Legal Aspect of Evidence Act

Smart notes with latest judgments 2020

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It is said, "Knowledge is Power". This quote has versatile shades of application and holds good in several contexts. Knowledge has enabled us make all the advancements in the science and techn le to achiev able, super arth. Know early distin mals. Without knowledge, you cannot be successful in life. To grow in one's career, gaining as much knowledge as possible is important. Knowledge does not pertain to science and technology and the fields you study in books. Knowledge is also very important to shape your personality and perfect our behavior and dealings with people. You need to understand ourselves, our strengths and weaknesses. You need to learn the art of life. You must make best judgments and decide on the right course that will let us move successfully.

- Success

WHAT'S INSIDE

Page No.

- **Introduction** 9
- **Law of Evidence - Meaning** 9
- **Need of Evidence Law** 10
- **Extend & Applicability** 11
- **Repeal of Enactments** 14
- **Important Definitions** 14
- **Classification of Evidence** 20
- **Presumptions** 21
- **Evidence of only Facts in issue & Relevant Facts** 25
- **Relationship between Relevancy & Admissibility** 25
- **Doctrine of Res Gestae** 27
- **Motive, Preparation & Conduct** 29
- **Circumstantial Evidence** 31
  - Last seen theory 32
  - 26 Circumstantial evidences in Aarushi Murder case (2008 Noida) 33
  - Circumstantial evidence in Jessica Lal Murder case 35
- **Identification Parade** 36
- **Conspiracy** 37
- **Plea of Alibi** 38
- **Right or Custom** 40
- **State of Mind** 42
- **Accidental or Intentional Act** 44
- **Admission** 44
  - Admissions by a party to proceedings or his agents 47
  - Admissions by persons whose position must be proved as against party to suit 48
  - Admissions by persons expressly referred to by party to suit 49
  - Against whom admission may be proved 50

- Oral admissions as to contents of documents 51
- Oral admissions as to contents of electronic records 51
- Communication without Prejudice 51
- Evidentiary value of Admissions 52

❖ **Confession** 53

- Confessions caused by Inducement, threat or promise 55
- Confessions to Police Officer 57
- Confessions in Police custody 58
- Information received from accused in Police custody (with Latest judgment dt.13th October 2019) 60
- Confession made After Removal of Threat, Inducement, etc 61
- Confession Relevant because of Promise of secrecy 62
- Confession of Co-Accused 62
- Retracted Confession 64
- Evidentiary value of Confession 65

❖ **Difference between Admission & Confession** 65

❖ **Dying Declaration** 66

- Case brief (Pakala Narayana Swamy, 1939) 74
- Latest judgments 78

❖ **Judgments – When Relevant** 79

- Previous judgments relevant to bar a second suit or trial 80
- Relevancy of certain judgments in probate, etc., jurisdiction 80
- Relevancy and effect of judgments etc, other than in Section 41 81
- Judgment etc. other than in Section 40 to 42, when relevant 81
- Fraud or collusion in obtaining judgment 81

❖ **Opinion of Third person/ Expert opinion** 82

- Opinion of Experts (Latest judgment October 2019) 82
- Evidentiary value of Experts 88
- Opinion as to Handwriting when Relevant 89

- Opinion as to Digital Signature when Relevant 89
- Opinion as to Existence of Right or Custom 89
- Opinion as to Usage, Tenants, etc. 90
- Opinion on Relationship 90
- Grounds of Opinion when Relevant 91

❖ **Character – When Relevant** 91

- In Civil Case Character to Prove Conduct Imputed, Irrelevant 91
- In Criminal Case Previous Good Character Relevant 92
- Evidence of Character or Previous sexual experience not Relevant 93
- Previous Bad Character Not Relevant, Except in Reply 93
- Character as Affecting Damages 94

❖ **Facts which needs not be proved** 94

❖ **Oral Evidence** 96

- Proof of facts by oral evidence 97
- Oral evidence must be direct 97
- Hearsay Evidence 98

❖ **Documentary Evidence** 99

- Proof of contents of documents 99
- Primary Evidence 99
- Secondary Evidence 100
- When Secondary Evidence may be given 101
- No Application to Produce Secondary Evidence 102
- Rules as to Notice to Produce 102

❖ **Electronic Records as Evidence** 103

- Electronic Evidence in Breach of Right to Privacy (Not inadmissible) 105
- Use of Video Conferencing mode 106
- Tempering Electronic Evidence 106
- Requirement of 65-B Certificate (Latest judgment dt.14th July 2020) 107
- Proof of Signature & Handwriting 108

- Proof of Digital Signature 109

❖ **Document to be attested** 109

- Proof of Document to be attested (Latest judgment dt.23rd Sept 2019) 109
- Proof where no attestor found (Latest judgment dt.17rd July 2020) 111
- Admission by party to Attested Document 112
- Proof of Document not required by Law to be Attested 113
- Comparison of Signature etc 113

❖ **Public & Private Documents** 114

- Certified copies of Public Documents 115
- Proof of Documents 115

❖ **Exclusion of Oral by Documentary Evidence** 116

- Evidence of Terms of Contract etc to reduced to Document 116
- Exclusion of Evidence of Oral Agreement 118
- Ambiguous Documents 120
- Proof of Patently Ambiguous Documents 121
- Proof of Latently Ambiguous Documents 121
- Evidence of Illegible Characters 122
- Evidence by Non-Parties 123

❖ **Burden of Proof** 124

- Meaning 124
- Burden to prove facts (Latest judgment dt.3rd April 2020) 125
- On whom burden of proof lies 126
- Burden to proof the particular fact 127
- Burden to prove to make evidence admissible 127
- Burden to prove that accused comes within exception 128
- Burden to prove fact specially within knowledge 128
- Burden to prove the death of person 130
- Burden to prove that person is alive 130
- Burden of proof as to Relationship 130

- Burden of proof as to Ownership 130
- Proof of good faith in transactions 131

❖ **Presumption as to Burden of Proof** 131

- Presumption as to certain offences 131
- Presumption as to Legitimacy of child (with latest judgments) 132
- Section 112 & The DNA Technology Bill 2019 135
- Proof of Cession of territory 136
- Presumption as to abatement of suicide 136
- Presumption as to dowry death 137
- Presumption as to existence of certain facts (Latest judgment dt.15th November 2018) 140
- Presumption in Rape case (Latest judgment dt.17th Feb 2018) 141

❖ **Doctrine of Estoppel** 142

- Kinds of Estoppel 143
- Difference between Estoppel & Res Judicata 146
- Difference between Estoppel & Promissory Estoppel 147
- Exception to Doctrine of Estoppel 147
- Estoppel in Evidence Act 148
- Estoppel of Tenant & Licensee 149
- Estoppel of acceptor of bill of exchange etc 150

❖ **Competency of Witness** 151

- Who may testify (Child witness with latest judgment dt.9th July 2019) 152
- Dumb Witness 155
- Husband/ Wife of any party 155
- Judge & Magistrate as witness 156
- Number of Witness 156
- Witness Protection Scheme 157

❖ **Privileged Communication** 157

- Communication during marriage 158

- Affairs of the State 158
- Official Communications 159
- Secret Informants 159
- Professional Communications 160
- No Privilege waived by volunteering evidence 161
- Confidential Communications 162
- Production of title deeds of Witness 162
- Production of document in possession of others 162
- Witness not excused to answer, which criminate him 163

❖ **Accomplice** 163

- Testimony of an Accomplice 165
- Importance of Sec. 114 in Sec. 133 (Latest judgment dt. 3rd June 2020) 166
- Accomplice & Co-accused 168
- Accomplice & Approver 168

❖ **Examination of Witnesses** 169

- Order of Production & Examination of Witness 169
- Judge to decide the Admissibility of Evidence 170
- Examination-in-chief 171
- Role of Defence Lawyer in Examination-in-chief 171
- Cross-examination 174
- Cross-examination Procedure in Civil Case 174
- Cross-examination Procedure in Criminal Case 175
- Canons of Cross-examination 175
- Re-examination 177
- Difference between Chief, Cross & Re-examination 177
- Order of Examinations 178
- Examination of Non-Witness 179
- Witness to Character 179
- Leading Questions 179
- Advantages of asking leading questions 180

- When leading questions must not be asked 181
- Evidence as to matter in writing 182
- Cross-examination on previous statements 182
- Lawful Questions 183
- When witness to be compelled to answer 184
- Court to decide when question to be asked 185
- No question without reasonable grounds 185
- Procedure when question is without reasonable ground 186
- Indecent & Scandalous questions 186
- Questions intended to insult or annoy 186
- No evidence to contracted answer testing veracity 187
- Question by party to his own witness [Hostile Witness] 187
- Impeaching credit of witness 189

❖ **Corroboration of Evidence** 190

- Corroboration/ Contradiction of statements of person who can't found ... 191

❖ **Rule as to Refreshing Memory** 191

- Refreshing Memory 191
- Testimony to facts stated in documents mentioned in Sec 159 193
- Right of adverse party as to writing used to refresh memory 193

❖ **Rule as to Production of Documents** 194

- Production of documents 194
- Giving documents, called for & Produce on notice 195
- Use of Documents Not Produced on Notice 195

❖ **Power of the Judge** 196
❖ **Power of Jury & Assessors** 197
❖ **Improper Admission & Rejection of Evidence** 197

Important note:- Kindly refer Bare Act along with notes.

Introduction

The dynamic changing society fails to believe in the words of mouth, rather they prefer written, documented statements to believe the facts of the same. Thus, evidence plays a very important role in establishing the occurrence of events that had taken place or which gradually would be taking place. Therefore, in order to establish the happening or non-happening of events, evidence also plays a very important role in the Court of Law.

The law of evidence is, therefore, based on reasoning and logic. Without a proper piece of evidence to determine the merit of the case in the Court of the Law, there will be much delay in trial to ascertain and give justice to the people. Thus, the very idea of the formation of the Indian Evidence Act is to give power to the judiciary and help them to decide the case and give a verdict of conviction and acquittal depending on the facts and evidence brought before it. Therefore, the Indian Evidence Act, 1872 is a mode or an instrument through which the court upheld its functions by reaching the truth of each case. The Indian Evidence Act, 1872 was passed on 15th March 1872 and enforced on 1st September 1872. The Indian Evidence Act is divided into three main Parts:

I. Relevancy of Facts (Chapter I containing Section 1-4 deals with 'Preliminary points'; Chapter II containing Section 5-55 deals with 'Relevancy of facts').

II. Mode of Proof (Chapters III containing Section 56-58 deals with 'Facts which need not be proved'; Chapter IV containing Section 59-60 deals with 'Oral evidence'; Chapter V containing Section 61-90A deals with 'Documentary evidence'; Chapter VI containing Section 91-100 deals with 'Exclusion of oral by documentary evidence').

III. Production and Effect of Evidence (Chapters VII containing Section 101-114A deals with 'Burden of proof'; Chapter VIII containing Section 115-117 deals with 'Estoppel'; Chapter IX containing Section 118-134 deals with 'Witnesses'; Chapter X containing Section 135-166 deals with 'Examination of witnesses'; and Chapter XI containing Section 167 deals with 'Improper admission & rejection of evidence').

Law of Evidence - Meaning

Sir James Stephen define Law of Evidence as-
"The law of evidence is that part of the law of procedure, which with a view to ascertain individual rights and liabilities in individual cases, it decides:

1) What facts may and what may not be proved in such cases.
2) What sort of evidence must be given to a fact which may be proved and

3) By whom and in what manner the evidence must be given by which any fact is proved."

Law Evidence is *"Lex fory"*:- Maxim *"Lex fory"* means the law of place of the action. The law of evidence is *'lex fory'*. Whether certain evidence proves a certain fact or not is to be determined by law of the country where the question arises, where the remedy is sought to be enforced and court sits to enforce it.

So, law of evidence deal with modes of Leading evidence as well as regulating that evidence of which fact can be given in court. The main object of the law of evidence is to assist the court in judging what facts are relevant to ascertain the truth and to avoid the confusion and how such relevant facts will be proved in courts by lawfully leading the evidence.
The complete *'corpus juris'* i.e, a body of laws, is divided into two categories:

- Subjective Law
- Adjective Law.

Law of Evidence is law of procedure i.e. adjective law. Evidence Act does not define rights or liabilities under the law but only prescribe the mode by which rights or liabilities of parties is as curtained. Therefore it is adjective law and helps in implementing the substantive law.

The Indian Evidence Act, 1872 is mainly based on the English law of evidence. The Act consolidates, defines and amends the law of evidence. The Act, however, is not exhaustive, i.e. it does not purport to contain all the rules of evidence. For the interpretation of the sections of the Act, the courts can look to the relevant English common law. However, the courts cannot import any principle of English law which is inconsistent with what is laid down by the Act.

The Need of Evidence Law

Evidence is the only possible way by which the court can make inferences to render a decision. The definition of evidence explains that evidence is the proof of any fact in issues so without evidence there will be no possibilities to prove any fact in issues or even to establish any facts in the cases. It is very obvious that it is not much difficult task to obtain trust through violating the basic structure of law but in the course of protecting those rights Evidence, Law comes into the picture. Evidence Law tells the basic principles and rules regarding collection. So the process of evidencing any facts or proof should be governed by a well-established law in order to achieve speedy and fair justice.

The law of evidence is not just a fundamental principle governing the process of proof rather it also has a multidimensional purpose of governing the rules relating to the process of proof in court proceedings. While it's moral dimension is a special

asset in criminal trials as it endeavors in protecting the innocent and highlighting the guilty person to administer complete and fair justice. On the other hand, the evidence rules also have the capability to hide and prevent the truth to be disclosed in the public domain to protect the mass public interest.

Extend & Applicability

Section 1 of the Indian Evidence Act, 1872 speaks about, "Short title, extent, commencement". This section says that the Indian Evidence Act, 1872 came into force on 1st September, 1872.

- It applies to the whole of India including the territory of Jammu & Kashmir.
- It applies to all *JUDICIAL PROCEEDINGS* in or before a court, including court Martials under the Army Act, 1950, The Navy Act, 1957 and the Air Force Act, 1950-

  - The term Judicial Proceeding is defined under this Act. However, it had been held by Justice Spankie in the case of *"R v. Gholam (1875) ILR 1"* All that judicial proceeding can be expressed as any procedure over the course of which evidence is or might be taken, or in which any judgment, sentence or final order is passed on recorded evidence.
  - The Court has to perform administrative or executive and legal obligations all together so that in a judicial proceeding, the adjudicator or the magistrate must act in a judicial capacity.
  - It had been held in the case of *"Munna Lal v. State of U.P AIR 1991, 1893 Cr LJ of 1991"*, that a Family Court also falls inside the ambit of the significance and articulation of Court.

Not applicable to –

- Proceedings under The Army Act, The Naval Discipline Act, 1934 and the Air Force Act passed by the British Parliament.
- Affidavits-

  - The definition of evidence is excluded from the meaning of evidence under Sections 3 of the Indian Evidence Act and is also explicitly avoided under Sections 1 of the said Act. In this manner, affidavit is a personal oath or affirmation which is based on a person's own knowledge.
  - Affidavits per se don't become evidence in suits, however, it can become evidence just by the assent of the parties or where it is exceptionally approved by any provisions of law.

- However, in the case of *"Shamsunder v. Bharat Oil Mills AIR 1964 Bom 38",* it had been held that affidavits can be used as evidence if, for sufficient reasons, the Court passes an order under Order 19, rule 1,2 of the Code Of Civil Procedure 1908. It, therefore, stated that an affidavit cannot be treated as evidence unless an order has been passed under Order 19 of the Code of Civil Procedure.
- In the case of *"Radhakrishnan v. Navoraton Mal Jain A 1990 Raj 127",* it had been held that when there was no order of the court under Order 19 rule 1, affidavits filed by the parties without giving them the opportunity of cross-examining the deponents, cannot be treated as evidence.
- An affidavit that is recorded suo moto by a party without having any direction from the Court can't be named as false evidence. But it had been held in the case of *"Delhi Lotteries v. Rajesh Agarwal AIR 1998 Del 332"*, that no action under the Indian Penal Code can be taken against the deponent.

➢ Arbitration proceedings-

- The Act in clear terms doesn't have any significant bearing to the arbitral method. As a result of which arbitrator isn't limited by the specialized standards of evidence except, if the fundamental principles of fairness and well-established principles of evidence are not disregarded.
- Thus, it had been held in the case of *"Haralal v. State Industrial Court A 1967 B 174"*, that the rules of Act don't apply to the procedures before an arbitrator. The very object of submission to an arbitrator is to have an expeditious dispute solving without getting into the tedious and elaborate procedure of a regular trial or technicalities.
- Even if the Indian Evidence Act doesn't apply to the arbitration procedure still it had been held in the case of *"Jatan Builders v. Army Welfare Housing Organization, 2009 AIHC 2475 (2485) (Del.)"* that arbitrator can evolve a procedure, which complies with the principle of natural justice for conduct of the proceeding. However, even if the provisions of the Evidence Act are not taken into consideration, still the parties and the arbitrators cannot override or ignore the contractual terms and act contrary to it.

➢ Departmental Inquiries/ Domestic Inquiries/ Commissions of Inquiries-

- In the case of *"State of Haryana v. Rattan Singh AIR 1977 SC 1512"*, it had been held that the rule of evidence under the Evidence Act may not apply to the domestic enquiry. Similarly in the case of *"K.L. Shinda v. State of Mysore AIR 1976 SC 1080"*, the rule of evidence doesn't apply to departmental proceeding as well.

