expert need not be a paid

professional expert who makes living by giving such evidence, but he must have devoted sufficienttime and study to the subject so that he can make his evidence trustworthy.

Subject Matters of Expert Evidence: The subjects of expert testimony mentioned by the section are foreign law, science, art and the identity of handwriting or finger –impressions. Expert on anyother subject is not admissible. This was the position in 1954. No more it is the law. Law relatedto expert evidence has developed in a piece meal method growing hand by hand with the development of technology in every field. The word science or art if interpreted in a narrow sense,would exclude matters upon which expert testimony is admissible such as matters related to trade,handicrafts, ballistics and many more. Every business or employment which has a particular classdevoted to its pursuit is an art or trade. When the question of foreign law is raised the evidence ofprofessional lawyer or the holder of an official situation which requires and therefore implies legalknowledge or a teacher of law is admissible. As far as science and art concerned they are to bebroadly construed so as to include all subjects on which a course of special study or experience isnecessary to the formation of an opinion and embrace also the opinion of an expert in footprint as well.

S.47 of the Indian Evidence Act exclusively deals with the opinion as to the handwriting.

The explanation further elaborates the circumstances under which a person is said to have known the disputed handwriting. Under this section a person who is deposing the evidence need not be a handwriting expert. Indeed the knowledge the general character of any person's writing which a witness has acquired incidentally and unintentionally, under no circumstance of bias or suspicion,is far more satisfactory than the most elaborate comparison of even an experienced person. Onecan get acquainted with others handwriting in many ways. The former might have seen the latterwriting a particular handwriting. He might be receiving letter from the latter

regularly. A superiorofficer might have seen his subordinate's writing on several occasions and vice versa. But, theevidence given by a person who has insufficient familiarity should be discarded. Indian EvidenceAct insists that documents either be proved by primary evidence or by secondary evidence.

S.67of the Indian Evidence Act prescribes the mode of proving the signature in a document. However,the opinion as to handwriting is admissible only if the condition laid down in S. 47 is fulfilled, that is
the witness is established to have been acquainted with the writing of the particular person in one of the modes enumerated in this section.20 However, the opinion of an expert is relevant when theCourt has to form an opinion on a point of science or art. At times expert opinion differs on provenor admitted facts. But when the facts are not admitted the Court will have first to come to aconclusion on the evidence as to what facts have been proved and then to apply to such facts thevarious expert opinions which have been offered. The opinion of an expert in handwriting should bereceived with great caution and should not be relied on unless corroborated.21 But no suchcorroboration is need in the case of finger prints. Of course, an expert can always refresh himmemory by referring to the text books. A doctor can refer to medical books, a valuer to the pricelists, a foreign lawyer to legal codes, texts and other journals.

The expert opinion is not confined to handwriting alone. The opinions in relation to customs are also admissible according to S. 48 of Indian Evidence Act.40 Section 1341 and S.32 (4) alsomentions about custom.42S.13 deals with all rights and customs, public, general and private and
refers to specific facts which may be given in evidence. The latter is a hearsay evidence where a secondhand opinion can be admissible in the Court of law where the person who opined cannot bebrought before the Court (because of death or inability) upon the question of the existence of anypublic right or custom or matter of public or general interest made ante litem motan. But S.48 dealswith the evidence of a living witness, who stood before the Court sworn to depose and subject tocross examination. Not only custom under this section opinion regarding usage is also admissible.

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d. ORAL EVIDENCE

The facts judicially noticeable and facts admitted are need not to be proved. Oral and documentary evidence are not only media of proof. This chapter deals with the oral evidence only. It enacts two broad rules regard to oral evidence: firstly, that all facts except contents of documents may be proved by oral evidence, and secondly, that oral evidence in all cases must be direct and not hearsay.

The meaning of expression "oral evidence" is given along with the definition of the term "evidence" in Section 3 of Indian evidence act as-: "Evidence" means and includes -:

(1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence.

(2) All documents including records produced for the inspection of the Court such documents are called documentary evidence.

Section 59 of the Indian evidence act reads as-:

All facts, except the contents of documents, [or electronic records, be proved by oral evidence.

Principle: This section lays down that all facts may be proved by oral evidence, except the contents of a document. The section is rather loosely worded as it makes an unqualified statement as regards the exclusion of oral evidence to prove the contents of a document. The true position is that oral evidence can be led as evidence relating to documents under section.

In general the evidence of a witness is given orally, and this means oral evidence. The expression oral evidence therefore includes the statement of witness before the court which the court either permits or requires them to make. The statement may be made by any method by which the witness is capable of making it. A witness who cannot speak may communicate of facts to the court by signs or by writings and in either case it will be regarded as oral evidence. Thus where a women was unable to speak because her throat was cut and she suggested the name of her assailant by the signs of her hand that was held to be a verbal statement relevant as a dying declaration.

Where oral evidence is credible and cogent, medical evidence is to contrary is inconsequential. Only when medical evidence totally improbable oral evidence, adverse inference can be drawn. Evidentiary value of the oral testimony of an eye-witness cannot be diluted by reason of non-production of any document in support of a claim contrary to the oral testimony.

Difference between 'Relevancy' & 'Admissibility'-: there are following three differences between the relevancy and Admissibility -:

1) The first deals with the probative value of specific facts,

2) The second including artificial rules which do not profess to define probative value but yet aim at increasing or safeguarding it, and

3) The third covering all those rules which rest on extrinsic policies irrespective of probative values.

EVIDENTIARY VALUE-: Oral evidence is a much less satisfactory medium of proof than documentary proof. But justice can never be administered in the most important cases without resorting to it. In all civilized systems of jurisprudence there is a presumption against perjury. The correct rule is to judge the oral evidence with reference to the conduct of the parties, and the presumptions and probabilities legitimately arising in the case. Another test is to see whether the

evidence is consistent with the common experience of mankind, with the usual course of nature and of human conduct, and with well-known principles of human action.

FALUS IN UNO FALUS OMNIBUS-: The maxim means false in one particular, false in all. This principle is a somewhat dangerous maxim. There is always a fringe of embroidery to a story, however true in the main and so where the falsehood in merely an embroidery, that would not be enough to discredit the whole of the witness's evidence; where , on the other hand the falsehood relates to a major or material point that is enough to discredit the witness.

APPRECIATION-: oral evidence should be approached with caution. The court must shift the evidence, separate the grain from the chaff and accept what it finds to be true and reject the rest. The credibility of the witness should be decided on the following important points:

(a) Whether the witness have the means of gaining correct information,

(b) Whether they have any interest in concealing the truth,

(c) Whether they agree in their testimony.

Though a chance witness is not necessarily being a false witness, it proverbially rash to rely upon such evidence. The real tests for accepting or rejecting evidence are; how consistent is the story in itself, how does it stands of cross-examination and how far does it fit it with the rest of the evidence and circumstances of the case. Non-consideration of oral evidence by the lower appellate court, it is a non observance of the mandatory provision of Order 41, Rule 31 which brings in the sessions infirmity in the judgment. The judgment in such a cases stands vitiated and is not binding on the high court in the second appeal. When a girl states that a particular person used to conduct himself as her father, she says so from his personal knowledge and it is not hearsay.