- However, again there is a contradictory view in the case of *"Balkrishna Mesra v. Presiding Officer, Orissa (1977) 35 Fac LR 11 (SC)"*, that there is no bar on the part of the competent authority to rely on evidence in disciplinary proceedings.
- The Evidence Act doesn't strictly apply to enquiries conducted by domestic Tribunals. This had been held in the case of *"Ahmed v. Chief Commissioner AIR 1966 Mani 18"*.
- However, a Commission appointed by Code of Civil Procedure and Code of Criminal Procedure has the power to summon the witness and evidence, and the rules of evidence apply to the proceedings before him.
- Income tax authorities are strictly not bound by the rules of evidence. This view had also been laid down in the case of *"Commissioner of Income-tax v. East Coast AIR 1967 SC 768"*.

➢ Contempt of Court-

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

➢ Tribunals/ Labour Court-

- All the technicalities of the Evidence Act are not strictly applicable to Labour Courts and Tribunals, except in so far as Sections 11 of the Industrial Disputes Act 1947 and the rules therein are permitted. This had been held in the case of *"Bareilly Electricity v. Workmen AIR 1972 SC 330"*.
- However, it had also been held in the case of *"Leonard Biermans v. Second Industrial Tribunal AIR 1962 Cal 375"* that a proceeding before an Industrial Tribunal is merely a quasi-judicial proceeding and the evidence is not applicable to such proceedings.
- Even in some cases, there have been contradictory views. In the case of *"Raghu v. Burrakur Coal Co. Ltd AIR 1966 Cal 504"*, it had been held that it is a Court under Sections 3 of the Indian Evidence Act, and therefore it must observe the rules of evidence and natural justice.

➢ Proceedings u/s 176 Cr.P.C./ Proceedings of preparation of inquest report by public officer.

Repeal of Enactments

Section 2(1) repealed all rules of evidence which were not contained in any Statute, Act or Regulation in force in any part of British India. Before passing of the Indian Evidence Act, the rules of evidence were governed by the rules of English Common Law, Hindu and Mohammedan Laws, and the rules of Equity, Justice and Good Conscience. Section 2(1) repealed all those rules of evidence. The Repealing Act, 1938, has repealed Section 2 and Schedule.

Important Definitions

Sections 3 of the Indian Evidence Act 1872, defines certain important terms which must be understood in order to facilitate a better interpretation of the provisions of the Act.

- Court -

The term "Court" is inclusive of the following:

- All Judges;
- All Magistrate; and
- All persons legally authorized to take evidence, except arbitrators.

Etymologically the word "court" means King's Durbar. It is also understood in the sense of:
(1) the place where justice is administered, and
(2) the person or persons who administer justice.

The expression "court" is defined in the Evidence Act in the latter sense. According to the definition given in Sections 3 of the Act the court does not mean the four walls of the premises where justices is administered but it means and includes all Judges, Magistrates and such other persons who are legally authorized to take evidence. The above definition under Sections 3 is not exhaustive. The expression "court" is not confined only to regular courts, it also includes any person who administers justice and is authorised to take evidence. For example: Commissioners appointed under the Code of Civil procedure, 1908 and the Code of Criminal Procedure, 1973.

Note: A Magistrate committing a case to the Sessions Court falls within the ambit of the aforesaid definition of Court, whereas a Magistrate holding preliminary inquiry under Sections 164 of the Code of Criminal Procedure cannot be said to be 'Court'.

➢ Fact -

The term "fact" means "an existing thing". But under the Evidence Act, the meaning of the word is not limited to only what is tangible and visible or, is any way, the object of sense. According to Sections 3 of the Act, fact means and includes:

1. Anything, state of things or relation of things capable of being perceived by the senses.
   Illustrations:
   a. That a person heard or saw something.
   b. That person said certain words.

2. Any mental condition of which any person is conscious.
   Illustrations:
   a. A person has an intention to commit murder.
   b. That a man has certain reputation.

Rights and liabilities in a judicial proceedings emerge (arise) out of facts. Sections 3 categorizes facts into: (i) Physical Facts; and (ii) Psychological Facts.

i. **Physical Facts**: – It means and includes anything, state of thing or relation of things, capable of being perceived by sense. In other words, all facts, which are subject to perception by bodily senses, are "Physical Facts". They are also known as external facts.

ii. **Psychological Facts**: – They are also known as "internal facts". Those facts, which cannot be perceived by senses, are "Psychological Facts". For Example: intention (means area) knowledge, good faith, fraud etc.

Note: Events which have neither occurred in the past nor in the present but are likely to occur in the future does not fall within the ambit of the definition of "Fact" under the Indian Evidence Act, 1872 vide "*Dueful Laboratory v. State, 1998 Cr LJ 4534 (Raj)*".

➢ Relevant Fact -

The word "relevant" has two meanings. In one sense, it means, "Connected" and in another sense "admissible". One fact is said to be relevant to another, when the one is connected is said to be relevant to another, when the one is connected with the other, in any of the ways referred to in the provisions of the Evidence Act relating to the relevancy of facts (Sections 5-55). In other/ simple words, a

fact is said to be relevant to another, if it is connected there with under the provision of the Evidence Act. The expression "relevancy" means "connection between one fact and another".

According to James Stephen, "relevancy" means "Connection of events as to cause and effect". What is really meant by "relevant facts" is a fact that has a certain degree of probative force? Kinds of relevancy:

I. Logical Relevancy; and

II. Legal relevancy.

I. **Logical Relevancy**: – A fact is said to be logically relevant to another, when by application of our logic, it appears (to us that one fact has a bearing on another fact. Facts. Which are logically relevant are not provable. For instance, Confessional statement made to wife, by her husband. Husband said his wife that he had committed a crime i.e. murder or rape or theft. If the wife gives evidence as to the commission of crime by her husband, it is not admitted in evidence under Section 122 of the Indian Evidence Act. The Act does not deal with logical relevancy. (The Act means Evidence Act). Therefore, it is aid that "All facts logically relevant are not provable; however, legally relevant facts are provable."

II. **Legal Relevancy**: - A fact is said to be legally relevant when it is expressed as relevant under Sections 5 to 55 (Relevancy of Facts).

Illustration: A is tried for administering poison to B with a motive of inheriting property. Here, the motive is relevant under Section 8. Similarly the fact revealed by post-mortem expert that the death is caused by the poison is relevant under sec.45. The Act deals with legal relevancy.

According to Sections 6-55 of the Act, following are relevant facts:

i. Facts connected with facts in issue or relevant facts (Section 6-16).
ii. Facts to the issue as admission (Section 17-23) and confessions (Section 24-30).
iii. Statements under special circumstances (Section 34-38).
iv. Judgments (Section 40 and 41).
v. Opinion of third person (Section 45-51), and
vi. Character of Parties (Section 52-55).

➢ Facts in issue -

The expression "Facts in issue" refers to facts out of which a legal right, liability or disability arises and such legal right, liability, or disability is involved in the inquiry and upon which the Court has to give the decision. The question as to

what facts may be "facts in issue" must be determined by substantive law or the branch of procedural law which deals with pleadings. Generally, in criminal cases the charge constitutes the facts in issue whereas in civil cases the facts in issue are determined by the process of framing of issues (Order 14 of CPC).

"Facts in issue" are those facts, which are alleged by one party and denied by the other in the pleading in a civil case or alleged by the prosecution and denied by the accused in a criminal case.

Illustration: A is accused of murdering B. At trial, the following facts may be in issue. That A caused B's death. (It refers to the question, whether A has caused the death of B. If the answer is "no", A is discharged/ acquitted. If the answer is "yes" the following question will arise). That A intended to cause B's death. (If A caused B's death, the next question arises is, whether A had an intention to cause B's death or not. If the intention (mens rea/ mental element) is present, is it murder or culpable homicide and A is awarded serious punishment i.e. death of life imprisonment. Otherwise, (if intention/men rea is absent) it amounts to accident, which is a defence under Section 80 I.P.C. If the accident is by negligence, the punishment is up to 2 years imprisonment or fine or both). That A had received grave and sudden provocation form B. (It refers to the question, whether B is instrumental/ responsible for such a grave and sudden provocation by A, actuating to cause B's death).

In short, the questions, which give rise to right or liability, are called Facts in issue. In a Criminal Proceeding, Charge contains are facts in issue. Facts in issue are alleged by the prosecution and denied by the defence counsel/defendant. According to Sec.3 of the Act, facts in issue are asserted by the plaintiff and denied by the defendant. According to Section 3 of the Act, facts in issue arise out of a legal right or liability or disability of a party to the case.

Recording facts in issue by civil court is also a fact in issue. Answers to facts in issue are also facts in issue. For Example: A sues B for default against promissory note. B denies execution of promissory note. The questions and also answers in this example constitute "facts in issue".

Comparison between Facts in issue & Relevant Facts

Srl. No.	Facts in issue	Relevant Facts
1.	It is necessary ingredient of a right or liability	It is not a necessary ingredient of a right or liability

2.	It is called the Principal fact or "factum probandium"	It is called evidentiary fact or "factum probandi"
3.	Facts in issue are affirmed by one party and denied by other	Relevant facts are foundation of inference regarding them

➢ Documents -

The word "Document" in the general parlance is understood to mean any matter written upon a paper in some language such as English, Hindi, Urdu and so on. Under the Evidence Act it means "any matter expressed or described upon any substance, paper, stone, or anything by means of letters or marks. According to Section 3 of the Indian Evidence Act, 1872, "Document" means any matter expressed or described on any substance by means of letters, figures, or marks; or by more than one of those means, intended to be used, or which may be used, for the purpose of recoding that matter.

Illustrations: Writing is a document. Words printed, lithographed or photographed are document: A map or plan is a document: an inscription on a metal plate or stone is a document: A caricature is a document. The word "Documents" literally means "written papers".

According to Section 3 of the Evidence Act, it means and includes matters expressed or described on all material substances by means or letters, figures or marks. For example, writing is a document, and inscription on a metal plate or stone is a document. Writing on the wall is a document. Numbers given on fixed tables and trees are document. Hence, document means all material substance on which human thoughts are recorded. Documents are inanimated proofs while witnesses are animated proofs.

➢ Evidence -

"Evidence" means and includes––

1. All statements which the Court permits or requires to be made before it by Witnesses, in relation to matter of facts under inquiry; such statements are called oral evidence;
2. All document (including electronic records produced for the inspection of the Court; such documents are called documentary evidence".

Evidence can be said to be any matter of fact which produces a persuasion in the mind regarding the existence and non-existence of some other matter of fact. Evidence may be oral, which refers to the testimony of witnesses, or

documentary, which refers to the documents and electronic records tendered before the Court. The guilt of an accused may be proved using circumstantial evidence also.

Circumstantial evidence refers to the indirect method of proving the guilt of an accused by drawing inferences from certain facts which are closely related to the facts in issue. However, the standard of proof required for circumstantial evidence is quite high and courts are usually cautious while basing convictions upon circumstantial evidence.

Difference between 'evidence' and 'proof' - The word 'evidence' includes all the legal means, exclusive on mere argument, which tend to prove or disprove any matter or fact, the truth of which is submitted to judicial investigation. 'Proof' is the establishment of fact in issue by proper legal means to the satisfaction of the court. It is the result of evidence, while evidence is only the medium of proof.

- 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.

The word "Proof" means "anything, which serves the purpose of convincing either immediately the mind as to the truth or falsehood of a fact or profession. The expression proof under Section 3 of the Evidence Act means "such evidence as would induce a reasonable man to come to a conclusion".

- Disproved -

A fact is said to be "disproved" when after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent ma ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. The definition of the expression disproved is converse of the definition of the expression proved.

- Not Proved -

A fact is said to be proved when it is neither proved nor disproved. A fact is said to be not proved when neither its existence nor its non-existence is proved. In other words, the man of ordinary prudence neither believes that the fact exists nor he believes that the fact does not exist.

Classification of Evidence

Evidence is classified into different categories such as:

- **Oral Evidence**- Section 60 deals with the oral evidence, where oral evidence is those evidence which the witness has either personally seen or heard any such facts or information which has the capability of proving or establishing the facts in issues. The only condition with these types of evidence is that they must be direct or positive for establishing the fact in issues.
- **Documentary Evidence**- Section 3 talks about the documentary evidence, where those facts or information in the form of the document can be witnessed directly by the court of law for establishing the facts in issues.
- **Primary Evidence**- Section 62 deals with primary evidence, these are those facts or information which by any means has a great capability of proving or disproving any fact in issues then such information is considered as primary evidence like a paper document of any vehicle is primary evidence to prove the ownership of the vehicles.
- **Secondary Evidence**- Section 63 deals with secondary evidence. These are those evidence which is given in the absence of primary evidence like when there is no primary evidence than secondary evidence can be used to prove a fact in issue. For example: - If the original paper document is lost then its photocopies can be used as secondary evidence to prove the ownership.
- **Real Evidence**- Real evidence means material evidence where the court can inspect the evidence directly and requires no further knowledge.
- **Direct Evidence**- It is one of the most powerful types of evidence as the court need not make any inference because these evidence shows the direct impact and has great value to establish or prove any fact in issues.
- **Indirect/ Circumstantial Evidence**- When there is no sufficient direct evidence to prove any fact in issue then the court can make an assumption on the availability of existing evidence and construct a link between the existing evidence and the inference. And if the constructive link is completely beyond any reasonable doubt then the court can establish any fact.
- **Hearsay Evidence**- Hearsay evidence is very weak evidence or no evidence as to the witness, himself is not the actual witness of the fact in issues because whatever he is reporting is not what he saw or heard rather the reporting facts are the facts which are narrated by another person. Hence the court believes that the narrated facts by the third person have not much credibility in establishing any facts.

- **Judicial Evidence**- Statements of witnesses, documentary evidence, facts established during the examination of a witness in the court, self-incrimination is some kind of evidence which the court receives itself and such evidence are known as judicial evidence.
- **Non- Judicial Evidences**- Confession made by the witness or accused or victim outside the court are considered as non- judicial evidence.
- **Prima Facie Evidence**- The concept of 'on the face of it' with respect to evidence is a principle when the court presumes any facts and considered them proved until they are disproved, then such evidence is known as prima facie evidence.

Presumptions

Section 4 of the Indian Evidence Act; 1872 provides for three types of presumptions namely, May Presume, Shall Presume and conclusive Proof. It runs as follows:

'May Presume':– Whether it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

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

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

Evidence is a "means" to arrive at proof. Proof is a process by which truth or falsehood as to fact is convinced. Proof enables a reasonable man to come to a conclusion. Before analyzing the expressions, May Presume, Shall Presume and Conclusive Proof, it is necessary to fathom the meaning of 'presumption', from which the above expressions are emerged.

Presumption: – In the absence of absolute certainty, we resort to presumptions. The word "presume" means "supposed to be". The word "presumption" means "an inference from known facts". "Presumption" is and inference, which takes place in the absence of absolute certainty as to truth or falsehood of a fact. In other words, presumption is an inference drawn by the court as to the truth of a particular, from other known or proved factsa.

Definition: – The term "Presumption", in its largest and most comprehensive signification, may by defined to be an inference, affirmative or disaffirmative of the

truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning from something proved or taken for granted.

For instance, A finds B's scooter in front of a, restaurant. Then, A may presume that B is in the restaurant. When A entered into the restaurant, he found B, then his presumption is correct/ true. Instead of B if C (B's brother) is found, his (A's) presumption is incorrect/ wrong. Thus, presumptions may be true or untrue. In other words, they may be rebuttable (may be challenged or irrebuttable (cannot be challenged).