ELECTRONIC RECORDS-The section was amended by the Information Technology Act, 2000 so as to include within the meaning of the term "document", electronic records also. Hence,

every other fact, except contents of an electronic record or of any document, can be proved by oral evidence.

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

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

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

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

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

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

PRINCIPLE-: this section enacts the general English rule that hearsay is no evidence. It embodies the second important rule about oral evidence, viz., that it must in all cases be direct and not hearsay. The section sets out the scope of the expression 'direct evidence'. It is true that hearsay evidence is excluded by this section. However, this is subject to well- recognized exceptions (e.g., sections 17 to 39).

Stephen – "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."

HEARSAY EVIDENCE AND ITS EXCLUSION-: the term hearsay is ambiguous and misleading as it is used in more than one scene. Stephen says "sometimes it means whatever a person is heard to say; sometimes it means whatever a person declared on information given by someone else; sometimes it is treated as nearly synonymous with irrelevant" , (Stephen's evidence, introduction. In its more generally accepted since the term hearsay is used to indicate that evidence which does not derive its value from the credit given to the witness himself, but which rests also on the veracity and competence of some other person. It is thus used in contradiction to 'direct evidence'. It is derivative evidence.

REASONS FOR EXCLUSION OF HEARSAY-:

(a) The irresponsibility of the original declerant;

(b) The deprecation of truth in the process of repetition; and

(c) The opportunities for fraud its admission would open; to which are sometimes added these

grounds, viz.,

(d) The tendency of such evidence to protract legal inquires, and

(e) To encourage the substitution of weaker for stronger proof.

Hearsay evidence is the statement of a witness not based on his personal knowledge but on what he heard from others. If the evidence is that of a fact the happening of which could be heard, for example, the noise of an explosion, the evidence must be that of a person who personally heard the happening of the fact. The evidence of a reporter that after filing the F.I.R at the instance of his companion, who told by the people there, by naming the accused, that he assaulted the deceased and escaped, was held to be irrelevant, being not an eye witness account. Thus all the cases the evidence has to be that of a person who himself witnessed the happening of the fact of which he gives evidence in whatever way the fact was capable of being witnessed. Such a

witness is called an eye-witness or a witness of fact and the principle is known as that of direct oral evidence or of the exclusion of hearsay evidence. A post mortem report was produced by the record clerk of the hospital. The doctor who conducted the post mortem was not produced. The court ruled that in such circumstances the report was not provable. Only the original report stand not a copy of it is admissible.The accused person was prosecuted for causing hurt by throwing a stone at prosecutor. So soon he was hit by the stone a woman who saw a man throwing the stone drew his attention towards a house and said: "*the person who threw the stone went in there*." Very soon thereafter he was caught and arrested in that house. But the above statement was held to be not relevant. The prosecutor himself had not seen any person throwing a stone at him and thereafter entering a particular house and, therefore, the statement was not hearsay.

EXCEPTIONS TO HEARSAY

- Res Gestae [s.6]
- Admissions and Confessions
- Statement relevant under section.32
- Statements in Public Documents.
- Evidence in Former Proceedings
- Statements of Experts in Treatises

Difference between Direct Evidence and Hearsay Evidence

Direct Evidence	Hearsay Evidence
1. Direct evidence is that which the witness is giving on the basis of his own perception	1. Hearsay evidence is that which has been derived by other person.
2. Direct evidence is best oral evidence of the fact to be proved.	2. Hearsay evidence is secondary one and it is admitted in exceptional cases.
3. The liability of veracity of direct evidence is on person who is giving its evidence.	3. In case of hearsay evidence the person giving evidence does not take the responsibility of its veracity.
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.
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.

DOCUMENTARY EVIDENCE

MEANING--: the expression *"documentary evidence"* as it is defined in section 3, means:

All documents including records produced for the inspection of the Court] such documents are called documentary evidence.

The expression "document" is defined in section 3 as follows:

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

S.3 defines the term 'evidence' as meaning and including oral and documentary evidence. All evidence comes to the tribunal either as the statement of a witness or as the statement of a document, i.e., oral or documentary evidence. The present chapter deals with the documentary evidence, i.e., the mode of proof of contents of documents old documents either by primary or secondary evidence, the types of documents, viz., public and private documents of the presumptions as to the documents. Father we are going to deal with the 3 main aspects --:

a) How documents are to be proved the manner of,

b) What are the presumptions about the various kinds of documents, and

c) When is oral evidence excluded by documentary evidence.

R.M.Malkani v. State of Maharashtra, the accused, which an appealed to the Supreme Court against his conviction, was the coroner of Bombay. A doctor, who was running a nursing home, operated upon a patient who afterwards died. It, being a post-operation death, becomes the subject of post-mortem and inquest. The coroner persuaded the doctor to pay him a sum of money if he wanted the report to be favorable to him. The payment was arranged to be made through another doctor and the final meeting for this purpose was to be settled by telephone call from the house of another the doctor. The police commissioner was called with the tape-

recording mechanism. This was connected to the doctor's telephone and thus the most incriminating conversation was recorded in the presence of the police officer. The Bombay High Court held that the testimony of the two doctors required corroboration and that the tape amply corroborated it. The decision was upheld by the Supreme Court.

N.Sri Rama Reddy v. V.V. Giri&Pratap Singh v. State of Punjab, The court accepted conversation of dialogue recorded on tape-recording machine as admissible evidence.

S.61 – Proof of contents of documents--: *The contents of document may be proved either by primary or secondary evidence.* Law of best evidence requires the best evidence must be given in proof of the facts in issue or the other relevant facts. Primary evidence is the best evidence. The best evidence rule is to produce the original and secondary evidence is not admissible unless the original is proved to be lost, etc, as required under section 65. Contents may be proved, i.e., in other words, there are no degrees of secondary evidence.
n India the rule is the same as in England. The section means that there no other method allowed by law for providing the contents of a document except by the primary or the secondary evidence. Where admissions were made in a written statement by the plaintiff's predecessors-in-interest which was filed in several judicial proceedings regarding the rights in the suit property, a certified copy of the written statement was held to be admissible in proof of the settled rights to the property. Where the document carried adhesive stamps which belonged to a period prior to six months from the date of purchase, the court said that such document could not be attached in evidence. it would have been admissible if it was not creative of any rights in favour of any party and merely recorded something. An unregistered family settlement deed was held to admissible strictly for collateral purposes only.

The subject of documentary evidence can be divided into three parts:

1. How the contents of a document are to be proved? {61-66}

2. How the document is to be proved to be genuine? {67-90}

3. How far and in what cases the oral evidence is executed by documentary evidence? {91-109}

e)BURDEN OF PROOF

1. What is meant by Burden of Proof.

Description, letter, then definition:

The judge or jury can decide a case only by considering the truth and values of the several facts alleged and proved by the parties and as the facts are unknown to both judge and jury. They must be established by evidence. The question at once arises, which party must adduce evidence ?The responsibility for adducing such evidence as will establish any allegation is called the " Burden of Proof".

The subject-matter of the Burden of Proof as applied to judicial proceedings falls into two parts:

1. Burden of Proving an issue.
2. Burden of Proving a particularfact.

THE NECESSITY FOR MAKING THIS DIVISION.