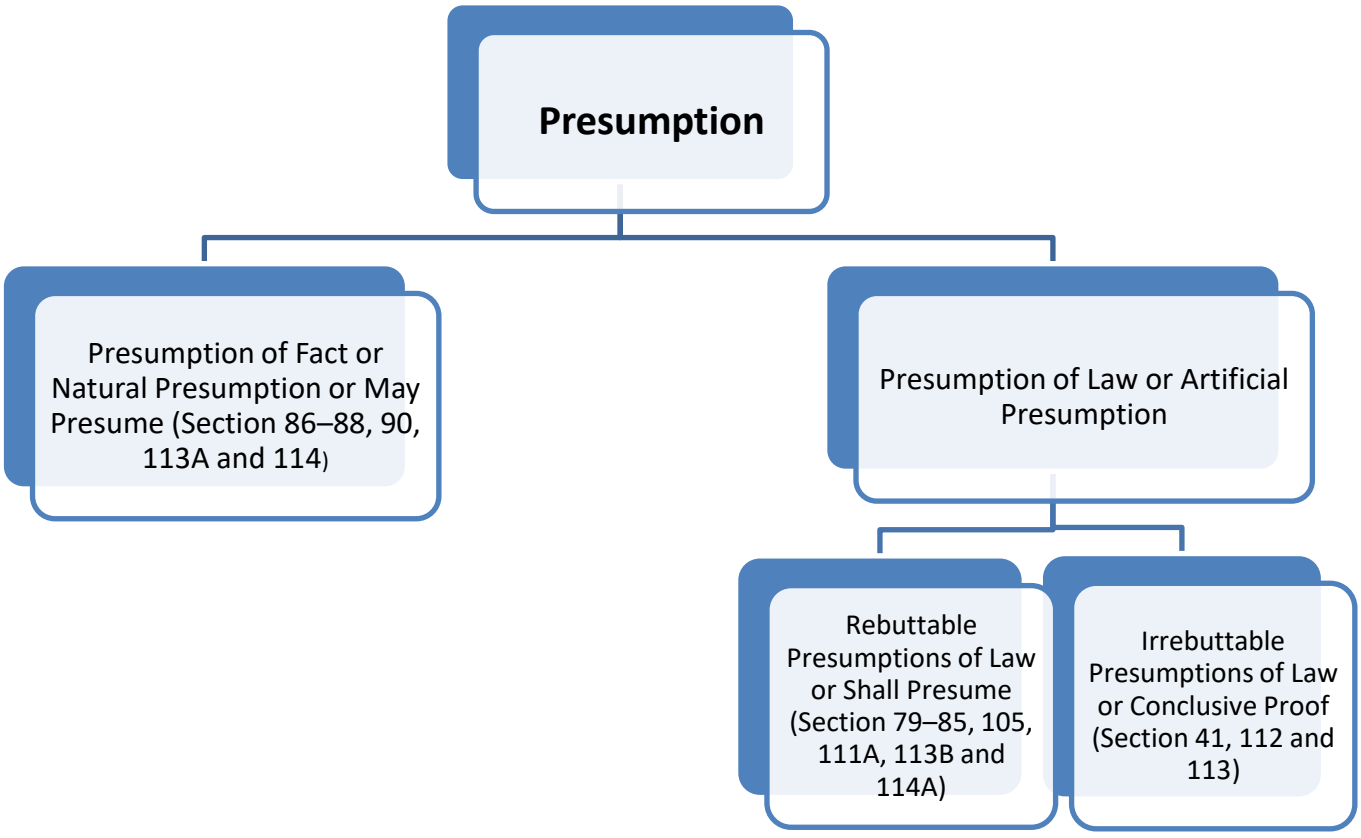
Classification of Presumption: – Presumptions may be classified as follows:

1. Presumption of Fact or Natural Presumption or May Presume (Section 86–88, 90, 113A and 114)

2. Presumption of Law or Artificial Presumption–

   (i) Rebuttable Presumptions of Law or Shall Presume (Section 79–85, 105, 111A, 113B and 114A)

   (ii) Irrebuttable Presumptions of Law or Conclusive Proof (Section 41, 112 and 113)



May Presume or Presumption of Fact or natural Presumption

Section 86–88, 90, 113A and 114 lay down the provision relating to Presumption of Fact or Natural Presumption or May Presume as stated below:

Section 86	"Presumption as to certified copies of foreign judicial records"
Section 87	"Presumption as to books, maps and charts"
Section 88	"Presumption as to telegraphic messages"
Section 90	"Presumption as to documents thirty years old"
Section 113A	"Presumption as to abetment of suicide by a married woman"
Section 114	"Court may presume existence of certain facts"

The expression "may presume" refers to discretion of the court as to the existence or non-existence of a fact in issue. For instance, when a person is found in possession of stolen property, the court may presume him as thief or has received such goods with the knowledge that they are stolen (Section 114).

According to Section 4 of the Evidence Act, "may presume" a fact mean (a) regard it as proved unless and until it is disproved, or (b) call for proof of it. In the above example, the court has discretionary power either to presume the possessor (of stolen property) as thief; or may presume that he had received such goods with the knowledge that they are stolen or may refuse to presume the guilt of accused and may ask (direct the prosecution to prove the guilt of the accused). These presumptions are generally rebuttable.

Shall Presume or Rebuttable Presumptions of Law

Section 79–85, 89, 105, 111A, 113B and 114A lay down the provisions relating to "Rebuttable Presumptions or Shall Presume" as stated below:

Section 79	"Presumption as to genuineness of certified copies"
Section 80	"Presumption as to documents produced as record of evidence"
Section 81	"Presumption as to Gazettes, newspapers, private Acts or Parliament and other documents"
Section 82	"Presumption as to document admissible in England without proof of seal or signature"
Section 83	"Presumption as to maps or plans made by authority of Government"
Section 84	"Presumption as to collection of laws and reports and decisions".
Section 85	"Presumption as to powers-of-attorney"
Section 89	"Presumption as to due execution, etc., of documents not produced"
Section 105	"Burden of proving that cause of accused comes within exceptions"
Section 111A	"Presumption as to certain offences"
Section 113B	"Presumption as to dowry death"

Section114A	"Presumption as to absence of consent in certain prosecution for rape"

According to Section 4 of the Evidence Act, the Court has no option or discretionary power in drawing a presumption as to the existence or non-existence of a fact in issue. The Court is bound to regard a fact as proved, unless an evidence is produced to disprove it. However, (rebuttable presumption of law) "shall presume" is not conclusive, but only rebuttable. Section 79 directs that when a certified copy of a public document is produced, the Court shall presume that the certifying officer held that official character when the copy was certified. The Court cannot call for evidence to disprove this fact but the opposite party still has privilege to disprove that he held that official character.

For Example: – The Court presumes the genuineness of every document purporting to be the official Gazette (u/s 81 of Evidence Act). Similarly, the court shall presume the accuracy or genuineness of the maps and plans made by the Government authority (u/s 83 of Evidence Act).

Conclusive Proof or Irrebuttable Presumptions of Law

Section 41, 112 and 113 of the Indian Evidence Act, 1872 lay down the provisions relating to "Conclusive Proof or Irrebuttable of Law" as stated below:

Section 41	"Relevancy of certain judgments in probate, etc. Jurisdiction"
Section 112	"Birth during marriage, conclusive proof of legitimacy"
Section 113	"Proof of cession of territory"

According to Section 4 of the Evidence Act, when one fact is declared by the Evidence Act to be conclusive proof of another, the court, on proof of that fact must regard the other having been proved and it (court) shall not permit any kind of evidence for the purpose of rebutting or disproving that fact. In other words, when a fact is proved to be conclusive under evidence Act, the court must confirm it as conclusive and shall not permit/entertain any evidence for the purpose of disproving that fact. In such words, neither the court has discretion to call for evidence nor the party has the privilege to disprove it. Even if the party seeks to disprove it, the court has a duty, not to allow evidence for that purpose.

For Example: – 'A' and 'B' are married but divorced. When the question arises whether 'A' and 'B' are husband and wife, if the decree of divorce is submitted to the court, the court shall conclusively presume that they are no longer husband and wife from the date of such decree for divorce. In this example, the divorce decree is regarded as conclusive proof.

Evidence of only Facts in issue & Relevant Facts

Section 5 of the Indian Evidence Act, 1872 says that, "Evidence may be given of facts in issue and relevant. It runs as follows: Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.
Explanation: - This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provisions of the law for the time being in force relating to Civil Procedure Code.

Illustrations:-

a) A is tried for the murder of B by beating him with a club with the intention of causing his death.
   At A's trial the following the club;
   A's beating B with the club;
   A's causing B's death by such beating;
   A's intention to cause B's death.
b) A suitor does not bring with him, and have in readiness for production at the first hearing of the cause of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

Section 5 of the Evidence Act says that evidence may be given of existence or non-existence of every facts in issue and of such other facts as are hereinafter declared to be relevant and of no others. The words "and of no others" under Section 5 indicate clearly that to be admissible in evidence, a fact must be either in issue or must fall within the purview of Section 6 to 55 of the Evidence Act. Otherwise, the fact cannot be admitted in evidence.

Relationship between Relevancy & Admissibility

Relevancy is the ultimate touchstone for determination of the admissibility of evidence. It is due to this fundamental rule of the Law of Evidence that the terms 'relevancy' and 'admissibility' are often used interchangeably. It must be noted that both the concepts are quite distinct from each other. For instance, a confession made by an accused to his wife may be relevant but is inadmissible since it falls within the purview of 'Privileged Communications' under the Indian Evidence Act, 1872. It may be stated that all that is admissible is relevant but all that is relevant may not be admissible. Let us further evaluate the difference between relevancy and admissibility.

A fact may either be logically relevant or legally relevant. Where a fact bears such casual relation to the other that it renders probable its existence or non-existence, it is said to be a logically relevant fact. The Evidence Act recognizes some of the kinds of causal relations. Thus, those kinds of causal relations which are recognized by law are known as legally relevant fact. Therefore, while all legally relevant facts are logically relevant, all logically relevant facts may not be legally relevant. For instance, an accused gives the following statement- "I have kept in the field the knife with which I killed A." While the statement may be logically relevant to establish the guilt of the accused, its legal relevancy extends to only so far as it confirms the fact that the accused had kept the knife in the field. This is so because Section 27 of the Evidence Act clearly lays down that only that part of the information may be proved which clearly relates to the fact thereby discovered.

Admissibility refers to the question as to whether the court must consider a relevant fact in deciding upon the issue or not. A fact is admissible only if it does not infringe any of the rules of exclusivity provided by law. Thus, logically relevant facts are relevant but may not be admissible whereas legally relevant facts are relevant as well as admissible. Relevancy is a question pertaining to the tendering of evidence before a court of law and is for the lawyers to decide. On the other hand, admissibility is for the judge to decide since it pertains to the weight that must be attached to a piece of evidence tendered before the court vide *"Dato' Seri Anwar bin Ibrahim v. Public Prosecutor, [2015] 2 MLJ 293".*

In "*Ram Bihari Yadav v State of Bihar, AIR 1998 SC 1850*", the Supreme Court observed that, more than often, the expressions relevancy and admissibility are used as synonym but their legal implications are different because more often than not, facts which are relevant may not be admissible for example, the communication made by spouse during marriage, the communication between an advocate and his client, though relevant are not admissible. So also the facts which are admissible may not be relevant. For example, questions permitted to be cross-examined to test the veracity or to impeach credit of witness, though not relevant are admissible.

Difference between Admissibility & Relevancy

Srl. No.	Admissibility	Relevancy
1.	Admissibility is not based on logic but strict rules of law.	Relevancy is based on logic and probativity.
2.	The rules of admissibility is described after section 56 of Indian Evidence Act, 1872	The rules of relevancy is described from sections 5 to 55 of Indian Evidence Act, 1872

3.	The rules of admissibility declare whether certain type of relevant evidence are admissible or are to be excluded.	The rules of relevancy declare what is relevant.
4.	Admissibility is the means and modes for admissibility of relevant evidence.	The rules of relevancy indicate the facts permitted to be proved which then become admissible.
5.	The facts which are admissible are not necessarily relevant.	The facts which are relevant are not necessarily admissible.

Doctrine of Res Gestae

'Res Gestae' is a Latin term which can roughly be translated to 'things done', but actually was originally used by the Romans which means to 'acts done or actus'. The concept of res gestae has emerged from the belief that certain acts or statements, which may otherwise be irrelevant and inadmissible, may be admitted as evidence due to the very situation in which they were committed or uttered. The doctrine of res gestae is generally used to admit a potentially inadmissible piece of evidence in order to provide context to an event. The most important principle of this doctrine is that all the facts must be described in the same transaction. Whereas transaction means a group of facts which are so connected to each other that they can be considered as a single fact. In Layman's language, a transaction may be considered as a series of certain acts and when all the actions are carried in the same situations at the same point of time then such situation or condition be called as the act of the same transaction. Circumstantial or indirect facts are also considered under the doctrine of res gestae as they are also forming a part of the same transaction.

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

Essentials of Doctrine of Res Gestae-

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

Illustrations-

a) If a person is dying of poison and before dying, he tells the name of the accused. Even Gestures made by the victim while dying may also qualify as res gestae vide "Queen v. Abdullah (1885) ILR 7 All 385".
b) If a person is about to die as the accused is in front of him holding a gun and he asks for help.
c) If an injured person is crying for help.

Important Judgments

"Krishna Kumar Malik v. State of Haryana, 4 (2011) 7 SCC 130"

The Supreme Court held that the doctrine of Res gestae is an exception to the rule of hearsay evidence. It further observed that for a statement to be admissible under Section 6 of the Evidence Act, it must be made contemporaneously with the act or immediately thereafter.

"Gentela Vijayvardhan Rao and anr. v. State of Andhra Pradesh, (1996) 6 SCC 241"

The Supreme Court held that where there was a significant time lapse between the occurrence of the event and recording of statement of injured victims by the magistrate, it was held that the statements will not qualify as res gestate statements u/s 6 of the Evidence Act.

"Bishna v. State of West Bengal AIR 2006 SC 302"

In this case, Hon'ble Supreme Court held that when the witnesses arrived at the place of occurrence immediately after the completion of the event and heard full account of what had happened. Their testimony was considered valid u/s 6 of the Evidence Act. It is essential to note here that only a statement of fact can form part of Res gestae and not a statement of opinion.

"Sukhar v. State Of Uttar Pradesh, (1999) 9 SCC 507"

In this case the victim tried to alarm that the accused will shoot him in a few minutes. On hearing the alarm the witness almost reached the place of incident. However, the victim survived and the accused was charged under section 307 of IPC. Despite the circumstances, in this case, being hearsay evidence, but still, the court recognised the act in the same part of the transaction and explained it to be a

case of section 6 of the Indian Evidence Act. Therefore the statements of the witnesses were admissible as it formed a part of the same transaction.

"Uttam Singh vs. State of Madhya Pradesh, 2002 INDLAW MP 79"

In this case the child and the victim were sleeping together at the time of the incident and he suddenly awakened due to the voice of axe and screamed for help by taking the name of the accused. Just after the call for help his mother, sister and other witness come there. The court found this evidence to be admissible as the act of the child and the accused was of the same part of the single transaction.

Motive, Preparation & Conduct

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

Motive - The general meaning of 'Motive' a purpose, or objective to obtain something. Motive refers to the internal motivation that tempts a man to do a particular act. As a general rule, there can be no act without a motive. The voluntary actions of sane persons are always guided by a motive. The conduct of the person is regarded as the proof for the motive. The Supreme Court of India defined motive is something which induces or activates a person to make an intention and knowledge, with respect to awareness of consequences of the act. It must be noted that motive, by itself, is not an incriminating circumstance and cannot be used in place of proof. Motive assumes an important role in cases relying solely on circumstantial evidence because, in such cases, motive itself is seen as a circumstance. Motive cannot always be shown directly. It has to be inferred from the facts and circumstances in evidence.

The Supreme Court in the reference of motive said that 'if the witnesses of any case are trustworthy and have enough credibility then the motive of any act done by the offender has no such importance'.

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

Important Judgments

"Chunni Lal v. State of U.P. AIR 2010 SC 2467"

In this case the accused, who expected of inheriting his childless Uncle's property, was frustrated when the Uncle got married and had a child. The uncle was murdered and the accused was found to be struggling to get the property transferred in his name. These facts held to be relevant since they established a motive on part of the accused to murder the deceased.

"Gurmej Singh v. State of Punjab, AIR 1992 SC 214"

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

Preparation - Preparation refers to the act of arranging for the means and methods required for the commission of the crime. Thus, where the A is being tried for the murder of B by poison, the fact that A had procured a similar poison prior to the murder is relevant. The Supreme Court of India interpreted 'preparation' as a word which denotes the action or preparation of any act and also those components which are prepared. Preparation includes arranging the essentials objects for the commission of a crime/offence.

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

Conduct - Section 8 of The Indian Evidence Act also defines *'conduct'*, conduct here means an external behaviour of a person. Conduct of the accused which is unnatural and abnormal, such as absconding, inability to provide explanation, inability to disclose location during the commission of offence, providing false alibis,

secretive cremation of death body, which destroys the presumption of innocence is a relevant factor in establishing guilt and building the chain of events.

To check if the conduct of a person is relevant to the incident then the court must establish a link between the conduct of a person who committed the crime and the conduct of incident. The most important role of this part is that the relevant conduct must bring the court to a conclusion of the dispute. If the Court came to a conclusion then the conduct was previous or subsequent, it shall be checked properly by the Court.

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

For example: - After the murder of B, the prime accused C went out of the state and subsequently disappeared to avoid arrest. The conduct of C is inconsistent with the conduct of an innocent man. Thus, increasing the presumption of guilt.

Important Judgments

"Sunil v. State of Rajasthan, 2001 Cr LJ 3063 (Raj)"

The presence of the accused near the village before and after the crime took place was held to be evidence of conduct under section 8 of the Evidence Act.

"Nagesha v. State of Bihar, AIR, 1996 SC 119"

It was held by the Court if the first information is given by the accused himself, the fact of his giving information is admissible against him as evidence of his conduct.

Circumstantial Evidence

The term 'circumstantial evidence' was first used by Sir James Stephen, stating circumstantial evidence to be facts that are relevant to the other fact, whose existence can prove by the existence of other fact. A 'circumstantial evidence' is the testimony of a witness to other relevant facts from which the fact in issue may be inferred. There must be a chain of independent evidence as complete and unbroken as to show that, within all human probability, the act must have been done by the accused. 'Circumstantial evidence' includes all the relevant facts. It is not secondary evidence; it is merely direct evidence applied indirectly.

The concept of circumstantial evidence has evolved through the interplay between statutes and judicial interpretation. Circumstantial evidence, also known as indirect evidence, is an unrelated chain of events which when put together formulates circumstances leading to the commission of the crime and can be used to derive a conclusion. Information pertaining to the said chain of events in civil or criminal cases establishes the existence of a fact or any assertion a party seeks to prove. Circumstantial evidence is supported by a significant amount of corroboration.

For example: - If police retrieves stolen goods from the house of a suspect, although it establishes that the suspect has stolen the good but does not necessarily establish guilty or the fact that he must have stolen the goods. Recovery of goods in the house of a suspect is a circumstantial evidence as the goods might be placed there by someone else, thus not establishing complete guilt but forming a chain of events. This would shift the burden of proof on the suspect to establish his innocence.