The Proof of an issue may involve the proof of many facts as they may involve the proof of only one fact.

Illustration:

1. Issue is, Did A commit murder of *B*?
2. Issue is, Is the signature on the document that *of A*?

Issue No. 2 involves the proof of one fact only. Issue No. I may involve the proof of many facts. e.*g.*

Was *A*present ? .

Could *C* see him?

Is the bloodstained shirt his ?and so on.

Burden of Proving an issue.

3. The framing of an issue presupposes an assertion of the existence of a certain set off acts and circumstances by one party and the denial of them by the opposite party. There aretwo ways by which the issue may be adjudicated upon (1) By proving that the circumstances alleged do not exist or (2) By proving that the circumstances alleged do exist. Question is which of the two modes of proving the issue to be adopted— the mode of proving the affirmative or the mode of proving the negative.

4. Where there are no reasons for holding :

(a) that what is asserted is more probable than what is denied and

(b)where the means of proof are equally accessible to both the parties then the rule is that the party which alleges the existence of the facts must prove that they exist. The burden is on him who states the affirmative of the proposition. He who denies need not prove that they do not exist.

This rule is laid down in Section 101.

5. Reasons why the law requires the affirmative to be proved instead of the negative.

(1) The man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not on the want of right or the weakness of proof in his adversary.

(2) A simple negative by reason of its indefiniteness is difficult if not impossible of proof. A person asserts that a *certain event took place,* not saying when, where, or under what circumstances. How can a person disprove that, and convince others that at no time, at no place and under no circumstances has such a thing occurred. The utmost that could possibly be done in most instances would be to show the impossibility of the supposed event and even this would require an enormous mass of presumptive evidence.

A negative averment must be distinguished from a contradiction of a positive averment, technically known as a " traverse ".

Illustrations: Malicious Prosecution.

In an action for Malicious Prosecutions the Plaintiff makes two main allegations.—

(1) That the Defendant prosecuted him,

(2) That the Defendant had no reasonable cause for the prosecution.

The first being affirmative the second a negative averment. The burden of proof of both of them is on the Plaintiff.

Negligence.

The Defendant did not take reasonable and proper care. This is not a negative but a negative Averment.

6. Two things must be noted with regard to the rule of evidence that the affirmative of a proposition must be proved.

The Burden of proving the issue in Criminal Trials

1. Section 101 is a general section and applies to both civil as well as criminal proceedings.

Section 105 is another section which relates to the burden of proving an issue as distinguished from the burden of proving a fact but applies to criminal proceedings only.

2. To understand this section it is necessary to know the scheme of the Indian Penal Code. The Indian Penal Code defines various offences such as theft, murder, cheating etc. Some 400 in all.The task of framing definitions which would be exact, neither too wide, nor too narrow has been very difficult and with the best of efforts the authors of the Code have failed to frame exact definitions. They have however erred in making them too broad. Consequently they found it necessary to limit these definitions by enacting exceptions. Some of these exceptions arc common to all the offences as defined by the Code. Other exceptions arc specifically applicable

to a particular offence.

I. BURDEN OF PROOF

(i) Matters of which Proof is not required.

Facts of which Proof is not required.

1. Matters of which Proof is not required fall under three heads:

(1) Facts Judicially noticed.

(2) Facts admitted by the Parties.

(3) Facts the existence of which is presumed by law.

(i) Facts judicially noticed.

1. Sections 56 and 57 deals with facts judicially noticed.

2. Section 56 says no fact of which the Court will take judicial notice need be proved.

3. Sec. 57 lays down 13 matters of which the Court *must* take judicial notice.

4. Principle of the Section. Certain matters are so notorious and are so clearly established that it would be useless to insist that they should be proved by evidence.

Illus—

(1) Commencement and Continuance of hostilities.

(2) Geographical Divisions.

The last two paras are important and read with section 56. They furnish a clue to the proper understanding of them. The effect is that when a matter enumerated in Section 57 comes into question, the parties who assert the existence to the contrary need not produce any evidence in support of their assertions. The judge must come to a conclusion without requiring any formal evidence.

(1) The Judge 'sown knowledge may be sufficient. If it is not he must look the matter up.

(2) The Judge can also call upon the parties to assist him, if he thinks it necessary.

(3) The Judge in making this investigation is emancipated entirely from all the rules of evidence laid down for the investigation of facts which the law requires a person to prove.

(ii) Facts admitted by parties. Section 58

There are two sorts of admissions which must be distinguished.

(1) Formal admissions made touching matters related to a proceeding in a Court and made intentionally by parties so as to dispense with their Proof.

(2) Informal admissions alleged to have been made by a party to the proceedings but not made in the course of the proceedings.

Section 58 applies only to formal Admissions. Formal admissions may be made by parties in 6 different ways : (i) On the pleadings. (ii) In answer to interrogatories. (iii) In answer to a notice to admit specified facts. (iv) In answer to produce and admit documents. (v) By the Solicitor of a party during the litigation. (vi) In open Court by the litigant himself or by his Advocate.

3. Proofofsuchfactswouldbefutile.TheCourthastotrythe questions on which the parties are at issue and not on which they are agreed.

f).English and Indian Law of Estoppel.

1. Under the English Law Estoppels are usually classed under three heads.
   - (i) (i) Estoppel by Record.
   - (ii) (ii) Estoppel by Deed.
   - (iii) (iii) Estoppel by Conduct
2. Estoppel by Record means estoppel by the Judgement of a competent Court.
   (i) Estoppel by Record is recognised by the law of India. It is dealt with:
   - (a) (a) By the Code of Civil Procedure. *Sections 11-4.*
   - (b) (b) By the Evidence Act. *Sections 40-44.*

3. Estoppel by Deed.

1. Under the English Law a party to a deed cannot, in any action between him and the other party, set up the contrary of his assertion in that deed. This rule affords an illustration of the exaggerated importance of a ' seal ' in English law. Neither sealing wax nor Walter is necessary to constitute a seal. Apparently, a smudge of ink on document purporting to be a deed is a seal if so intended, and it makes a greater importance in law than a deliberate and identifiable signature.

There is no estoppel in the case of ordinary signed documents.

2. The strict technical doctrine of Estoppel by Deed cannot be said to exist in India.

3. But while the technical doctrine has no application in this country, statements in documents are, as admissions, always evidence against the parties. In some cases such a statement amounts to a mere admission of more or less evidential value according to circumstances, but not conclusive. In other cases namely those in which the other party has been induced to alter his position upon the faith of the statement contained in the document, such a statement will operate as an estoppel. In this view of the matter, an estoppel arising from a deed or other instrument is only a particular application of that estoppel by conduct or misrepresentation under Section 115.

4. An estoppel does not arise under the Evidence Act merely because a statement is contained in a deed. It can work an estoppel only when it can fall with section 115.

5. A Recital in a deed may be merely an admission or it may be estoppel according to circumstances.

Particular Estoppels.

1. Section 115 deals with Estoppels in general, sections 116 and 117 deal with particular Estoppels.

2. The distinction between Estoppels under Section 115 and Estoppels under 116-117 may be noted.

(i) Estoppels under section 115 can arise between any two parties. It is not necessary that they should be related by a particular legal tie. Estoppels under 116-117 arise only between parties who are related by a particular relationship.