Circumstantial evidence can be sole basis for a conviction, if circumstances establish the chain of events leading to the guilt of the accused and commission of the crime without other possibilities. The Court should be satisfied that the said circumstances were clearly establishes and complete the chain of events and prove the guilt of the accused beyond reasonable doubt. Moreover, all the circumstances should indicate towards the guilt of the accused and should be inconsistent with his innocence.

The onus is on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defense or plea. The chain of events or circumstances should be complete without gaps to the extent no other conclusion or inference apart from the guilt of the accused can be drawn.

Last seen theory

However circumstances leading to "last seen together", does not necessarily imply that it was the accused who has committed the crime. If the circumstances are limited to just "last seen together" without further corroboration, conviction cannot be based on the said assertion. The doctrine of "last seen together" shifts the onus onto the accused to establish his innocence.

Thus, last seen together is not a conclusive proof establishing guilt, it is imperative to look at surrounding circumstances such as victim relationship, history of hostility, weapon recovery, relationship between the victim and the accused among others. The proximity between the time of death and last seen together is

essential to conclude that the accused and deceased were last seen together without the probability of other persons coming in between exists.

"Hanumant Govind Nargunkar v. State of M.P. AIR 1952 SC 343"

In this case the Supreme Court gave following principles, which are known as *'Panch Sheel'* of the proof of a case based on circumstantial evidence.

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established;
(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
(3) The circumstances should be of a conclusive nature and tendency;
(4) They should exclude every possible hypothesis except the one to be proved; and
(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

"The State of U.P. through the CBI v. Rajesh Talwar & Anr., Session Trial No. 477/2012"

Judgment delivered on **26th November, 2013**.

The accused Dr. Rajesh Talwar and Dr. Nupur Talwar are convicted under Section 302 read with Section 34 and Section 201 read with Section 34 I.P.C. Dr. Rajesh Talwar is also convicted under Section 203 I.P.C on the basis of circumstantial evidence.

The following circumstances, according to the Judge unerringly pointing out to the guilt of the accused and exclude every possible hypothesis on the innocence of the accused:

1. That irrefragably on the fateful night of May 15 and 16, 2008 both the accused were last seen with both the deceased in Flat No. L-32, Jalvayu Vihar at about 9.30 P.M. by Umesh Sharma, the driver of Rajesh Talwar;
2. That on the morning of May 16, 2008 at about 6.00 A.M. Aarushi was found murdered in her bed-room which was adjacent to the bedroom of the accused and there was only partition wall between two bed-rooms;

3. That the dead body of the servant Hemraj was found lying in the pool of blood on the terrace of flat no. L-32, Jalvayu Vihar on May 17, 2008 and the door of terrace was found locked from inside;
4. That there is a close proximity between the point of time when both the accused and the deceased persons were last seen together alive and the deceased were murdered in the intervening night of May 15 and 16, 2008 and as such the time is so small that possibility of any other person(s) other than the accused being the authors of the crime becomes impossible;
5. That the door of Aarushi's bed-room was fitted with automatic click-shut lock. Mahesh Kumar Mishra, the then S.P. (City), NOIDA has deposed that when he talked to Rajesh Talwar on May 16, 2008 in the morning, he had told him that in the preceding night at about 11.30 P.M. he had gone to sleep with the key after locking the door of Aarushi's bed-room from outside. Both the accused have admitted that door of Aarushi's bed-room was having automatic-clickshut lock like that of a hotel, which could not be opened from outside without key but could be opened from inside without key. No explanation has been offered by the accused as to how the lock of Aarushi's room was opened and by whom.
6. That the internet remained active in the night of the gory incident suggesting that at least one of the accused remained awake;
7. That there is nothing to show that an outsider(s) came inside the house in the said night after 9.30 P.M.;
8. That there was no disruption in the supply of electricity in that night;
9. That no person was seen loitering near the flats in suspicious circumstances during that night;
10. That there is no evidence of forcible entry of any outsider(s) in the flat in the night of occurrence;
11. That there is no evidence of any larcenous act in the flat;
12. That in the morning of May 16, 2008 when the maid came to the flat for the purpose of cleaning and mopping, a false pretext was made by Nupur Talwar that door might have been locked from outside by the servant Hemraj although it was not locked or latched from outside;
13. That the house maid Bharti Mandal has nowhere stated that when she came inside the flat both the accused were found weeping;
14. That from the testimony of Bharti Mandal it is manifestly clear that when she reached the flat and talked to Nupur Talwar then at that time she had not complained about the murder of her daughter and rather she told the maid deliberately that Hemraj might have gone to fetch milk from Mother dairy after locking the wooden door from outside. This lack of spontaneity is relevant under section 8 of the Evidence Act;
15. That the clothes of both the accused were not found soaked with blood. It is highly unnatural that parents of deceased Aarushi will not cling to and hug her on seeing her murdered;
16. That no outsider(s) will dare to take Hemraj to the terrace in severely injured condition and thereafter search out a lock to be placed in the door of the terrace;
17. That it is not possible that an outsider(s) after committing the murders will muster courage to take Scotch whisky knowing that the parents of the deceased Aarushi are in the nearby room and his top priority will be to run away from the crime scene immediately.

18. That no outsider(s) will bother to take the body of Hemraj to the terrace. Moreover, a single person cannot take the body to the terrace;
19. That the door of the terrace was never locked prior to the occurrence but it was found locked in the morning of May 16, 2008 and the accused did not give the key of the lock to the police despite being asked to give the same;
20. That the accused have taken plea in the statements under section 313 Cr.P.C. that about 8-10 days before the occurrence painting of cluster had started and the navvies used to take water from water tank placed on the terrace of the flat and then Hemraj had started locking the door of the terrace and the key of that lock remained with him. If it was so then it was not easily possible for an outsider to find out the key of the lock of terrace door;
21. That if an outsider(s) may have committed the crime in question after locking the door of terrace and had gone out of the flat then the outer most mesh door or middle mesh door must have been found latched from outside;
22. That the motive of commission of the crime has been established;
23. That it is not possible that after commission of the crime an outsider(s) will dress-up the crime scene;
24. That golf-club No.5 was thrown in the loft after commission of the crime and the same was produced after many months by the accused Rajesh Talwar;
25. That pattern of head and neck injuries of both the accused persons are almost similar in nature and can be caused by golf-club and scalpel respectively; and
26. That the accused Rajesh Talwar was a member of the Golf-Club NOIDA and golf-clubs were produced by him before the CBI and scalpel is used by the dentists and both the accused are dentists by profession.

"Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), 2010 (69) ACC 833 (SC)"

In this case, court awarded accused life imprisonment for the murder of Jessica Lal, on the grounds of circumstantial evidence. The conduct of the accused after the incident (absconding), ballistic report, presence at the scene of crime established by various testimonies and the circumstantial evidence connecting the vehicle and the cartridges during the commission of crime formed a chain of impenetrable evidence pointing towards the guilt of the accused.

"Sukhpal Singh v. State of Punjab, Crl. Appeal No. 1697/2009, SC"

Judgment delivered in **February 2019**. In this case, Supreme Court held that the inability of the prosecution to establish motive in a case of circumstantial evidence is not always fatal to the prosecution case.

The appellant before the SC was a police officer, who was convicted under Section 302 IPC for murder, on the basis of circumstantial evidence. It was argued on behalf of the motive assumes great significance in a case of circumstantial

evidence, and the prosecution's failure to establish it affects the case. The Court noted that there was testimony to the effect that the deceased was last seen in the company of the accused. Further, the bullet recovered from the dead body matched with the service revolver of the accused.

The bench of Justices A M Khanwilkar and K M Joseph held so while dismissing a criminal appeal.

> *"We would think that while it is true that if the prosecution establishes a motive for the accused to commit a crime it will undoubtedly strengthen the prosecution version based on circumstantial evidence, but that is far cry from saying that the absence of a motive for the commission of the crime by the accused will irrespective of other material available before the court by way of circumstantial evidence be fatal to the prosecution".*

On the basis of forensic evidence the Court also observed

> *"The only inevitable conclusion we can reach is that the gun was recovered from him and the bullet which has been found to have caused the fatal injury to the deceased and which was recovered from the body of the deceased has been fired from the appellant's gun".*

The defence of the appellant that his service revolver was surrendered during the relevant time as he was under suspension was not accepted by the bench, as he had not produced evidence of suspension, except making a statement during Section 313 examination.

Identification Parade

Section 9 of the Indian Evidence Act, 1872 provides for "Facts necessary to explain or introduce relevant facts and "Identification parade of persons". It runs as follows: Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations:

(a) The question is, whether a given document is the will of A. The state of A's property and of his family at the date of the alleged will may be relevant facts.
(b) A sues B for a libel imputing disgraceful conduct to A; B affirm that the matter alleged to be libelous is true.

Identification parade of persons: - The purpose of identification test is to test the memory and veracity of a witness, who claims to identify an accused person, who is said to have participated in a crime. Section 7 and 8 of the Evidence Act deal with facts, which have some causal relation with the facts in issue or relevant facts. Whereas Section 9 of the Act deals with the facts, which are not so connected but are necessary to introduce or explain the facts in issue or relevant facts.

Identification is as important process in the administration of justice. Where the Court has to know the identity of any-thing or any person, any fact, which establishes such identity is relevant. The identity of a person can be established by the evidence of person, who know him. Identification parades are held for the purpose of identifying the properties, which are subject matter on an offence or persons concerned in an offence. During the course of investigation test identification parades are arranged by the police either in jail or at some other place. Certain persons are brought to such a place and the accused person is mixed with them. In case of property, the property recovered is mixed with some other articles/ properties, of similar description. Then the Magistrate or the attorney will ask the witness to identify the accused person or the property in questions. The evidence given by such witness is relevant under Section 9 under Evidence Act.

Conspiracy

A conspiracy is entirely a secret affair. Conspiracy means few people come together to do an act with common intention. So in the same context, a criminal conspiracy is the act of at least two or more persons to do an act which is not authorised by the law i.e., an illegal act, or to do a legal act by illegal means. Criminal Conspiracy is a kind of partnership in crime, and every member of such partnership must join the partnership by mutual agreement for executing a common plan. There are two relevant provisions which deal with the criminal conspiracy i.e., Section 120(A) of the Indian Penal Code and Section 10 of the Indian Evidence Act talks about the things said or done by a conspirator.

Section 10 of the Indian Evidence Act, 1872, provides for the relevancy of statements made or acts done by conspirators in reference to a common design. The section provides that if there is sufficient ground to believe that two or more persons have conspired to commit an offence or an actionable wrong then anything that is done, written or said by anyone of them in pursuance of the common intention, the same is a relevant fact-

a) Against the alleged conspirators
b) In order to prove the existence of a conspiracy.

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

- There should be reasonable grounds to establish a conspiracy.
- There should be at least two or more persons to form a conspiracy.
- There should be a common intention of all the conspirators.
- Acts or Statement of the conspirators.
- The acts or statements of the conspirators must be in reference to common intention. However, the expression "in reference to their common intentions used in Section 10 of the Evidence Act is very comprehensive.

Important Judgments

"Bhagwan Swaroop v. State of Maharashta, AIR 1965 SC 682"

In this case, the Supreme Court pointed out that the expression "in reference to common intention" has a wider scope than the expression "in furtherance of common intention" used under English Law.

"State of Tamil Nadu v. Nalini, AIR 1999 SC 2640"

The court held that once any of the participants of conspiracy execute the conspiracy then his statements made by him cannot be used against other conspirators according to Section 10 of the Indian Evidence Act.

"Subramaniam Swamy v. A Raja, (2012) 9 SCC 257"

The court in its judgments showed that anything which is doubtful cannot be considered as legal proof and such proofs are insufficient to prove any criminal conspiracy.

Plea of Alibi

Section 11 of the Indian Evidence Act that, "when facts not otherwise relevant become relevant". It reads as follows Facts not otherwise relevant are relevant–

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

As stated above, Section 11 comprises of two clauses. First clause provides that the facts, which are inconsistent with the facts in issue or relevant facts, are relevant. The second clause provides that the facts, which by themselves or I

connection with other facts make the existence or non-existence of any facts in issue or relevant fact higly probable or improbable, are relevant.

Clause 1 of Section 11 contains five common instances/ cases of inconsistent facts as stated below:

(i) Alibi;
(ii) Absence or non-access of husband;
(iii) Survival of the alleged deceased;
(iv) Commission of an offence by a third person; and
(v) Self-infliction of harm alleged.

Among the above, alibi is of great importance.

Alibi: The word *'Alibi'* is derived from the Latin word, which means *'elsewhere'*. Section 11 of the Indian Evidence Acts explains the concept of *'Facts not otherwise relevant become relevant'* and makes the provision as a defending ground for the accused. The simplest meaning of this section is a condition when the incident took place and the accused is charged for the incident then he may make defend him on explaining that at the time of the incident he was not present at the location. Although previously it was not relevant for the court to know that where he was as the investigation showed that he committed the crime but his explanation that he was not at the place of incident make the irrelevant facts a relevant fact. The important part of Section 11 of the Evidence Act is that this rule is only accepted in the course of admission of the evidence and no other statute provides such rule. The plea of alibi has to be taken on the very first stage of the trial and must be proved without any reasonable doubt as the burden of proof is on the person who is taking advantage of Section 10 i.e., *Plea of Alibi.*

Essentials of Plea of Alibi:

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

Important Judgment

"Sahabuddin & Anr vs the State of Assam, Criminal Appeal No. 629 of 2010"

Once the court is in doubt with respect to plea of alibi and the accused does not give any substantive explanation to support his statement under Section 313 CrPC,

then the Court is authorised to conclude a negative or not a positive inference against the accused.

"Lakhan Singh @ Pappu v. The State of NCT of Delhi, Delhi HC Crl. Appeal No. 166/1999"

A plea of alibi cannot be compared with a plea of self-defence although both the plea is to be taken on the very first instance of the court proceedings.

"Jitender Kumar v. State of Haryana, (2012) 6 SSC 2014"

The Court not believing the plea of alibi as the accused did not provide the sufficient supportive evidence for establishing the defence. And the Court supported the case from the prosecution side.

Absence or non-access of husband: Where legitimacy of a child is in question the absence or non-access of husband is a relevant fact because legitimacy of the offspring implies a begetting by the husband. (For detail see Section 112, Evidence Act).

Survival of the alleged deceased: Where A is alleged to have killed B on a particular date the fact that after that date B was seen alive is a relevant fact as being inconsistent with this being killed on that date. (See for details Section 107 and 108 of the Evidence Act).

Commission of an offence by a third person: Where A is charged with a crime committed by himself alone, any evidence which includes that B might have committed the crime may be received. Threats by a third person or motive of such third person are generally offered to prove that he and not the accused have committed the alleged crime.

Self-infliction of harm alleged: Where A is charged with murder of B, if it is proved that B has committed suicide A cannot be convicted for murder of B. Where a lover was charged with murder of a woman, whose body was found in a river the fact that during the week before her death she had actually attempted to down herself and had been prevented from doing so was held to be relevant to show that she might have made a second attempt.

Right or Custom

Section 13 of the Indian Evidence Act, 1872 speaks about, "Facts relevant, when right or custom is in question". It runs as follows:

"Where the question is as to the existence of any right or custom, the following facts are relevant-

a. *Any transaction by which the right or custom in questions was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence;*
b. *Particular instances, in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from".*

Illustration: The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

Right: - The word "right" literally means "an interest recognised and protected". If it is protected by the administration of justice, it is called "legal right". Section 13 is concerned with legal rights only. Section 13 applies to all kinds of 'rights' — public or private, right of full ownership or falling short of ownership (e.g. rights of easements), a corporeal or incorporeal right (e.g. right of way).

Custom: - The term "Custom" means "usage or traditionally followed long practice by the members of a society". Manu recognized custom to be transcendent law. Custom is a good source to interpret law in the administration of justice. A custom is a particular rule, which has existed from time immemorial and has obtained the force of law, in a particular locality. A custom is nothing but a long-standing usage. The requisites of a valid 'custom' are that the same should be ancient, certain and reasonable (should not be opposed to public policy or morality).

Proof of Custom: Section 13 makes the instances and transactions relevant to prove or disprove a custom: it has nothing to do with the mode of proof. A custom is a mixed question of law and fact. First certain facts are to be proved and from those facts an inference of the existence of a valid custom is drawn. Where a custom is pleaded by one party and denied by the other, the onus is on the party pleading it to show its existence. A custom may be "proved or disproved" in any of the following ways:

1) By opinion likely to know of its existence of having special means of knowledge thereof.
2) By statement of persons who are dead or whose attendance cannot be procured without unreasonable delay or expenses provided they were made before any controversy as to such custom arose and were made by persons who would have been or likely to have been aware of the existence of such custom if it existed.

3) By any transaction by which the custom in question was claimed, modified recognized, asserted or denied or which was inconsistent with its existence.
4) By particular instances by which the custom was claimed recognized or exercised or knowledge of its existence was disputed, asserted or departed from.

Judgments, orders or decrees are relevant to prove a custom but they are not conclusive proof thereof. But, when a custom has been repeatedly brought to the notice of the court and judicially recognized, it becomes a part of the law of the locality where it prevails and it is not necessary to prove its attributes in each individual case.