(ii) Estoppel under 115 arises by reason of misrepresentation of facts by one party to another. Estoppel under 116, 117 arise by reason of agreement between the parties which

has forged a particular relationship between them.

Section 116.deals with Estoppels between

(i) (i) Landlord and Tenant and

(ii) (ii) Licensee and Licensor of immovable property.

I. Landlord and Tenant.

1. This Estoppel applies to the tenant of immovable property.

2. This estoppel applies also to a person claiming through the tenant. In other words, if a tenant sublets his property without the knowledge or permission of the landlord, the sub-tenant will also be estopped from denying that the landlord had the title in the beginning.

3. This Estoppel does not ensure to the benefit of a person claiming through the landlord.

There are two possible cases in which premises may be let :

(i) Where the Plaintiff has let the Defendant into possession of the land.

(ii) When Plaintiff is not himself the person who lets the Defendant into possession, but claims under a title derived from the person who did.

This section applies to the first case and estops the tenant from denying the Landlord's title. It does not apply in the second case where the title of the landlord is derivative i.e. by sale, lease or inheritance so that when the Plaintiff claims by a derivative title, the defendant is not estopped from showing that the title is not in the Plaintiff but in some other person. The tenant can show that he has no derivative title. This is the effect of the absence of the words " claiming through the landlord "..

This estoppel applies to a denial of title at the beginning of the tenancy, so that a tenant can show that his landlord's title has expired or is determined. In such a case he does not dispute the title, but confesses and avoids it by a matter *ex-post facto*. Justice requires that the tenant should be permitted to raise this plea, for, a tenant is liable to the person who has the real title and may be faced to make payment to him, and it would be unjust if, being so liable, he could not show the expiry or determination of his landlord's title as a defence.

4. The Scope of the Estoppel. A tenant or his representative will not be permitted to deny that on the day on which his tenancy commenced, the landlord who granted the tenancy had title to

the property.

5. This Estoppel binds the tenant only so long as the tenancy continues. Once the tenancy has ceased he is free to deny that his landlord had any title even on the day on which tenancy commenced.

II. Licensee and Licensor of immovable property.

1. The rule is the same as a licensee, namely, that the licensor had title to such possession at the time when such license was given.

2. Difference between a tenant and a licensee.

License means permission given by one man to another to do some act, which without such permission it would be unlawful for him to do. It is a personal right, and is not transferable, but dies with the man to whom it is given. It can as a rule be revoked by the Licensor unless the licensee has paid money for it.

Tenancy is an interest in land and is transferable and heritable.

Section117 deals with (1) Estoppel of acceptor of a Bill of Exchange.

(2) Estoppel of a Bailee.

(3) Estoppel of a Licensee.

(1) The Estoppel with regard the Acceptor is to the effect that he shouldnotbepermittedto deny that the drawer had an authority to draw the Bill or to endorse it.

g. Privileged Communications

Regarding privileged communications , Taylor said , "… it is thought that greater mischief would probably result from requiring or permitting their admission , than from wholly rejecting them ". A witness though compellable to give evidence , is privileged , in some cases , with respect to particular matters . And in those matters , there are limits within which a witness is not bound to answer questions while giving evidence . Some of these privileges are based on public

policy . These privileges are contained in sections 121 , 122 ,123 , 124 , 125, 126 and 129 of the Indian Evidence Act .

i) Judges and Magistrates :-

Section 121 of the Indian Evidence Act provides that no judge or Magistrate shall , except upon the special order of some Court to which he is subordinate , be compelled to answer any questions as to ---

i) his own conduct in Court as such Judge or Magistrate , or

ii) 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 .

Let us suppose , A , on his trial before the Court of Sessions , says that a deposition was improperly taken by B , the Magistrate . B can not be compelled to answer the questions as to this , except upon the special order of a superior Court .

But when , A is accused before the Court of Session of attempting to murder a police officer whilst on his trial before B , a Sessions Judge . B may be examined as to what occurred .

ii) Communications during marriage :-

This kind of privilege is based on the ground that the admissions of such evidence would have a powerful tendency to disturb the peace of families.

Section 122 of the Indian Evidence Act provides that 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---

i) in suits between married persons , or

ii) proceedings in which one married person is prosecuted for any crime committed against the other .

iii) Affairs of State :-

The State has the prerogative of preventing evidence being given on the matters that would be contrary to the public interest .

Section 123 of the Indian Evidence Act lays down that no one shall be permitted to give any evidence derived from any unpublished official records relating to any affairs of the 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 .

Court can draw an adverse inference if the head of the Department does not state why the privilege is claimed or what matters of the State are involved .

iv) Official Communications :-

Section 124 of the Indian Evidence Act says that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure .

But the protection is not afforded to the statements made by a witness to a police officer during investigation , to any public servant accused of dishonesty or bad faith and the officer of any Nationalized Bank .

v) Information as to crime :-

Section 125 of the Indian Evidence Act lays down that no Magistrate , Police Officer or Revenue Officer shall be compelled to disclose the source of his information as to the commission of any offence .

This section protects disclosure of the name of a spy or secret informant .

vi) Professional Communications :-

This rule is made in the interest of justice .

In the case of Bolton Vs. Liverpool , it was held that if such communications were not protected , no man would dare to consult a professional advisor , with a view to his defence , or to the enforcement of his rights , and no man could safely come into Court , either to obtain redress or to defend himself .

Section 126 of the Indian Evidence Act says that 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 , attorney , pleader or vakil , by or on behalf of his client , or to state the contents or the 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 ---

1) any such communication made in furtherance of any illegal purpose ,

2) any fact observed by any barrister , attorney , pleader 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 .

It is immaterial whether the attention of such barrister , attorney , pleader or vakil was or was not directed to such fact by or on behalf of his client .

It has been explained by section 126 that the obligation stated in this section continues after the employment has ceased .

Let us suppose , 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 .

But when, 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.

This species of professional communication is not absolute in nature . Because this privilege is for the protection of the client and not of the lawyer . And that the client is entitled to waive it .

Section 129 is a counterpart of section 126 of the Evidence Act . Section 129 lays down that no litigant shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser , unless he offers himself as a witness , in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given , but no others .

Unit-IV

PRESUMPTIONS REGARDING DISCHARGE OF BUDEN OF PROOF

a)Accomplice –

An accomplice is a person who has taken part, whether big or small, in the commission of an offence. Accomplice includes principles as well as abettors.
Not an Accomplice - person under threat commits the crime, person who merely witnesses the crime, detectives, paid informers, and trap witnesses
Generally, a small offender is pardoned so as to produce him as a witness against the bigger offender. However, evidence by an accomplice is not really very reliable because – 1) he is likely to swear falsely in order to shift blame, 2) as a participator in a crime, he is a criminal and is likely immoral, and so may disregard the sanctity of oath, and 3) since he gives evidence in promise of a pardon, he will obviously be favorable to prosecution.
Even so, an accomplice is allowed to give evidence. As per Section 133, he is a competent witness against the accused and a conviction based on his evidence is not illegal merely because

his evidence has not been corroborated. At the same time, Section 114(b) contains a provision that allows the Court to presume that an accomplice is unworthy of credit, unless he is corroborated in material particular. The idea is that since such a witness is not very reliable, his statements should be or verified by some independent witness. This is interpreted as a rule of caution to avoid mindless usage of evidence of accomplice for producing a conviction. Since every case is different, it is not possible to precisely specify a formula for determining whether corroborative evidence is required or not. So some guiding principles were propounded in the case of R vs Baskerville, 1916.

According to this procedure –

1. It is not necessary that there should be an independent confirmation of every detail of the crime related by the accomplice. It is sufficient if there is a confirmation as to a material circumstanceof the crime.

2. There must at least be confirmation of some particulars which show that the accused committed the crime.

3. The corroboration must be an independent testimony. i.e one accomplice cannot corroborate other.

4. The corroboration need not be by direct evidence. It may be through circumstantial evidence. This rule has been confirmed by the Supreme Court in Rameshwar vs State of Rajasthan, 1952.

Accomplice and Co-accused

The confession of a co-accused (S. 30) is not treated in the same way as the testimony of an accomplice because -

1. The testimony of an accomplice is taken on oath and is subjected to cross examination and so is of a higher probative value.

2. The confession of a co-accused can hardly be called substantive evidence as it is not evidence within the definition of S. 3. It must be taken into consideration along with other evidence in the case and it cannot alone form the basis of a conviction. While the testimony of an accomplice alone may be sufficient for conviction.

Different stages in testimony of a witness. (Sections 137, 138) Witnesses are examined by the parties or their advocates by the way of asking questions with a view to elicit responses that build up a factual story. To be able to derive meaningful conclusions from the statements of the witnesses, it is necessary to follow a standard pattern in presenting them and questioning them before the court. It will also be impractical and time consuming to call witnesses multiple times at random. Besides causing severe inconveniences to the witnesses, it will also not be helpful in arriving at a decision. Thus, standard procedure for examining a witness must followed so that a trial can proceed swiftly. This procedure is described in Sections 137 and 138.

Stages of Examination

Section 137 defines three stages of examination of a witness as follows - 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.
Section 138specifies the 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 to be confined to the facts 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 by permission of the Court,

introduced in re-examination, the adverse party may further cross-examine upon that matter. Let us discuss these stages one by one –

1. Examination in Chief – The first stage is where a witness is examined by the party who has called it. In this stage, the goal of the party is to make the witness make statements that prove the facts alleged by the party. The party asks questions, the responses to which are expected to support the factual story submitted by the party.

2. Cross Examination – The second stage is where the witness is cross examined by the opposite party. In this stage the goal of the party which is examining the witness is to poke holes in the story of the witness with a view to discredit the evidence that the witness has given. However, when it is intended to suggest to the court that the witness is not speaking the truth on a particular point, it is necessary to direct his attention to it by questions in this stage. The witness must then be given an opportunity to explain the apparant contradictions while he is in the witness box. For example, in the case of Ravinder Kumar Sarma vs State of Assam, 1999, the appallant sued two police officers for damages for malicious prosecution. The appallant put questions in that regard to one of them who denied the allegation that he demanded a bribe. He did not put the allegation on the other police officer. It was held that the appallant had not properly substantiated the allegation.

3. Re-examination – The final stage, is where the witness is re examined by the party who called the witness if, in the cross examination stage, inconvenient answers are given by the witness. The goal in this stage is to nullify the effect of such answers and to reestablish the credibility of the evidence given by the witness.

The Re Examination is not confined to the matters discussed in Examination in Chief. New matter may be elicited with the permission of the court and in such a case, the opposite party can again Cross examin the witness on new matters.

In Tej Prakash vs State of Haryana, 1996, it was held that tendering a witness for cross examination without examination in chief is not warranted by law and it would amount to failure to examine the witness at the trial.

Section 138 provides a valuable right to cross examin a witness and Section 146 further gives the right to ask additional questions to shake the credibility of the witness. In case of Rajendra vs Darshana Devi, 2001, it was held that if a party has not taken advantage of these provisions, he cannot be allowed to complain about the credibility of the witness.

What is a leading question? (Section 141)

According to BENTHAM, a Leading Question is a question that indicates to the witness the real or supposed fact which the examiner expects or desires to have confirmed with the witness. For example, "did you not work with Mr X for five years?", "is your name so and so", "did you not see the accused leave the premise at 8 PM?", are all leading questions. Section 141 defines a Leading question thus – Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question. In the previous examples, it is clear that the question itself contains the answer and the examiner is merely trying to confirm those answers with the witness and are thus leading questions.

When leading questions may and may not be asked –

As per Section 142 – Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in re-examination, except with the permission of the Court. The Court shall permit leading questions as to matters which are introductory or undisputed or which have, in its opinion, been already sufficiently proved.

Further, Section 143 provides that Leading questions may be asked in cross-examination. The purpose of Examination in Chief of a witness is to enable the witness to tell the court the relevant facts of the case. A question should be put to him about a relevant fact and he should be given ample scope to answer the question from the knowledge that he posses about the case. The witness should be left to tell the story in his own words. However, as seen in the previous example, instead of eliciting information from a witness, information is being given to the witness. This does not help the court arrive at the truth. If this type of questioning is allowed in

Examination in Chief, the examiner would be able to construct a story through the mouth of the witness that suits his client. This affects the rights of the accused to a fiair trial as enshrined in Article 21 of the constitution and is therefore not allowed. A question, "do you not live at such and such address?", amply gives hint to the witness and he will immediately say yes. Instead, the question should be, "where do you live?" and he then should be allowed to answer in his own words.

Normally, the opposite party raises an objection when a leading question in asked in Examination in Chief or Re Examination. If the examining party then desires, it can request the court for its permission to ask the question and the court permits the question if it pertains to matters which are introductory, matters on which there is no dispute, or matters which are already proven.

Overall, a leading question can be asked in the following situations -

1.In Examination in Chief and Re – examination if -
a) the opposite party does not object or
b) the question is about the matter which is introductory, undisputed, or is already proven or
b) the court permits the question overruling the objection of the opposite party
2. In Cross examination.

Categories of Accomplice:

1. Principal offender of First Degree and Second Degree: The principal offender of first degree is a person who actually commits the crime. The principal offender of the second degree is a person who either abets or aids the commission of the crime.

2. Accessories before the fact: They are the person who abet, incite, procure, or counsel for the commission of a crime and they do not themselves participate in the commission of the crime.

3. Accessories after the fact: They are the persons who receive or comfort or protect persons who have committed the crime knowing that they have committed the crime. If they help the accused

in escaping from punishments or help him from not being arrested, such person are known as harbourers. These persons can be accomplices because all of them are the participants in the commission of the crime in some way or the other. Therefore anyone of them can be an accomplice.