State of Mind

Certain offences are culpable on the basis of the state of mind of the accused. In order to prove such offences, certain facts which show the existence of a particular state of mind are relevant and admissible as evidence. Section 14 of the Indian Evidence Act, 1872 deals with the proof of "Facts showing the existence of any state of mind or of body or bodily felling". It runs as follows:

"Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or goodwill towards any particular person, or showing the existence of any state of mind or body or bodily felling, is in issue or relevant.

Explanation–1: A fact relevant as showing the existence of a relevant state of mind must that the state of mind exists, not generally, but in reference to the particular matter in questions.

Explanation–2: But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact".

Illustrations:

a) *Fact in Issue*: The question is whether A has been guilty of cruelty towards B, his wife.
Relevant Facts: Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

b) *Fact in Issue:* The question is what was the state of A's health at the time an assurance on his life was affected.
Relevant Facts: Statements made by A as to the state of his health at or near the time in question are relevant facts.

State of Mind: Facts showing the state of mind constitute Intention, Knowledge, Good Faith, Negligence, Rashness, ill will or Good will. For the purpose of showing the existence of state of mind, it is not possible to provide direct evidence. Brain, C.J. observed, "It is common knowledge that thought of a man cannot be tried for devil knoweth not what passes in one's mind." But it is now well established that the state of one's mind is as much a fact as the state of his digestion. If need not be directly proved by confession by the accused or by the evidence of a person who had an admission from the accused about his intention.

State of Body or Bodily Feeling: The condition of one's body or his bodily felling may help a lot in finding the truth. Thus, where it is alleged that A was murdered by administering poison to him his statements regarding his condition and bodily felling may help in finding whether poison was given to him and which type of poison was administered.

Exaplantion-1 (Specific State of mind): As per Explanation 1 to the section, the evidence must be pertaining to the specific state of mind that pertains to the case at hand and not that of general reputation. Thus, anything that has a distinct and immediate connection to the case at hand is admissible.

In *"R v. B (RA) [1997] 2 Cr App R 88*" the accused was convicted of assaulting his grandsons on the basis of pornographic magazines found in his possession and his sexual proclivities. The subsequent appeal filed by him was allowed and the Court observed that the evidence of pornographic magazines and the subsequent cross-examination of the accused showed a mere tendency and had no probative value due to which it should not have been admitted as evidence in the first place.

Explanation-2 (Previous Conviction): As per Explanation 2 to the section, in a case where the previous commission of an offence is relevant, the fact that the accused was previously convicted for the said offence would be relevant under the section. However, the question of previous convictions being used in subsequent cases is often debated under various provisions of the Evidence Act.

For instance, in *"Emperor v. Alloomiya Husan, (1903) 28 Bom 129: 5 Bom LR 805*" the accused was arrested and convicted under the Bombay Prevention of Gambling Act for keeping a common gaming house. The conviction by the Magistrate was based upon the fact that the accused was previously convicted on multiple occasions under the Gambling Act. Upon appeal, the decision was upheld and the fact pertaining to previous convictions was held to be relevant and admissible under Section 14 of the Evidence Act.

Accidental or Intentional Act

Section 15 of the Indian Evidence Act, 1872 speaks about, "Facts Bearing on Question whether Act was Accidental/ Intentional". It runs as follows:

"When there an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant".

Illustrations: A is accused of burning down his house in order obtain money for which it is insured. The fact that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fire A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

Rule: Section 14 and 15 of the Evidence Act are overlapping. Section 15 is an application of the general rule laid down in Section 14. It may be noted that evidence of similar facts can be given when it will go to establish a state of mind or mens rea which is either a condition of liability or is otherwise relevant. Such evidence falls both under Section 14 and 15.

Section 15 is an exception to the general rule that the evidence of similar facts is not relevant. This exception became necessary to prove system or design or to overthrow the defence of accident in cases of "habitual crimes" by an offender. Thus, where A falsely represented to B that he was the manager of a mercantile firm, and obtained money for the purpose of deposit from B, the fact that A had made similar representations to C and D and obtained sums from them, is relevant.

Admission

Admission is dealt in Chapter-2 Section 17 to 23 of the Indian Evidence Act, 1872. Section 17 of the evidence act defines admission it says that, *"An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances, hereinafter mentioned."* An "admission" is a statement of fact which waives or dispenses with the production of evidence by conceding that the fact asserted by the opponent is true.

If, for example, a person is sued for the recovery of a loan and there is an entry in his account book recording the fact of the loan, that is an admission on his part of his liability or if he makes any statement to the effect that "he does owes the money" that will also be an admission being a direct acknowledgment of liability.

"H.G. Ramchandra Rao v. Srikantha, 1997 Cr LJ 347"

Admissions should be clear, accurate and specific and it should be the language told by the person admitting inference drawn by a person upon the words of the person admitting cannot be called admission.

"G. Rangaiah v. Govindappa, AIR 2008 Kant 151"

It was said that admission should be of a precise fact and it should be specific and there should not be multiple inferences available for an admission.

"Ajodhya Prasad Bhargava v. Bhawani Shankar Bhargava, AIR 1957 All 1"

Admission is the confession or voluntary acknowledgement of a party or any person identified with them to that of the existence of certain facts in legal interest, the predominant characteristics of such types of evidence is of its binding nature.

"Mukesh Kumar Ajmera v. State of Rajasthan, AIR 1997 Raj 250"

It was observed by the court that just because an allegation is not denied it cannot be denied as to have been admitted.

"N. Murali Krishna v. South Central Railway, Secunderabad, AIR 2014 AP 100"

Admission must be self harming, not self serving. It was said that admission has to be made by an adversary and not by the person who asserts it.

Reasons for admissibility of Admissions

An admission is a relevant evidence. Several reasons have been suggested for receiving admissions in evidence:

i. Admissions a waiver of proof- If a party has admitted a fact, it dispenses with the necessity of proving that fact against him.

ii. Admissions as statement against interest- It is highly improbable that a person will voluntarily make a false statement against his own interest.

iii. Admissions as evidence of contradictory statements- Another reason for the relevancy of an admission is that there is a contradiction between the party's statement and his case. This kind of contradiction discredits his case.

iv. Admissions as evidence of truth- The most widely accepted reason that accounts for relevancy of admission is that what a party himself admits to be true may be presumed to be so.

Effects of Admissions

"Ajodhya Prasad Bhargava v. Bhawani Prasad Bhargava, AIR 1957 All 1"

In this case three effects of admissions were enumerated. They are:–

1. An admission constitutes a substantive piece of evidence in the case; and, for that reason, can be relied upon for proving the truth of the facts incorporated therein.
2. Admission has the effect of shifting the onus of proving to the contrary on the party against whom it is produced with the result that it casts an imperative duty on such party to explain it. In the absence of a satisfactory explanation, it is presumed to be true.
3. An admission, in order to be competent and to have the value and effect referred to above, should be clear, certain and definite, and not ambiguous, vague or confused.

"Basant Singh v. Janki Singh, AIR 1967 SC 341"

The question before the court was as to the date of death of a particular person. The plaintiff sought reliance on a statement made by the defendant in the plaint in an earlier suit. However, he denies the other statements contained in the plaint.

The Supreme Court, in this case, said that: –

1. Section 17 of the Evidence Act does not make any distinction between an admission made by the party to the proceeding and other types of admissions. An admission made by a party in a previous case can be used against him in other cases. However, in other cases, it will not be regarded as conclusive and it is on the party to the suit to disprove the admission.
2. All the statements made in the plaint are admissible as evidence. The court is however not bound to accept all the statements, it has the discretion to accept some and reject the rest. In this case, the court rejected the statements that were against the plaintiff because of other circumstances.

Forms of Admissions

There are two types of admission, they are: -

- Judicial or formal admissions
- Extra-judicial or informal admissions.

Judicial admissions are made by a party to the proceeding of the case prior to the trial. Such admissions, being made in the case, are fully binding on the party who makes them. Judicial admissions are fully binding on the party who made them and they constitute a waiver of proof. Its reference can be taken from section 58 of the act. In comparison, the evidentiary admissions which are receivable at the trial as evidence, can be shown to be wrong. Informal or casual i.e. extrajudicial admissions are those which do not appear on the record of the case, and may occur in the ordinary course of life, or in the course of business. However, unlike judicial admissions, they are binding on the party only partially, except in cases where they operate as or have the effect of estoppels.

In the case of *"Prasad Bhargava v. Bhawani Shankar Bhargawa (supra)"* it was said that unlike judicial admissions extrajudicial admissions are not fully but partly binding on the parties. However, they are binding in cases where they operate as or are having the effect of estoppel, in which cases they are fully binding.

"In criminal cases, statements made out of court by an accused are similarly admissible against him though they are subject to special conditions of admissibility and are usually called "confessions." Confessions which comply with these special conditions and other statements made by a party or an accused person are admissible against him as evidence of the truth of the facts asserted and are termed informal admissions. Such admissions, unlike formal admissions, do not bind their maker but maybe contradicted or explained."

Notes: Persons whose admissions are relevant are covered under Section 18-20.

Admissions by a party to proceedings or his agents

This is dealt with in Section 18 of the evidence act. Section 18 says that *"Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.*

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

Statements made by -

1. *party interested in subject-matter–persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or*
2. *person from whom interest derived–persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,*

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

Section 18 lays down five classes of persons who can make admissions: –

1) Party to the proceeding;
2) Agent authorized by such party;
3) Party suing or sued in a representative character, making admissions while holding such character;
4) Person who has any proprietary or pecuniary interest in the subject-matter of the proceeding, during the continuance of such interest; and
5) Person from whom the parties to the suit have derived their interest in the subject-matter of the suit, during the continuance of such interest.

"Nathoo Lal v. Durga Prasad, AIR 1954 SC 355"

It was said that whatever is admitted by the party in the court must be presumed to be true unless the contrary is proven but before this proposition can be taken it must be shown that the admission by the party is clear and unambiguous as must be conceived unless explained.

"Roopi Bai v. Mahaveer, AIR 1994 Raj 133"

In this case, the defendant merely pleaded ignorance of the facts that were placed before him. The court held that it will amount to admission unless by necessary implication it will amount to the denial of the fact.

"Sital Prasad v. State, AIR 1953 All 101"

In this case, a person was accused of the Foodgrains Control Order. The accused person made a general statement that he used to keep food grain bags which were left by a businessman. The court said that it was a general-statement and it do not satisfy the necessary conditions to prove offence and the fact that it was kept by him for sale, thus he cannot be convicted by the statement.

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

Section 19 of the Indian Evidence Act deals with "admissions by persons whose position must be proved as against party to suit".

It says that *"Statements made by persons whose position or liability, it is necessary to prove as against any party to the suit, are admissions if such*

statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability."

As per the general rule contained in Section 18, it is not permissible to take statements from people who are third parties to the suit this section and Section 20 says makes it possible to take statements from people who are third parties to the suit. These two sections are the exceptions to the general rule and it shows when and under what circumstances third party admission to a suit can be taken.

"Appavu v. Nanjappa, ILR 25 Mad LJ 329"

In this case, it was said by the court that "The object of this section is not to lay down that certain statements are relevant or admissible, but merely to add to the category of persons by whom a statement may be made before it can be considered to be an admission within the terms of the Indian Evidence Act. The statements referred to in Section 19 become admissible provided they satisfy the requirements of Section 17 as regards their nature, and Section 21 or any of the following sections, as regards their liability."

Admissions by persons expressly referred to by party to suit

Section 20 of the Indian Evidence Act deals with "Admissions by persons expressly referred to by party to suit". This section states that *"Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions."*

As explained earlier this section is another exception to the general rule that admissions of third parties are not relevant to the suit. This section says that when a person refers a third person to him for information over an uncertain or disputed matter then his statement over the matter will be relevant.

"Hirachand Kothari v. State of Rajasthan, AIR 1985 SC 998"

The court said that, "Where a party refers to a third person for some information or an opinion on a matter in dispute, the statements made by the third person are receivable as admissions against the person referring. The reason is that when a party refers to another person for a statement of his views, the party approves of his utterance in anticipation and adopts that as his own. The principle is the same as that of reference to arbitration. The reference may be by express words or by conduct, but in any case, there must be a clear admission to refer and such admissions are generally conclusive."

Against whom Admission may be proved

Section 21 of the Indian Evidence Act, 1872 speaks about, "Proof of admissions against persons making them, and by or on their behalf".

First part of Section 21 — *"Admissions are relevant and may be proved as against the person who makes them, or his representatives in interest".*

Section 21 lays down the principle as to proof of admissions. It is based upon the principle that an admission is an evidence against the party who had made the admission and, therefore, it can be proved only against him. No man should be at liberty to make evidence for himself through his own statements (i.e. he himself cannot prove his own statements). Granted this facility, every litigant would construct a favourable case by his own statement. Thus, *'self-favouring'* admissions are not permissible. A party can prove a self-serving statement only under the exceptions laid down in Section 21. Where, however, a person's self-serving statement subsequently becomes adverse to his interest, it may be proved against him as an admission.

Second part of Section 21 (Exceptions to Section 21) — Admissions cannot be proved by, or on behalf of, the person who makes them, except in the following three cases:

Exception 1 — *"When it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section 32".*

Thus, the statement should have been relevant as dying declaration or as that of a deceased person under Section 32. Illustration (b) to Section 21 is on the point. If the question was whether a ship was lost due to negligence or otherwise and the captain of the ship was dead, the contents of his personal diary would have been relevant though they operate in his favour. [See Illustration (c)]

Exception 2 — *"When the admission 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 a state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable".*

The exception enables a person to prove his statements as to his state of body or of mind. If, for example, a person is injured and the question is whether the injury was intentional or accidental, his statement as that time as to the way he was injured can be proved by himself. Where the question is whether a person received a stolen property with knowledge that it was stolen. In order to prove that he did not have guilty knowledge, he offers to prove that he refused to sell the property below its value or natural price. His statement explains the state of his mind and is

accompanied by the conduct of the refusal to sell. He may thus prove his statement [Illustration (d)]. Similarly, where a person is charged with having in possession a counterfeit coin with knowledge that it was counterfeit. He offers to prove that he consulted a skilful person on the matter and he was advised that the coin was genuine. He may prove this fact.

Exception 3 — *"An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission".*

This exception is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance, as part of the res gestae, or as a statement accompanying or explaining particular conduct. Where, for example, immediately after a road accident, a person pulled up to the injured who then made a statement as to the cause of the injury. This statement may be proved by or on behalf of the injured person, it being a part of the transaction which injured him (Section 6). Where A says to B, "You have not paid back my money", and B walks away in silence, A may prove his own statement as it has influenced the conduct of a person whose conduct is relevant (Section 8).

Oral admissions as to contents of documents

Section 22 of the Indian Evidence Act deals with "Oral admissions as to contents of documents". This section states that *"Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under Section 65, or unless the genuineness of the document produced is in question."*

When the question is whether a document is genuine or forged, oral admissions about this fact are relevant. A document can be proved by the primary evidence (original document) or secondary evidence (attested copies or oral account).

Oral admission as to contents of electronic records

Section 22-A of the Indian Evidence Act deals with "Oral admission as to contents of electronic records". This section states that *"Oral admissions as to the contents of electronic records are not relevant unless the genuineness of the electronic record produced is in question."*

Communication without Prejudice

Section 23 of the Indian Evidence Act, 1872 speaks about, "Communication without Prejudice". It runs as follows:

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

Explanation — Nothing in this section shall be taken to exempt any barrister, pleader or attorney from giving in evidence of any matter of which he may be compelled to give evidence under Section 126 (communication made to lawyer in furtherance of a crime)".

Section 23 gives effect to the maxim "*interest rei publcae ut finis litium"* (it is in the interest of the State that there should be an end of litigation). Section 23 applies only to civil cases. When a person makes an admission "without prejudice" i.e. upon the condition that the evidence of it shall not be given, it cannot be proved against him. The words "without prejudice" simply mean this: "I make you an offer and if you do not accept it, this letter is not to be used against me". This protection or privilege against disclosure is intended to encourage parties to settle their differences amicably and to avoid litigation if possible.

The rule under Section 23 applies only if there is a dispute or negotiation with another, or if they are written bona fide. Section 23 does not protect all letters merely because they are headed with the words "without prejudice". An admission made to a stranger, under whatever terms as to secrecy, is not protected by law from disclosure. When letters marked "without prejudice" are tendered in evidence, and the other party admits them (instead of objecting to them), the admission implied that the other party has waived his privilege, and such letters can then be used in a judicial proceeding.

Evidentiary value of Admissions

An admission does not constitute a conclusive proof of the facts admitted (Section 31). It is only a prima facie proof; thus, evidence can be given to disprove it. The admissions, thus, constitute a weak kind of evidence. The person against whom an admission is proved is at liberty to show that it was mistaken or untrue. But until evidence to the contrary is given an admission can safely be presumed to be true.

An admission is substantive evidence of the fact admitted and the admissions duly proved are admissible evidence irrespective of whether the party making them appears in the witness-box or not and whether that party made a statement contrary to his admissions vide *"Bharat Singh v. Bhagirath AIR 1966 SC 405"*. Section 17 makes no distinction between an admission made by a party in his pleading and other admissions. Thus, an admission made by a person in plaint signed and verified by him may be used as evidence against him in other suits.

There is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence *proprio vigore* (of its own force).

The admissions at best only suggest inferences. The court must examine the statement inside out and before holding a party to his statements must see that the statement is clear, unequivocal and comprehensive. If a party's admission falls short of the totality of the requisite evidence needed for legal proof of a fact in issue, such an admission would be only a truncated admission.