Competency of Accomplice as Witness:

An accomplice is a competent witness provided he is not a co accused under trial in the same case. But such competency which has been conferred on him by a process of law does not divest him of the character of an accused. An accomplice by accepting a pardon under Section 306 CrPC becomes a competent witness and may as any other witnesses be examined on oath; the prosecution must be withdrawn and the accused formally discharged under Section 321 CrPC before he can become a competent witness. Even if there is an omission to record discharge an accused becomes a competent witness on withdrawal of prosecution. Under Article 20(3) of the Constitution of India, 1950 no accused shall be compelled to be a witness against himself. But as an accomplice accepts a pardon of his free will on condition of a true disclosure, in his own interest and is not compelled to give self-incriminating evidence the law in Sections 306 and 308, Code of Criminal Procedure is not affected. So a pardoned accused is bound to make a full disclosure and on his failure to do so he may be tried of the offence originally charged and his statement may be used against him under Section 308.

When Accomplice becomes a competent witness:

Section 118 of the Indian Evidence Act says about competency of witness. Competency is a condition precedent for examining a person as witness and the sole test of competency laid down is that the witness should not be prevented from understanding the questions posed to him or from giving rational answers expected out of him by his age, his mental and physical state or disease. At the same time Section 133 describes about competency of accomplices. In case of accomplice witnesses, he should not be a co-accused under trial in the same case and may be examined on oath.

Importance of Section 114 and 133:

These are the two provisions dealing with the same subject. Section 114 of the Indian Evidence Act says that the court may presume that an accomplice is unworthy of any credit unless corroborated in material particulars.

Section 133 of the Indian Evidence Act says that an accomplice shall be a competent witness as against the accused person and a conviction the accused based on the testimony of an accomplice is valid even though it is not corroborated in material particulars.

Necessity of Corroboration:

Reading Section 133 of the Evidence Act along with Section 114(b) it is clear that the most important issue with respect to accomplice evidence is that of corroboration. The general rule regarding corroboration that has emerged is not a rule of law but merely a rule of practice which has acquired the force of rule of law in both India and England. The rule states that: A conviction based on the uncorroborated testimony of an accomplice is not illegal but according to prudence it is not safe to rely upon uncorroborated evidence of an accomplice and thus judges and juries must exercise extreme caution and care while considering uncorroborated accomplice evidence.

An approver on his own admission is a criminal and a man of the very lowest character who has thrown to the wolves his erstwhile associates and friends in order to save his own skin. His evidence, therefore must be received with the greatest caution if not suspicion. Accomplice evidence is held untrustworthy and therefore should be corroborated for the following reasons:

- An accomplice is likely to swear falsely in order to shift the guilt from himself.
- An accomplice is a participator in crime and thus an immoral person.
- An accomplice gives his evidence under a promise of pardon or in the expectation of an implied pardon, if he discloses all he knows against those with whom he acted criminally, and this hope would lead him to favour the prosecution.
- Like the Supreme Court has laid down what is known as theory of "double test" in the case of Sarwan Singh v. State of Punjab . In this case Sarwan Singh who was the third accused, was tried along with two others, i.e. Gurdayal Singh and Harbans Singh, under Section 302 for the murder of one Gurdev Singh who was the brother of the first accused, Harbans

Singh. The case was that Sarwan Singh along with Gurdayal Singh and Banta Singh, who became an approver later on , caused the death of Gurdev Singh and all the accused were convicted on the basis of the evidence of Banta Singh. So the evidence of Accomplice is subject to corroboration.

Application of the Concept of Accomplice witness in various cases:

- Janendranath Ghose v. State of West Bengal the accused was tried for the offence of murder and the jury found him guilty on the evidence of the approver corroborated in material particulars. It was contended that there was a misdirection because the jury were not told of the double test in relation to the approver's evidence laid down in Sarwan Singh case.
- Raghubir Singh v. State of Haryana – In this case it was observed:
- "To condemn roundly every public official or man of the people as an accomplice or quasi – accomplice for participating in a raid is to harm the public cause. May be a judicial officer should hesitate to get involved in police traps when the police provides inducements and instruments to commit crimes, because that would suffer the image of the independence of the judiciary." In the present case the Magistrate was not a full – blooded judicial officer, no de novo temptation or bribe money was offered by the police and no ground to discredit the veracity of the Magistrate had been elicited.
- Lachi Ram v. State of Punjab – the accused was charged with murder and was convicted on the evidence of an approver corroborated in material particulars. On the question whether proper tests were applied in applied in appreciating the approver's evidence the Supreme Court held:
- "It was held by this Court in Sarwan Singh case that an approver's evidence to be accepted must satisfy two tests".
- The first case to be applied is that his evidence must show that he is a reliable witness, and that is a test which is common to all witness. The fact that High Court did not accept the evidence of the approver on one part of the story does not mean that the high Court held that the approver was an unreliable or untruthful witness. The test obviously means

that the Court should find that there is nothing inherent or improbable in the evidence given by the approver and there is no finding that the approver has given false evidence.

- The second case which thereafter still remains to be applied in the case of an approver and which is not always necessary when judging the evidence of the witness, is that his evidence must receive sufficient corroboration. In the present case the evidence of the approver was reliable and was corroborated on material particulars by good prosecution witnesswho have been belived by the lower courts."
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B) Judicial Notice

Generally, if a fact is alleged by any party to a suit or criminal case, that party has to provide proof of the truthfulness of that fact to the court. However, Indian Evidence Act allows the court to accept certain kinds of facts without any necessity to be proven by any party. These kinds of facts are specified in Section 56, 57, 58, and 114.

Section 56 – Facts judicially noticeable need not be proved – No fact of which the Court will take judicial notice need be proved. This means that if the court is bound to take notice of a particular fact, the parties do not have the burden of proving that fact. It is part of the judicial function to know that fact. For example, the court is bound to know the various laws and customs of the country. A party does not need to provide any proof when stating any law. Facts for which a court will take judicial notice are specified in Section 57. These include Laws in force in India, Public Acts of Parliament, Local, and person acts declared by it to be judicially noticed, Articles of War for Indian armed forces, the rule of the road, land, or sea, that vehicles in India must keep to the left of a road etc, the territories under the dominion of Govt. of India. In all these case, the court may resort appropriate books or documents of reference for its aid. Also, the matters enumerated in this section are not exhaustive. The section merely provides that the court must take judicial notices of the facts enumerated in this section. It does not prohibit the court from takings judicial notice of any other facts. To understand this point, we need to look at the meaning of judicial notice –

Meaning of "Taking Judicial Notice" - It means recognition of something as existing or as being true without having any proof. Judicial notice is based upon reasons of convenience and expediency. Certain things are so commonly known that any ordinary person is aware of it and it is a waste of time to seek any proof for such things. For example, it is a commonly known fact that certain parts of MP, Bihar, and AP are naxalite affected or that J&K is a terror striken area. A court does not need to spend time in looking for its proof. Thus, judicial notice is the cognizance taken by the court itself of certain matter which are so notorious or clearly established that the evidence of their existence is unnecessary. For example, in the case of Managing Committee of Raja Sidheshwar High School vs State of Bihar, AIR 1993, the court took judicial notice of the fact that education in the state was virtually crumbled. In another case, court took judicial notice of the fact that several blind persons have acquired great academic distinction. If the court is called upon by a person to take judicial notice of a 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. The basic requirement for taking judicial notice is that the fact has to be of a class that is so generally as to give rise to the presumption that all persons are aware of it. However, a judge cannot bring his personal knowledge into judicial notice if that knowledge is not public knowledge. Just because a judge knows something does not make it a thing of common knowledge.
J Chandrachud observed that a court does not operate in ivory tower. It can take cognizance of facts that are happening all around it. Shutting judicial eye to the existence of such facts and matters is in a sense an insult to common sense and would reduce the judicial process to a meaningless and wasteful trial. No court therefore need to insist upon a formal proof of notorious facts such as date of polls, passing away of an eminent person, or events that have rocked the nation.