Confession

The term "confession" is not defined in the Indian Evidence Act. However, it is dealt with from Section 24 to 30 of the Evidence Act and in Section 164, 281 and 463 in the Criminal Procedure Code, 1973. Section 24 says that confessional statement made and inadmissible. Similarly, Section 24 and 26 exclude evidence of confessional statements to police officer. Section 27 deals with how much of information received from accused may be proved. Section 28 and 29 are in the nature of exception to Section 24. Section 30 deals with the admissibility of confession of a co-accused jointly tried with the accused.

The expression "confession" means "a statement made by an accused admitting his guilt. It is an admission or acknowledgement as to commission of an offence. If a person accused of an offence (accused) makes a statement against himself, it is called confession or confessional statement. According to Sir James Stephen "a confession made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime." Confession cannot be regarded as the sole basis for a conviction as prudence and justice dictates that such evidence may be used as corroborative piece of evidence. Deliberate and voluntary confessions of guilt, if proved are considered the most effectual proofs in law. Confession should be voluntarily and it can be given orally or in written form.

It is a rule of universal law that "a person may be convicted on the basis of his confession made in a judicial proceeding". The underlying principle is enshrined in two Latin maxims as stated below;

1. *Confession in Judicio Omini Probatione Major Est*: It means "confession in judicial proceedings is greater than any other proof".
2. *Confession Facta in Judicio Est Plena Probatio*: It means "confession is the absolute proof."

"Pakala Narayan Swami v. Emperor, AIR 1939 PC 47"

In this case, Lord Atkin stated that "A confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not in itself a confession". A mixed-up statement which, even though contains some confessional statement, will still lead to acquittal, is no confession. Thus, if the maker does not incriminate himself the statement will not be a confession.

"Palvinder Kaur v. State of Punjab, AIR 1952 SC 354"

Facts - "Palvinder was on trial for the murder of her husband; the husband's body was recovered from a well The post mortem could not reveal whether death was due to poisoning or what. In her statement to the court, she said that her husband, a photographer, used to keep handy photo developing material which is quick poison; that on the occasion he was ill and she brought him some medicine; that the phial of medicine happened to be kept nearby the liquid developer and the husband while going for the medicine by mistake swallowed the developer and died; that she got afraid and with the help of the absconding accused packed the body in a trunk and disposed it into the well." The statement, thus, consisted of partly guilty and partly innocent remarks.

It was held that a statement that contains self-exculpatory matter (e.g. killing done in private defence) which if true would negative the offence, cannot amount to a confession. This is so because a confession must be accepted or rejected as a whole, and the court is not competent to accept only inculpatory part (self-incriminating) and reject exculpatory part (self-defence).

"Nishi Kant Jha v. State of Bihar, (1959) SCR 1033"

The Court held that there was nothing wrong in relying on a part of the confessional statement and rejecting the rest, and for this purpose, the court drew support from English authorities. Under the English law, a confession is not rejected only because of the exculpatory statements.

"Laksman Shah v State of W.B., (AIR 2001 SC 1760)"

In this case, the statement of the accused which showed that he joined an assembly when it had already decided to chase the victim and finish him was regarded as a confession.

The Supreme Court observed: "The statement must be read as a whole (instead of dissecting it intodifferent sentences) and then only the court should decide whether it contains admission of his inculpatory involvement in the offence. If the result of that test is positive then the statement is confessional, otherwise not."

"Shabad Pulla Reddy v State of A.P., (AIR 1997 SC 3087)"

In this case, where the accused confessed that he knew about the conspiracy to commit the murder in question but did not confess that he was a party to the crime, die statement was held to be not relevant as a confession.

Forms of Confession

A confession may occur in any form. It may be written or oral. It is not necessary for the relevancy of a confession that it should be communicated to some other person.

There are two types of confession, they are:-
1. Judicial Confession
2. Extra-judicial Confession

It may be made to the court itself (judicial confession) or to anybody outside the court (extra-judicial confession). While, judicial confession is a good piece of evidence, the extra-judicial confession is a weak kind of evidence and has to be used with great caution.

An extra- judicial confession is made to anybody outside the court, and it could be a direct admission of guilt or in the form of repentance or in any other way. "An extra-judicial confession to afford a piece of reliable evidence must stand the test of reproduction of exact words, the reason and motive for confession and the person selected in whom confidence is reposed". For example: - A confession made to the Municipal Commissioner with whom the accused had no special friendship was held to be not trustworthy.

Note: Confessions when Irrelevant: Involuntary Confessions given under (Section 24-26)

Confessions caused by Inducement, threat or promise

Section 24 of the Indian Evidence Act, 1872 speaks about, "Confession caused by Inducement, threat or promise".

Ingredients: To attract the prohibition enacted in Section 24 the following facts must be established:

1. That the statement in question is a confession;
2. That such confession has been made by the accused;
3. That it has been made to a person in authority;
4. That the confession has been obtained by reason of any inducement, threat or promise, proceeding from a person in authority;
5. Such inducement threat or promise must have reference to the charge against the accused; and
6. The inducement, threat or promise must in the opinion of the court be sufficient to give the accused ground, which would appear to him reasonable, for supporting that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceedings against him.

When these conditions are present, the confession is said to be not free or voluntary and will not be receivable in evidence. It is necessary that the above conditions must cumulatively exist. A positive/ strict proof of the fact that there was any inducement, threat, etc. is not necessary. Anything from a barest suspicion to positive evidence would be enough to discard a confession. A Confession to be admissible in evidence, it must be free and voluntary. If it proceeds from remorse and a desire to make reparation for the crime, it is admissible. A Confession made by an accused in a criminal proceeding is irrelevant, if it is caused by any inducement, threat or promise.

Where the prisoner is only told to tell the truth without exciting any hope or fear in him, his statement cannot be regarded as being made in response to any threat or promise. Similarly, where a constable told a prisoner that he need not say anything to criminate himself, but what he did say would be used in evidence against him. However, where the objectionable words being that 'it would be better to speak the truth', held that the confession was involuntary.

Where the accused was told by the magistrate, "Tell me where the things are and I will be favourable to you", or "If you do not tell the truth you may get yourself into trouble and it will be worse for you", etc, the statements were held to be attracted under Sec 24. However, mere moral or spiritual inducements or exhortations will not vitiate a confession via. where the accused is told, "Be sure to tell the truth", or "You have committed one sin, do not commit another and tell the truth".

Person in authority — The inducement, threat or promise should proceed from a person in authority, i.e., one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him viz. government officials, magistrates, their clerks, police constables, wardens and others in custody of prisoners, prosecutors, attorneys, etc A purely private person/

Panchayat officer cannot be regarded as a person in authority, even if he is able to exert some influence upon the accused.

In case of ordinary confessions, the burden is not upon the prosecution to establish that the confession was made without threat, inducement or promise. However, it is the right of the accused to have the confession excluded, if some evidence of mal practice is proved by the accused.

Confessions to Police Officer

Section 25 of the Indian Evidence Act, 1872 speaks about, "Confession to police officer not to be proved". Confession under Section 25 may be a statement directly made to a Police Officer orally or in writing or indirectly made to such Police Officer. The reason is the Police Officers in India resort to third rate methods to extort Confession. Confessions to Police Officer are excluded even if arrest and custody are illegal. In England, a confession made to a police officer would be relevant evidence; if the Judge feels confident that there was no oppression and the statement was free, fair and voluntary, he may admit it.

Police Officer – A police officer not only includes a member of the regular police force, but also would include any person who is clothed with the powers of a police officer viz. a chowkidar, a village headmen, a home guard,24 etc Thus, excise inspectors are held to be police officers, but not the custom officers or an officer under the FERA or a member of the Railway Protection Force It has been held that mere power of arrest, search and investigation are not enough and the police officers should also be empowered to file a charge sheet or lodge a report before a Magistrate.

Section 25 absolutely excludes from evidence against the accused a confession made by him to a police officer under any circumstances whatsoever. Whether such person is in police custody or not, whether the statement made during investigation or before investigation is irrelevant. However mere presence of a police officer does not render the statement inadmissible. If person A is making a confession to person B and a police officer happen to overhear the same, such a confession will be considered voluntary and admissible.

If the confession is made in FIR then only that part of a confessional First Information Report is admissible which does not amount to a confession or which comes under the scope of Section 27. The non-confessional part of the FIR can be used as evidence against the informant accused as showing his conduct under Section 23.

Confessions in Police custody

Section 26 of the Indian Evidence Act, 1872 speaks about, "Confession by accused while in custody of police not to be proved against him".

The section will come into play when the person in police custody is in conversation with any person other than a police officer and confesses to his guilt. The section is based on the same fear, namely, that the police would torture the accused and force him to confess, if not to the police officer himself, at least to someone else. Thus the confession is likely to suffer from the blemish of not being free and voluntary.

The word custody does not mean formal custody; it means police control even if be exercised in a home, in an open place or in the course of a journey and not necessarily in the walls of a prison (actual arrest). The immediate presence of police officers is not necessary, so long as the accused persons are aware that the place where they are detained is really accessible to the police. A temporary absence of the policeman makes no difference.

Exception to Section 26: - If the accused confesses while in police custody but in the immediate presence of a Magistrate, the confession will be valid. The presence of a Magistrate rules out the possibility of torture thereby making the confession free, voluntary and reliable. The Magistrate must be present in the same room where the confession is being recorded. A confession made while the accused is in judicial custody or lockup will be relevant, even if policemen are guarding the accused. The mere fact that the accused, after having made a confession before a police officer, subsequently says before a Magistrate that "I" told the police officer that I murdered B, does not render the statement admissible.

Note: Confessions when relevant given under (Section 27-29).

Information received from accused in Police custody

Section 27 of the Indian Evidence Act, 1872 speaks about, "How much information received from accused may be proved".

Section 27 is an exception to the Sections 24, 25 and 26. According to Section 27, when an information, given by the accused in police custody leads to the discovery of an incriminating material object, like jewellery, weapons etc. the portion of the information can be proved. The reason is such discovery guarantees truth of the information.

Conditions:– For application of Section 27, the following conditions are to be satisfied.

1. The accused in police custody has given some information in his confessional statement.
2. Such information must relate to the discovery of certain fact relating to the commission of some offence.
3. In pursuance of such information, the police discovered certain facts.
4. The facts discovered must be connected with (or relevant to) the offence.

When the above conditions are satisfied, only that portion of the information which directly relates to the fact discovered, shall be relevant.

Illustration: A is tried for murder of B. If A, in police custody says "I have killed B and buried the dead body in my garden". Accordingly, if the body is found, A's statement (confession) becomes provable under Section 27.

Under the Evidence Act, there are two situations in which confession to police are admitted in evidence. One is when the statement is made in the immediate presence of a Magistrate, and the second, when the statement leads to the discovery of a fact connected with the crime. Section 27 is founded on the principle that if the confession of the accused is supported by the discovery of a fact, it may be presumed to be true and riot to have been extracted. That is why, Section 27 is a proviso or exception to Section 25 and 26 of the Act.

Normally, the section is brought into operation when a person in police custody produces from some place of concealment some object e.g. a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. The 'discovery of fact' includes the object found, the place from which it is produced and the knowledge of the accused as to its existence. However, information as to the 'past use' of the object produced is not related to its discovery.

Constitutional validity of Section 27 –

The validity of Section 27, Indian Evidence Act, 1872 was challenged on the ground that, it violates Article 20(3) of the Indian Constitution. According to Article 20(3) of the Indian Constitution, *"No person accused of an offence shall be compelled to be a witness against himself"*. It is the responsibility of the prosecution to prove the guilt of the accused. The constitutional validity of Section 27, Indian Evidence Act was challenged on the ground that, using information given by the accused for discovery of a fact against him, makes the accused, a witness against himself.

Before the constitution came into force, the information leading to discovery was provable and admissible, whether it was given by the accused voluntarily or compulsion. But, after the constitution came in to force, such information obtained by compulsion is not admissible on the ground that, it violates Article 20(3) of the

constitution. This view was followed by A.P. High Court in *"Re madugula Jermaiah (AIR 1957, AP 611)"* Allahabad High Court in *"Amin v. State (AIR 1958 All 293)"* and Bombay High Court in *"Amrut v. State (AIR 1960 Bom, 488)"*. But the Mysore High Court in *"Re Govinda Reddy (AIR 1958 Mys. 150)"* was of the view that Section 27 of the Evidence Act, is not controlled by Article 20(3) of the Constitution.

The above conflict was resolved by the Supreme Court in *"State of Bombay v. Kati kallu Oghad (AIR 1961 SC 1808: 1961 (2) Cr. LJ 856 (SC)"* that, such information obtained does not give rise to a presumption that the information was given under compulsion. It is the prosecution to find out whether the accused gave the information voluntarily or by compulsion.

"State of Rajasthan v. Bhup Singh, (1997) 10 SCC 675"

The statements admissible under Section 27 are not admissible against persons other than the maker of the statement. The discovery must be made by the police as a result of information given by the accused and not by any other source. Statements made by the accused in connection with an investigation in some other case which lead to the discovery of a fact are also relevant.

"Mohd. Inayatullah v. State of Maharashtra (AIR 1976 SC 483)"

In this case, the accused charged with theft, stated: "I will tell the place of deposit of the three chemical drums which I took out from the Haji Bunder on first August" The facts discovered were: chemical drums, the place of deposit of drums, and the accused's knowledge of such deposit. It was held that only the first part of statement, namely, "I will tell the place of deposit of three chemical drums" was relevant because only this part was the direct cause of the fact discovered. The rest of the statement was a simple confession (past history) which led to no discovery.

"Gurcharan Singh v. The State of Himachal Pradesh, Crl. Appeal 806/2011, SC"

Judgment delivered on **16th October, 2019**

The case of the prosecution in brief is that the appellant (accused) is the husband of Daljeet Kaur (deceased/ wife) and had been working in Greece for a few years. He often used to come to India to meet his wife and two children. It is alleged that the deceased suspected that the appellant was having an illicit relationship with his sister-in-law (Kamaljit Kaur) and therefore questioned him. She is said to have told her parents and her brother that the appellant used to beat her whenever she objected to this illicit relationship. On the date of the incident i.e. 09.02.2005,

following a quarrel with the deceased, the appellant beat her with a wooden bat and committed her murder with a Takua. Supreme Court observed that-

> *"We find that there are only two circumstances against the appellant that are relevant for our consideration, given that there are no eye witnesses to the incident. These two circumstances are: (a) the motive for commission of the offence and (b) disclosure statement by the appellant and discovery of material pursuant thereto in terms of Section 27 of the Indian Evidence Act, 1872".*

On the second issue, the Supreme Court observed that-

> *"As far as the next circumstance of disclosure and discovery is concerned, there are again conflicting versions that have been put forth by the witnesses. PW 2, an independent witness, was the signatory to the socalled disclosure statement of the accused. However, he has admitted in his deposition before the Court that the accused did not make any such statement before the police and that nothing was recovered by the police at his instance. Another independent witness, PW-4, has also deposed before the Court that no disclosure statement was made by the accused. If it is so, the recovery allegedly made by the police would not fall under Section 27 of the Indian Evidence Act, 1872 and recovery circumstance cannot be treated as having been proved satisfactorily in accordance with law".*

It further observed "Further, even though the wooden bat and Takua (small axe) were both seized from the house, only the Takua was received by the Forensic Science Laboratory for chemical examination. It was found that the Takua contained human blood of the same blood group as that of the deceased. Though these facts have been proved, the moot question that has not been answered by the prosecution is how the weapon could be connected to the appellant. Upon our consideration, we find that there is no connecting link which shows that the appellant has committed the murder by using sharp edged weapon which was seized by the police, to commit the murder of the deceased".

Supreme Court also observed "Even assuming that such a weapon was seized from the house of the deceased, this would not be sufficient to bring home the guilt against the accused for the offence under Section 302 IPC especially since there are no other circumstances against the appellant".

Note: Sections 28 and 29 provide for exceptions to Section 24.

Confession made After Removal of Threat, Inducement, etc

Section 28 of the Indian Evidence Act, 1872 speaks about, "Confession made after removal of Threat, Inducement, threat or promise, relevant". "If such a confession as is referred to in Section 24 is made after the impression caused by any such

inducement, threat or promise has, in the opinion of the court, been fully removed it is relevant".

Section 28 deals with the validity of confession which is made after the effect of inducement is already over (e.g. by lapse of time). Thus, a confession, which is rendered irrelevant under Section 24, may become relevant under Section 28.

"The word 'fully' in Section 28 is significant, it means 'thoroughly', 'completely', 'entirely', so as not to leave any trace of the impression created by torture or fear; for, confession forced from the mind by the flattery of hope or by torture or fear comes in so questionable a shape that no credit can be given to it. A free and voluntary confession is presumed to flow from the strongest sense of guilt and therefore, it is admitted as proof of the crime."

Confession Relevant because of Promise of secrecy

Section 29 of the Indian Evidence Act, 1872 speaks about, "Confession Otherwise Relevant not to become Irrelevant because of Promise of Secrecy, etc".

Under this section all confessions will be relevant which are made under: –

i. A promise of secrecy, or
ii. In consequence of a deception or artifice practiced on the accused, or
iii. When he was drunk, or
iv. Because it was elicited in answer to a question, or
v. Because no warning was given that he was not bound to say anything and that whatever he might say would be used as evidence against him.