Section 58 – Facts admitted need not be proved – No fact need 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.
This basically means that if a fact has been admitted by a party, the other party need not provide proof of that fact. For example, admissions made in written statements, or things said before and accepted to be said in the trial need not be proved. in averments made in a petition that have not been controverted by the respondent carry the weight of a fact admitted. However, an admission may not necessarily constitute conclusive evidence of the fact admitted. Therefore, this section allows the court to ask for some other proof of the admitted fact. This is a discretionary power of the court.
Section 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. For example, a person may be presumed to be dead if his whereabouts are not known for seven years. Such facts need not be proven.

c) Dowry death

"Legislation cannot by itself normally solve deep rooted social problems. One has to approach them in other ways too, but legislation is necessary and essential, so that it may give that push and have that educative factor as well as the legal sanctions behind it which help public opinion to be given a certain shape." These are the words of late Prime Minister Jawaharlal Nehru. Dowry system and the deaths associated with it is one such problem. Dowry system is an evil which has been plaguing the society for centuries. It is a matter of grave concern considering its ever increasing and disturbing proportions and the inability of the legislations to curb the menace. This is what prompted the writers of this article to go deep into the problem and to analyse the legal ambit and scope of various legislations enacted in this regard, especially Section 113-B of Indian Evidence Act and Section 304-B of Indian Penal Code.

Definition

Before going into the legal connotations it is better to have an understanding of what 'Dowry' is and what 'dowry death' means in layman's language. Dowry is the property which a girl brings to her husband's house at the time of marriage. It is the payment made in cash or kind by the bride's family to the bridegroom's family along with the giving away of the bride. 'Dowry death' means the death of a married woman caused due to cruelty or harassment by her husband or his relatives in connection with demand for dowry.

The definition of 'dowry' as in Dowry Prohibition Act 1961, Section 2, has been enumerated below:

'Dowry' means any property or valuable security given or agreed to be given either directly or indirectly-

(a) by one party to a marriage to the other party to the marriage; or

(b) by parents of either party to a marriage or by any other to either party to the marriage or to any person;

at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of person to whom the Muslim Personal Law (Shariat) applies.

Section 304-B(1) of the Indian Penal Code tells the meaning of dowry death. It is as follows:

"Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death' and such husband or relative shall be deemed to have caused her death." The explanation relating to this section adds that for the purpose of the above sub-section, 'dowry'

shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961.

In , the origin of dowry system can be traced back to the upper caste families wherein dowry was a form of wedding gift given to the bride by her family. Later on it was given to help with marriage expenses and soon took the shape of an insurance given to prevent the in-laws form mistreating the bride. Although dowry was legally prohibited in 1961, it still continues to be highly institutionalized.

Recent Legislations and their Scope

Section 304-B of Indian Penal Code and Section 113-B of the Indian Evidence Act was inserted by the Dowry Prohibition (Amendment) Act, 1986 and are the pillars in Indian law as far as cases pertaining to dowry deaths are concerned. Section 304-B of IPC defines 'dowry death' and prescribes the punishment for the same.

Sub-section 1 of Section 304-B defines 'dowry death.' Accordingly 'where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death.' Further, the explanation pertaining to this section lays down that for the purpose of this section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961.

Sub-section 2 of Section 304-B states the following: "Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than 7 years but which may extend to imprisonment for life."

Section 113-B of the Indian Evidence Act, along with section 304-B of Indian Penal Code, was inserted by the Dowry Prohibition (amendment) Act 43 of 1986 to combat the increasing

problems of dowry deaths. It states thus: "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 had 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."

The 91st report of Law Commission on 'Dowry Death & Law Reforms' was the driving force behind the insertion of these sections in Indian Penal Code and the Indian Evidence Act by an amendment. The observations made by the commission and the recommendations suggested prompted the legislature to insert Section 113-B by an amendment after a century of enacting the Indian Evidence Act. The commission observed that in spite of the then existing laws, the death of married women in highly suspicious circumstances were increasing alarmingly. They concluded that the weak link was the incompetent law itself which did not provide to include all facts fully and even if it did so, could not aid to prove a dowry death beyond all reasonable doubts due to the many loopholes it fathered. Further, the offender is either the husband or any of his relatives and this aids in covering up the guilt as the family members remain silent though they may be witnesses to all that happened. The commission concluded that when the gap between one fact and another is very wide-which is what happens in most dowry death cases-it cannot be crossed with normal rules of evidence but only by presumptions. They therefore recommended that a presumption regarding dowry death be inserted urgently so as to connect the facts in cases. Though the insertion of such presumptions was considered a deviation from the prescribed norms of criminal law, they were absolutely necessary to bring the offenders before the judiciary. This resulted in Section 113-B of Indian Evidence Act along with Section 304-B of Indian Penal Code.

Section 113-B of Indian Evidence Act simply enjoins upon the court to draw a presumption of dowry death on proof of circumstances. Thus, it actually shifts the onus on the accused to show that his wife was not treated with cruelty soon before her death. But it cannot be opined that the section tilts the scale of balance in favour of the prosecution. It was held by the Rajasthan High Court in Gurditta Singh v. State of Rajasthan[5] while dealing with Section 304-B of IPC and Section 113-B of IEA that there are sufficient in built safe guards for the accused in these

provisions. The presumption under Section 113-B can be raised only on the proof of the following essentials:

(i) The question before the court must be whether the accused has committed the dowry death of a woman. That is, the presumption can be raised only if an accused is being tried for an offence under Section 304-B of IPC. If the Prosecution has failed to prove the case under Section 304-B IPC, then no presumption can be raised under Section 113-B.[6]

(ii) The woman was subjected to cruelty or harassment by the husband or his relatives.

(iii) Such cruelty or harassment was for or in connection with any demand for dowry.

(iii) Such cruelty or harassment was soon before her death.

Section 113-B and the presumption raised there under has been effective in plugging most of the loopholes in the then existing law and in punishing the guilty. In Gurbachan Singh v. Satpal Singh the circumstantial evidence showed that wife was compelled to take the extreme step of committing suicide as the accused person had subjected her to cruelty by constant taunts, maltreatment and also by alleging that she had been carrying an illegitimate child. The suicide was committed within 7 years after the marriage and the Supreme Court held that the presumption under Section 113-B could be drawn. Similarly, in Public Prosecutor, Andhra Pradesh High Court v. T. BasavaPunnaiah, the Court held that even where the wife has committed suicide by hanging, the death will be regarded as 'dowry death' within the scope of Section 304-B of the Indian Penal code, if it is shown that she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand for dowry.