In criminal cases, the public interest lies in prosecuting criminals and not compromising with them. Therefore, where an accused person is persuaded to confess by assuring him of the secrecy of his statements or that evidence of it shall not be given against him, the confession is nevertheless relevant. Where the two accused persons were left in a room where they thought they were all alone, but secret tape recorders were recording their conversation, the confessions thus recorded were held to be relevant. A confession secured by intercepting and opening a letter has also been held to be relevant. A confession obtained by intoxicating the accused is equally relevant.

Confession of Co-Accused

Section 30 of the Indian Evidence Act, 1872 speaks about, "Consideration of proved confession affecting person making it and others jointly under trail for same offence".

When more than one person is being jointly tried for one and the same offence or offences they are called 'co-accused'. The philosophy of Section 30 is that confession of co-accused affords some sort of sanction in support of the truth of his confession against others and himself. However, it does not necessarily follow that because a man has truly implicated himself, therefore his implication of another is also true. It is opposed to the principle of jurisprudence to use a statement against a person without giving him the opportunity to cross-examine the person making the statement. This section is an exception to the rule that the confession of one person is entirely inadmissible against another.

The principle behind this section is that where an accused person confesses his own guilt, as a result, implicates another person who is being jointly tried with him for the same offence, and then the confession made him can be used against the other person too. The reason is that when a person admits his guilt then the admission of his own guilt operates as a sort of sanction, which, to some extent, takes the place of the sanction of an oath and so affords some guarantee that the whole statement is a true one. But this is a weak guarantee because a statement may be true as far as the effect on the confessor is concerned but the statement can be said in malice as well when its effect to the other people is concerned.

The expression 'same offence' in Section 30 means the identical offence and does not mean offence of the same kind. If different offences are committed in course of the same transaction and many persons are tried jointly for different offences (viz. abduction and rape), the confession of one of such persons cannot be used against the others.

"Badri Prasad Prajapati v. State of M.P. 2005 CrLJ 1856, 1858"

The ingredients to be fulfilled in case of evidence against other co-accused were given: –

1) There must be a joint trial for the same offence;
2) It must be a confession;
3) The confession of guilt must affect himself and others, i.e., implicate the maker substantially to the same extent as the other accused;
4) The confession of guilt must be duly proved.

All the conditions should exist at one time and if any of the condition is missing in a case, this section had no applicability and the accused cannot be roped.

Evidentiary value of section 30 — Section 30 does not say that the confession of one accused will be evidence against the other co-accused. It only says that the

court may take into consideration such confession. The confession of co-accused is not "evidence", as it is not recorded on oath, nor it is given in the presence of the accused and nor its truth can be tested by cross-examination. It is an evidence of a very weak type.

The confession of co-accused may only be taken into consideration along with other evidence in the case, and it cannot alone form the basis of a conviction. It can be used only, if necessary, to corroborate other evidence of the record. It can only be used to help to satisfy a court that the other evidence is true.

Retracted Confession

When a person, having once recorded a confession which is relevant, goes back upon it at the trial, saying either that he never confessed or that he wrongly confessed or confessed under pressure, that is called a 'retracted' confession.

A court shall not base a conviction on such a confession without a general corroboration from independent evidence. Even if a confession is inculpatory, corroboration is necessary if the confession is retracted. The court can take into consideration retracted confession against the confessing accused and his co-accused.

"Pakkirisamy v. State of T.N., (1997) 8 SCC 158"

In this case, an extra-judicial confession was recorded by the village assistant in the presence of the village administrative officer; the accused made no reference to the confession in his statement recorded by the C.J.M. under Section 164, Cr.P.C. and only said that he was innocent and had not committed any offence, it was held that this could not be called a retraction of the confession.

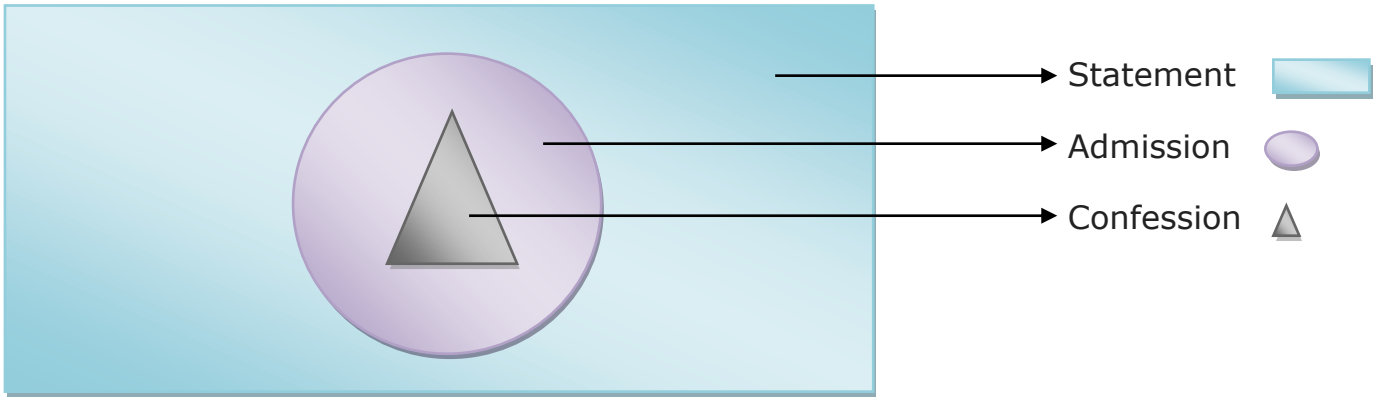
"State of T.N. v. Kutty, (AIR 2001 SC 2778)"

The Supreme Court has held that retraction is too insufficient a reason for overruling a confession *(State of T.N. v Kutty AIR 2001 SC 2778)*. A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and voluntarily made. In the case of a retracted confession, one has only to find out whether the earlier statement which was the result of repentance, remorse and contrition was voluntary and true or not and it is with that object that corroboration is sought for.

Evidentiary value of Confession

A confession is considered the best and most conclusive evidence, as no person will make an untrue statement against his own interest It is well settled that a confession, if voluntarily and truthfully made, is an efficacious proof of guilt However, the evidentiary value of a confession is not very great As observed by Best, a confession may be 'false' due to mental aberration, mistake of law, to escape physical or moral torture, to escape ignominy of a stifling enquiry, due to vanity, to endanger others by naming them as co-offenders, and so on. Therefore, confessions may not always be true. It would be very dangerous to act on a confession put into the mouth of the accused by a witness and uncorroborated from any other source. It would not be quite safe to base a conviction for murder on a confession by itself.

Difference between Admission & Confession



*"**Sidheshwar Nath V. Emperor, AIR 1934 All 351, 152 Ind Cas 174**"*
----Statement is genes, admission is species and confession is sub-species.

There are many common features between an admission and a confession. But there are obvious points of distinction to a The Act lays down different rules as to their relevancy.

(1) Confessions find place in criminal proceedings only. Admissions are generally used in civil proceedings, yet they may also be used in criminal proceedings.

(2) Every confession is an admission, but every admission is not a confession. The word 'admission' is more comprehensive and includes a confession also. A confession is only a species of admission.

(3) A confession is the admission of guilt and, thus, invariably runs against the interest of the accused. A confession should necessarily be of inculpatory nature. The term 'admission' includes every statement whether it runs in favour of or

against the party making it. However, there is nothing in Evidence Act which precludes an accused person from relying upon his own confessional statements for his own purposes.

(4) A confession always proceeds from the accused or suspect person, but in reference to admissions, the statements of certain persons, who are not parties to the case, as admissions against the parties.

(5) The confession of an accused person is relevant against all his co-accused who are being tried with him for the same offence (Section 30). In the case of admissions, statements of a co-plaintiff or those of a co-defendant are no evidence against the others.

Dying Declaration

The term dying declaration is derived from "*Leterm Mortem*", which means "Words before death". The basis "dying declaration" is derived from the Latin maxim *"Nemo moriturus praesumitur mentire",* which implies "a man will not meet his maker with a lie in his mouth". A dying declaration is a declaration written or verbal made by a person, as to the cause of his death (by way of homicide or suicide) or as to any of the circumstances of the transaction, which resulted in his death. A dying declaration is considered credible and trustworthy evidence based upon the general belief that most people who know that they are about to die do not lie. A victim is an exclusive eye witness, thus the evidence cannot be excluded. There is no requirement as per Indian Law for the victim to be under expectation of imminent death. If the victim survives, the statement can be used to corroborate or contradict him in court; however survival diminishes the weight of the statement.

Illustration: X has been attacked by Y. If X, shortly before death, makes a declaration holding Y, responsible for his injuries, it is called "dying declaration".

Though dying declarations are not statements made on oath and no cross-examination is possible, yet because of the solemnity of the occasion, which ensures truth more than a positive oath they are received in evidence. Absolute guarantee of truth cannot be expected even in case of statements made on oath in a Court.

Section 32(1) specifically deals with the concept of dying declaration in respect of a cause of death and it is assumed that such statements are relevant even whether the person who made them was not at the time when they were made. The general rule is, "hearsay evidence is no evidence and is not admissible in evidence". Sections 32 & 33 of the Evidence Act are among the exceptions, as such dying declaration is an exception to this general rule.

"Uka Ram v. State of Rajasthan, A.I.R. 2001 S.C. 1814"

The Supreme Court defined dying declaration in a way that, "when a statement is made by a person in the threat of his death or as to any circumstances which cause threat or results into his death, and when the cause of his death comes in question the statements made by him are admissible as evidence, such statement in law are compendiously called dying declaration.

"P.V. Radhakrishna v. State of Karnataka, Crl. Appeal No. 1018 of 2002, SC"

The Supreme Court held that 'the principle on which a dying declaration is admitted in evidence is indicated in the Latin maxim, *'nemo morturus praesumitur mentire'*, which means that a man will not meet his maker with a lie in his mouth. Information lodged by a person who died subsequently relating to the cause of his death is admissible in evidence under this clause.

"K.R. Reddy & Anr. v. The Public Prosecutor, 1976 AIR 1994, 1976 SCR 542"

"The dying declaration is admissible under Section 32 & because the statement not made on oath so that its truth could be tested by cross-examination, the court has to observe the closest inspection of the statement before acting upon it. And it is also assumed that the words of a dying man are of very serious nature because a person on the verge of death is not likely to tell lies or to connect a case to a malice prosecution of an innocent person. Once the court is satisfied that the dying declaration is true & voluntary and are not influenced, then the statements can be sufficient to prove the conviction even without further corroboration."

Section 32

Section 32 deals primarily with statements from people who are unable or have become incapable to give evidence. The section says that, *"statements written or verbal, of relevant facts made by a person, who is dead or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expenses, which under the circumstance of the case, appears to the court unreasonable, are themselves relevant facts in the following cases.*

1. *When it relates to cause of death; or*
2. *When it is made in course of business; or*
3. *Against the interest of the maker; or*

4. *Gives opinion as to public right or custom or matters of general interest; or*
5. *Relates to existence of relationship; or*
6. *When it is made in will or deed relating to the family affairs; or*
7. *In document relating to transaction mentioned in Section 13(a); or*
8. *When it is made by several person and expresses felling relevant to matter in question".*

Section 32 makes relevant statement made by a person.
(i) Who is dead;
(ii) Who cannot be found;
(iii) Who has become incapable of giving evidence; or
(iv) Whose attendance cannot be procured without unreasonable delay or expenses.

Reasons for admissibility of dying declaration

Dying declaration is admissible for the following two reasons:-

1. As the victim is sole eye witness, exclusion of his evidence defeats the ends of justice. Where is the only evidence available under the circumstances, rejection of it may result in injustice. The person, being no more in the world cannot be called in the Court to testify and other evidence is not available to help in determining the truth.
2. Declarations made by a person under expectation of death are presumed to be true.

Distinction between the English and Indian Law

a. In English law, a dying declaration is relevant only in criminal cases where the cause of death is in question". In lndian law such statements are admissible both in civil and criminal proceedings; they are admissible even if the trial is not for a person's death.

b. In English law, the dying declaration is admissible only in the single instance of homicide i.e. murder or manslaughter. In Indian law, cases of `suicide' are also covered.
c. In English law, to be relevant, a dying declaration must have been made in expectation of death. A declaration made without appreciation of immediate or impending death would not be admitted. In Indian law, there is no such requirement. If the person giving declaration has in fact died and the statement explains the circumstances surrounding his death, the statement will be relevant even if no cause of death had arisen at the time of the making of the statement.

d. In English law, it is necessary that the deceased should have completed his statement, before dying. In Indian law, if the deceased has narrated the full

story, but tails to answer the last formal question as to "what more he wanted to say", the declaration can be relied upon.

Recording of Dying Declaration

The recording of dying declaration can be done by 4 categories of persons:-

1. Magistrate (most evidentiary value) - A dying declaration is to be recorded by Magistrate, who is also required to ascertain whether the victim is in a condition to record his/ her statement. There is no particular law that necessitates that a declaration can only be recorded by a magistrate.

"Samadhan Dhudaka Koli v. State of Maharashtra, AIR (2009) SC 1059"

It was said that a dying declaration made before a Judicial Magistrate has a higher evidentiary value. The Judicial Magistrate is presumed to know how to record a dying declaration. He is a neutral person.

2. Doctor - A doctor is required to provide a fitness certificate to support the findings. However even with the absence of the fitness certificate, the declaration can still be considered reliable and truth worthy, given the victim was in a fit condition to make the statement. Wherein a dying declaration was recorded by a doctor in the form of question and answers in the presence of another witness, it was held that it was sufficient to convict the accused.

3. Police Officer - A clear and corroborated declaration cannot be rejected on the grounds that were recorded by a police officer. The Court is more cautious when they review dying declaration recorded by police officers. Where an injured person lodged the F.I.R. and then died, it was held to be relevant as a dying declaration.

"Laksbmi v. Om Prakash, AIR 2001 SC 2383"

A dying declaration recorded by police alone is relevant under Section 32 (1), however, it is better to leave such a statement out of consideration unless the prosecution satisfies the court as to why it was not recorded by a magistrate or a doctor. Only because certain names were included in F.I.R but were not mentioned in dying declaration docs not detract from the value of dying declaration and would not by itself prove the falsity of the declaration.

4. Any other person (less evidentiary value) - In a matter of dowry death, dying declaration cannot be rejected simply on the grounds that it was made to a relative. The Court is more cautious when they review such declaration.

Format/ Language of dying declaration

It can be in written or verbal or in form of gestures and signs. A dying declaration recorded in the language of the declarant, increases the value of the evidence. Further, a dying declaration can be in form of question and answer or in the form of narration. A dying declaration is not complete if it does not reveal the relevant facts, names of the accused and circumstances leading to the death of the victim. Notes from the diary of the deceased can also be considered dying declaration if they refer to the transaction leading to her death or cause of her death, For example: - diary of a women who committed suicide due to cruelty.

The court cannot reject any dying declaration on the basis of the language. It can be recorded in any language Beat it Hindi, English, Urdu, Punjabi, Assamese etc. If this statement is in other language than the one which magistrate recorded then the precautions should be taken. meaning there why where is statement was in Hindi and the magistrate recorded in English but the precaution was taken in explaining every statement to the disease by the another person, it was held that this statement was the valid dying declaration. The only thing that should be taken care of is that it must be functioning as a piece of evidence with proper identification.

In Nirbhaya case 2013, a bench of justice Deepak Mishra, R Banumathi and Ashok Bhushan said a dying declaration should not necessarily be made by words or in writing and it could be through gestures. Not just words but even gestures can be made admissible in court now.

"Queen Express v. Abdulla (1885) ILR 7 All 385"

In this case, the throat of the deceased girl was cut and she being unable to speak indicated the name of the accused by the signs of her hand, this was held to be relevant as dying declaration and it was concluded that if an injured person is incapable of speaking, he may make his dying declaration in form of gestures and signs.

"Prempal v. State of Haryana, (2014) 10 SCC 336"

When the dying declaration is produced in the court as evidence the court must be satisfied that the dying declaration is not as a result of either tutoring or

imagination of the dying man. The court must be satisfied that the dying declaration was given voluntarily and that the deceased was in a fit state of mind. If a dying declaration is found to be reliable then there is no need for corroboration conviction can be made on that basis alone.

"Muralidhar v. State of Karnataka, (2014) 5 SCC 730"

It was said that the recording will have to be done in the by the deceased himself and tit should not be the dictation of someone else as this will create suspicion on the reliability of the evidence.

"State of U.P. v. Madan Mohan, AIR 1989 SC 1519"

Guidelines given by the Supreme Court:

1. It is for the court to see that dying declaration evokes full self assurance as the maker of the dying declaration is no longer available for cross-examination.
2. Court satisfy that there was no opportunity of tutoring or prompting.
3. Certificate of medical doctor ought to point out that sufferer was once in a healthy state of mind. Magistrate recording his very own satisfaction about the healthy mental situation of the declarant was not acceptable specially if the physician was available
4. Dying assertion be recorded via the government magistrate & police officer to record the dying statement only if circumstance of the deceased was so precarious that no other alternative was left.
5. Dying declaration may additionally be in the shape of questions & answers & answers being written in the phrases of the man or woman making the death declaration. But courtroom cannot be too technical.

Conditions for admissibility

For admissibility of dying declaration, the following conditions are to be satisfied.

1. <u>The person making statement must have died</u> –

   Dying declaration to be admissible, when the declarant dies. If the declarant survives, it is not admissible under Section 32(1). The death need not occur immediately after the making of the statement. If the person making the declaration chances to live, his statement is inadmissible as a 'dying declaration', but it might be relied on under Section 157 to corroborate his testimony or to contradict him under Section 145. Further, it can he used to corroborate the evidence in court under Section 6 and Section 8. The fact that the person is dead must be proved by the person proposing to give evidence of his statement. Further, the deceased must be proved to have died as a result of injuries

received in the incident. Where A made a statement shortly after an injury, and he was admitted in hospital and thereafter discharged, but after 5 days he died of high fever, the statement made by him is not admissible under Section 32(1).