In a case, where the death took place within seven years of marriage and the in-laws of the deceased did not inform deceased's parents about the death but hurriedly cremated the dead body, the court held that the death could not be considered as a natural death

and hence the presumption under Section 113-B stands attracted. In Hemchand v. State of

Haryana, the Supreme Court held that irrespective of whether the accused any direct connection with the death or not, he shall be presumed to have caused dowry death provided the ingredients of Section 113-B have been proved. In this particular case, the death was found to be unnatural viz. by strangulation and cruelty on the part of husband was also proved and hence the presumption under Section 113-B was held to be rightly drawn. Where the ingredients of dowry death were established, the Supreme Court held that merely because the accused was acquitted under Section 302 of IPC (ie. charge of murder) did not absolve him of the liability of 'dowry death' and the presumption under Section 113-B did not automatically stand rebutted. In G.M.Natarajan v. State, the Court held that harassment of a woman can take place even without inflicting injuries on her body and the burden of proof cannot be shifted upon the prosecution solely on the account that there were no injuries on the body of the woman.

Thus we find that the 'presumption' has served one of its purposes which is to help in the conviction of the accused and in preventing the accused from going scot-free in cases where the gap between two facts is very wide. But the evil system of dowry still goes on unabated and it is in this respect that the law has failed miserably. Certain obvious drawbacks in the law or perpetuated by the judicial decisions are very much evident.

For the purpose of Section 113-B, dowry death has the same meaning as in Section 304-B of IPC. Accordingly, the death of a woman should take place within 7 years of marriage for it to fall under the purview of Section 304-B. For raising a presumption under Section 113-B, death within 7 years of marriage has to be proved. It was so held in Ratanlal v. State of MP. This can be considered as one of the weak links tailing behind Sections 304-B & 113-B. If a woman dies within 6 years and 9 months after

marriage, the husband is presumed to have caused dowry death (provided other conditions are satisfied) but if a woman dies after 7 years and 1 month, the husband is not convicted for dowry death even if there is ample proof to show the wife was harassed for dowry soon before her death. This is grossly unfair and irrational as a difference of few days can make a difference between justice and injustice. The husband might be convicted under some other section but the laws relating to dowry death do not serve their purpose which is to put an end to the dowry system.

This fixed time limit is a small loophole which can be made larger thus aiding in deflating a case of dowry death. Besides, there is no specific reason or logical ground for fixing the time limit at 7 years[14] and it is a test of reasonableness which has been applied in this regard. But it can never be conclusively said that a dowry death cannot occur after 7 years of marriage. Further, in cases where the death occurs after six years or so, the accused often challenges the marriage as having taken place seven years prior to the death of the woman. Then the burden falls on the prosecution to show that the death took place within seven years of marriage and this becomes all the more difficult in cases where the marriage has not been registered which often happens in rural areas. A man escaping from liability under Section 304-B solely due to the fact that the 'seven years condition' has not been satisfied is a big blot on the law. Fortunately, our judiciary has not been embroiled in many such cases though possibility of such a case -raising a big hue and cry- in future cannot be ruled out. Therefore it is advocated that the 'seven years' condition shouldn't be strictly adhered to. It has to be given respect considering the facts and circumstances of the case and relaxation of the rule should be allowed in those cases marked by the presence of blatant evidences against the accused. In this regard judicial activism is the need of the hour.

Another very frequently debated question in cases of dowry death relates to the expression 'soon before' used in Section 113-B. the Supreme Court and various High Courts have pronounced judgments and given their opinions regarding this in a number of cases. In Shamlal v State of

Haryana, the Supreme Court had an occasion to deal with Section 113-B. It stated that for raising the presumption under 113-B, it is essential to prove that the deceased woman was subject to cruelty or harassment 'soon before her death'. If it is not proved that soon before her death, the victim was subjected to cruelty or harassment in connection with demand for dowry, no presumption under Section 113-B can be raised.

In BabajuCharan Barik v. State, the Orissa High Court held that the prosecution is obliged to prove that there was cruelty or harassment soon before the occurrence of death and only in that case the presumption under Section 113-B is operational. It also stated that 'soon before' is a relative term and no fixed period can be indicated in this regard.

Judicial Activism and Approach of Judiciary

Though judicial activism and role of judiciary can help prevent the guilty from going scot-free, it cannot and has not put an end to the system of dowry. Besides, many times the judiciary has refused to break free from the shell of orthodoxy and give creative decisions. Despite the existence of rigorous laws to prevent dowry deaths and related crimes to women, the problem continues unabated. More and more bride burning cases are being reported and still many more are going unreported. This implies that the law has not been able to create any influence upon the society and the enforcement of legislation seems to be weak. The question is will the enhancement of punishment deter dowry seekers and whether law alone can prevent dowry violence to women? The answer is a big blatant 'no'. The system of dowry exists not because the law is inadequate and punishment is not severe but because it is a long established tradition which will only die when social condition and social values change. Social intervention is low and despite the stigma dowry continues to be a signature of marriage. More awareness and education among women has led to increasing resistance to demands for dowry, but it has also led to increased familial friction. It is a difficult battle to win for women as they are handicapped by a social system with strong gender bias. In such a

detrimental gender system, dowry is the main consideration for a women's status elevation.[28] Still, educated women who refuse to be absorbed into orthodoxy are putting up an impressive defiance though it is coming at a cost.

There is a pungent smell of hypocrisy attached to each and everything related to dowry. This is obvious even in the manner in which the society views dowry and treats those guilty of dowry death. The guilty are ostracized and at the same time giving and taking of dowry is widely accepted. While the laws remain stringent, the crimes continue. Most go unreported, thus reducing the role of law and judiciary to a large extent. A study made by the Institute of Development and Communication points out that for every reported case of bride burning or dowry death, 299 go unreported. And of those reported, only 5 percent are legally pursued as compromise through monetary means has become an easy alternative. The lack of official registration of crimes related to bride burning is obvious in

Delhi , where 90 percent of the cases of women burnt were recorded as accidents and 5 percent were shown as suicide. Only the remaining 5 percent were shown as murder.

Therefore, it is very evident that eradication of this evil is an uphill task. It is in no way a cakewalk and cannot be achieved overnight. We have to work hard in the society itself and try to educate people, particularly the younger generation about the evils of dowry system. Suggestions to prevent bride burning include: an increase in the standard of education for women which will improve economic and social independence; establishment of voluntary associations to decrease the importance of dowry in general and to help change the social milieu in which the phenomenon occurs; conducting awareness campaigns especially in rural areas and proper implementation of the existing laws with the back-up of an active judiciary possessing the fortitude to challenge the existing social norms with constructive decisions. Only a combination of legal and social measures may help us to eradicate this evil of dowry system from our society.

d. CERTAIN OFFENCES:

Section 111A in The Indian Evidence Act, 1872

111A. Presumption as to certain offences.—

Where a person is accused of having committed any offence specified in sub-section (2), in— tc "1[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 areas under any enactment, for the time being in force, making provision for the suppression of disorder and restoration and maintenance of public order; or tc" (a) any area declared to be a disturbed areas 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, tc" (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:—tc "(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); tc" (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).] tc" (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).]"

Text books / Compulsory Readings (Latest editions only):

1. Rattan LalDheerajLal – Evidence
2. Avtar Singh – Evidence
3. Monir – Evidence