The interval between the time of death and the statement is immaterial. If there is nothing to show that the death is caused by the injuries regarding which the deceased gave his statements then those are not admissible as dying declaration.

"Ram Prasad v. State of Maharashtra, AIR 1999 SC 1969"

In this case, dying declaration was recorded by the Judicial Magistrate. But, the declarant survived. It was held that the statement/declaration could not be used under Section 32, but it could be used to corroborate his evidence under Section 157 of the Evidence Act.

2. Statement as to cause of death or circumstances leading to death –

The statement must relate to the cause of his death or circumstances of the case resulting in his death. Statements which relate to cause or circumstances not responsible for his death are not admissible as dying declaration under the Clause (1) of Section 32. If the statement made by the deceased does not relate to his death, but to the death of another person, it is not relevant.

For example, where the wife made a statement that her husband is killed by Z and then she committed the suicide.

"Sharda Birdichand Sharda v. State of Maharashtra, AIR 1984 SC 1622"

In this case, a married woman had been writing to her parents and other relatives about her critical condition at the hands of her in-laws. She lost her life some four months later. Her letters were held to be admissible as dying declaration. The court also pointed out that Section 32 (1) is applicable to cases of 'suicide' also. Thus, the statements made before a person has received any injury or before the cause of death has arisen or before the deceased has any reason to anticipate of being killed are relevant as dying declarations, but such statements should have a direct relation to the cause or occasion of death.

3. Cause of death must be in question –

The statement as to cause of the death of the deceased person will be relevant only if the cause of his death is in question. For example: - X and five other persons were charged with having committed a dacoity in a village. X, who was seriously wounded while being arrested, made before his death a dying

declaration as to how the dacoity was committed and who had taken part in it, the declaration made by X, is not admissible in evidence.

4. Statement must be complete –

   If the deceased fails to complete the main sentence (as tor instance, the genesis or motive for the crime), a dying declaration would be unreliable. However, if the deceased has narrated the full story, but fails to answer the last formal question as to "what more he wanted to say", the declaration can be relied upon. A dying declaration ought not to be rejected because it does not contain details or suffers from minor inconsistencies. Merely because it is a brief statement, it is not to be discharged.

5. Statement must be consistent –

   When a dying declaration was given to multiple people (such as the doctor, police, parents etc.) then each of the dying declarations will have to be consistent with each other or otherwise the dying declaration will not be admissible. If there are multiple dying declarations with inconsistencies pertaining to relevant facts of the case, cause of death, factor leading to the death of the accused or name and identities of the accused would lead to rejection of the declaration.

6. Competence of declarant –

   The admissibility of statement under Section 32 is based on the assumption that the maker of the statement was competent to take oath as a witness. A dying declaration of child is inadmissible.

Exceptions of Dying Declaration

The exceptions of 'Dying declaration' stipulate that where the statements made by way of demise folks are not admissible:

1) If the reason of demise of the deceased is no longer in question. If the deceased made declaration before his demise something except the reason of his death, that announcement is now not admissible in evidence.

2) If the declarer is no longer a competent witness, declarer ought to be competent witness. A dying declaration of a child is inadmissible.

3) Inconsistent & Incomplete declaration: Inconsistent & incomplete dying declaration is no evidentiary value. If the declaration does not state the reason or person behind death then it is of no value.

4) Uninfluenced declaration: it ought to be stated that death announcement must not be under impact of any one.

5) Untrue declaration: it is perfectly permissible to reject a part of dying declaration if it is observed to be untrue & if it can be separated.

6) Contradictory statements: if a declarant made more than one death declarations & all are contradictory, then those all declarations lose their value.

Evidentiary value of Dying Declaration

Dying declaration can only be taken into consideration when it is

a) Recorded by a competent magistrate (with certain exception),
b) The said statement must be recorded in the exact words,
c) There must not be any scope of influence from the third party, and hence the declaration must be made soon after the incident that is the reason of the death,
d) There must not be any ambiguity regarding the identity of the offender or cause of death.

It is very important to note that such a statement must not be made under the influence of anybody or it must not be given by promoting or tutoring. In case there is such a suspicion, then such dying declaration needs evidence to corroborate.

Important Case Laws

"Pakala Narayana Swamy v. The King Emperor (AIR 1939 PC 47)"

(This case is generally read for understanding dying declaration and admissibility of evidence under section 162 of Cr.P.C.)

This is an appeal case against the judgment of the High Court of Patna where the appellant was convicted for the murder of one Kurree Nukaraju and was sentenced to death.

Facts:
The accused's wife had taken some money from the deceased a year ago in 1936. On 20th March 1937, the deceased received a letter inviting him to come to Berhampur for collecting his dues but the letter was unsigned. There was a general suspicion that the letter was sent by the accused's wife but the judge was not satisfied with the handwriting evidence that was given. The deceased set for Berhampur but he never came back. His body was found on 23rd March 1937 from a passenger train in Puri in an unclaimed trunk in seven pieces. The post-mortem report confirmed that its murder.

During the investigation, it was found that the trunk was bought on behalf of the accused. Evidence was given by the washerman of the accused who bought it on behalf of the accused and also by the shop-keeper who sold the trunk.

Issues:
A number of questions arose in this case: –

1. Whether the statement of the deceased's wife that the deceased told him that he was going to collect his dues from the accused's wife will be treated as a dying declaration or not?
2. Whether the statements given by the accused's during the investigation will be protected under section 162 of CrPC or not?

Judgment:
The Judgment was given by a 5-judge bench of the Privy Council and it was delivered by J. Atkin.

Re, 1st Issue: In this issue, a variety of questions arose, previously it was suggested that the statement must be made after the transaction has taken place and the person making the statement must be in a near-death situation.

In the present case, the lordships declared that the natural meaning of the words of section 32(1) of the Indian evidence act does not convey any such limitations.

The statement may be made before the cause of death has arisen or even before the deceased had any reason to anticipate getting killed but the circumstances must be circumstances of the transaction and any general expression of suspicion or fear from any individual or otherwise that is not directly related to the case will not be admissible.

The circumstances must have some proximate relation with the actual occurrence.

In the present case, the cause of the deceased's death comes into question. Here the transaction is the one when the deceased was murdered on 21st or 22nd March and his body was found to be in a trunk which was proved to be bought on behalf of the accused, in this case the statement made by the deceased on 20th and 21st march that he was going to a meet the accused's wife who lived in the same house as that of the accused appears clearly to be a statement that is in relation to the circumstances of the transaction which caused the death of the deceased.

Therefore, the statement was said to be was rightly admitted.

Re, 2nd Issue: Another issue that was discussed in this case was whether the statements made by the accused to the police before his arrest was admissible as evidence. The lordships referred to various case laws in this regard and ultimately

came to the conclusion that the statement made by a person during the investigation will not be admissible as evidence in court even if the statements are made by the person who is ultimately the accused and such statements are protected under section 162 of Cr.P.C.

Reasoning:
In this case, the Lordships gave detailed reasoning with regard to the decision on the second issue.

1. The lordships reasoned that in section 162 of Cr.P.C. the mention of the words "any person" would mean each and every person giving their statement. During an investigation, many people are suspected to be the accused and all of them may have to give their statements. The fact that the section prohibits the signing of the recorded statements should essentially mean that the section should be applicable to the accused person also.

2. It was also stated that if the intention of the legislature was otherwise or if they're meant to be an exception, then it can be safely expected that the it would be expressed in the section. In this case, the lordships could not see any reason for departing from the plain meaning of the words used in the section.

3. Section 25 of the evidence act also supports the decision. Section 25 says that no confessions made to a police officer shall be proved against an accused person. In addition to this reference to sections, 26 and 27 were also given.

   Held: The appeal was dismissed by the Privy Council.

"Kalawati v. State of Maharashtra, Crl. Appeal No. 267 of 2009, SC"

In this case, the court said that corroboration after a dying declaration is only a matter of prudence. Justice Dr. Arijit Pasayat gave 11 points in Para No. 6 of this judgment, on the basis of which conviction of an accused can be done by Dying declaration: –

1. There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration.

2. If the Court is satisfied that the dying declaration is true and voluntary it can base a conviction on it, without corroboration.

3. The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration.

4. Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.
5. Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected.
6. A dying declaration which suffers from infirmity cannot form the basis of conviction.
7. Merely because a dying declaration does contain the details as to the occurrence, it is not to be rejected.
8. Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth.
9. Normally the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eye-witness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail.
10. Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.
11. Where there is more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declarations could be held to be trustworthy and reliable, it has to be accepted.

"Purshottam Chopra & Anr. v. State, Crl. Appeal No.194-195/2012, SC"

The Supreme Court observed that merely because the deceased had suffered 100% burn injuries, it cannot be said that he/ she was incapable to make a statement which could be acted upon as dying declaration.

The contention taken in this case was that the victim had suffered 100% burns and he was already in critical condition and further to that, his condition was regularly deteriorating. It was contended that in such a critical and deteriorating condition, he could not have made proper, coherent and intelligible statement. The accused in this case were held guilty of causing death of Sher Singh by putting him on fire.

Rejecting this contention, the bench of Justice AM Khanwilkar and Justice Dinesh Maheshwari observed thus:

"Irrespective of the extent and gravity of burn injuries, when the doctor had certified him to be in fit state of mind to make the statement; and the person recording the statement was also satisfied about his fitness for making such

statement; and when there does not appear any inherent or apparent defect, in our view, the dying declaration cannot be discarded. Contra to what has been argued on behalf of the appellants, we are of the view that the juristic theory regarding acceptability of statement made by a person who is at the point of death has its fundamentals in the recognition that at the terminal point of life, every motive to falsehood is removed or silenced. To a fire victim like that of present case, the gravity of injuries is an obvious indicator towards the diminishing hope of life in the victim; and on the accepted principles, acceleration of diminishing of hope of life could only obliterate the likelihood of falsehood or improper motive. Of course, it may not lead to the principle that gravity of injury would itself lead to trustworthiness of the dying declaration. As noticed, there could still be some inherent defect for which a statement, even if recorded as dying declaration, cannot be relied upon without corroboration. Suffice would be to observe to present purpose that merely for 100% burn injuries, it cannot be said that the victim was incapable to make a statement which could be acted upon as dying declaration."

"Poonam Bai v. The State of Chhattisgarh, Crl. Appeal No. 903/2018"

In **year 2018**, Hon'ble Supreme Court acquitted a convict by setting aside the judgment of the High Court of Chattisgarh which had convicted her for murder, after finding lacunae in the dying declarations.

In case the person recording the dying declaration is satisfied that the declarant is in a fit medical condition to make the statement and if there are no suspicious circumstances, the dying declaration may not be invalid solely on the ground that it was not certified by the doctor. Insistence for certification by the doctor is only a rule of prudence, to be applied based on the facts and circumstances of the case. The real test is as to whether the dying declaration is truthful and voluntary".

"Firoza v. State, Crl. Appeal No. 243/2016, Delhi High Court"

In **December 2019**, Delhi High Court held that a dying declaration would simply not become unreliable, just because it was recorded by an Executive Magistrate instead of a Judicial Magistrate. Challenging the order of the conviction as recorded by the trial court, the counsel of the accused raised following issues:

a. The dying declaration can't be accepted as voluntary, as at the stage of recording of the statement, the victim was under the influence of drug called *'Fortwin'*, which materially affected her mental state.
b. The dying declaration can't be relied upon as it was recorded by an Executive Magistrate, instead of a Judicial Magistrate, which is in violation of Chapter 13A of Delhi High Court Rules.

The court rejected the first claim of the appellants by relying upon the post mortem report, MLC as well as the statement of the medical practitioner.

The medical practitioner has stated that at the time of recording of the declaration, the victim was fit to give a statement.

Moreover, the medical reports reflect that the statement was recorded more than 24 hours of administering the said drug. Therefore, the argument of victim not being in a proper mental state is refuted.

On the second issue of the dying declaration being recorded by an Executive Magistrate, the court noted that: 'The magistrate being a disinterested witness and is a responsible officer and there being no circumstances or material to suspect that the magistrate had any animus against the accused or was in any way interested for fabricating a dying declaration, question of doubt on the declaration, recorded by the magistrate does not arise.'

Judgments – When Relevant

The general principle of law is that judgments whether previous or subsequent are not relevant in any case or proceeding. Every case has to be decided upon its own facts as they exist between the parties to it and not by reference to the judgments in other cases. A judgment in the criminal trial is not relevant to the civil case except for the purpose of showing the fact of trial and conviction for it.

Thus, in a suit for damages for damaging the plaintiff's trees, the fact that the defendant was acquitted on the same charge in a criminal prosecution was not admitted in evidence. For the same reason, a civil judgment is not relevant to a criminal trial though arising out of the same facts. For example, a judgment in a civil suit for defamation is not relevant to a criminal prosecution based upon the same defamatory statement.

If an action is started against a manufacturer for supplying defective goods and the court holds the manufacturer to be not liable. Subsequently, another person starts an action against the same manufacturer, for supplying the same kind of defective goods. The previous judgment is not relevant to the subsequent case.

Kind of Judgments:

Judgments are categorized/ classified into two kinds, namely–

1. Judgments in rem - Judgments affecting the legal status of some subject matters, persons or things are called "Judgments in rem". E.g. Divorce Court

Judgment, grant of probate or administration etc. Such judgments are conclusive evidence against all the persons, whether parties to it or not.

2. Judgments in personam - Judgments in personam are all the ordinary judgments not affecting the status of any subject matter, any person or anything. In such judgments, the rights of the parties to the suit or proceedings are determined.

Judgments are, however, relevant facts of great importance. Thus, to the general principle that judgments are not relevant, the Act recognizes a few exceptions (Section 40-43).

Previous judgments relevant to bar a second suit or trial

Section 40 of the Indian Evidence Act, 1872 speaks about, "Pervious judgments relevant to bar a second suit or trial".

Section 40 permits evidence of the previous judgment, order or decree, which by law prevents any court from taking cognizance of a suit or holding a trial, when the question arises whether such court ought to take cognizance of such suit or hold such trial. The object of Section 40 is to avoid multiplicity of suits and to save the precious time of the court. This provision is incorporated under Section 11 of the Code of Civil Procedure, 1908, which deals with the doctrine of Res judicata.

Relevancy of certain judgments in probate, etc., jurisdiction

Section 41 of the Indian Evidence Act, 1872 speaks about, "Relevancy of certain judgments in probate, etc., jurisdiction". Section 41 deals with judgments in rem, which bind not only the parties and their representatives but the whole world. A judgment in rem under Section 41 shall be conclusive in civil as well as criminal proceedings.

Under this section a final judgment, order or decree of a competent court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction which confers upon or takes 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 absolutely (not as against some specific person) is relevant when existence of any such legal character or title to any such things is relevant. A judgment in rem under this section shall be conclusive in civil as well as criminal proceedings.

Conditions: – For application of Section 41, the following conditions are to be satisfied:

i. The judgment should be final judgment;
ii. The court must be competent;

iii. The judgment must be in exercise of any of the following four types of jurisdictions mentioned in the Section viz. probate, admiralty, matrimonial and insolvency;
iv. Such judgment must confer upon or take away from any person any legal character or declare that any person is entitled to such character, or declare that any person is entitled to any specific thing absolutely.

Relevancy and effect of judgments etc, other than in Section 41

Section 42 of the Indian Evidence Act, 1872 speaks about, "Relevancy and effect of judgment, order or decrees, other than those mentioned in Section 41". According to Section 42, Judgments, Orders or Decrees other than those mentioned in Section 41, are relevant if they relate to matters of public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Judgments etc. other than in Sections 40 to 42, when relevant

Section 43 of the Indian Evidence Act, 1872 speaks about, "Judgments etc. other than those mentioned in Sections 40 to 42, when relevant". Section 43 provides that Evidence can be given of a judgment when the existence of the judgment is itself a fact in issue or is fact otherwise relevant to the case. Thus, if a person is murdered in consequence of a judgment, the judgment being a cause or motive of the murder, will be a relevant fact. The illustrations appended to Sec. 43 amply show that the existence of a judgment may become relevant under any of the provisions relating to relevancy (Section 6-55).

For example: - A prosecutes B for stealing a cow from him. B is convicted. A afterwards, sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

Fraud or collusion in obtaining judgment

Section 44 of the Indian Evidence Act, 1872 speaks about, "Fraud or collusion in obtaining judgment, or incompetence of Court, may be proved". The general rule is, a judgment of a competent court shall be binding on the parties operating as Res judicata in subsequent proceedings between the same parties. Section 44 contains exceptions to this general rule. According to Section 44, a judgment is liable to be annulled/ impeached on the ground of a) want of jurisdiction; b) fraud; and c) collusion.

The existence of a judgment over a matter which is again in question is a satisfactory piece of evidence, through, of course, nothing is said about its

evidentiary value in the Evidence Act. The Act only provides that the value of a judgment may be demolished by showing that it was delivered by a court of incompetent jurisdiction, or it was obtained by fraud or collusion.

Such a judgment does not have the effect of Res judicata. A judgment obtained by 'collusion' means that there was no cause of action between the parties and by collusion of the parties a cause of action was feigned thus enabling the court to pass its judgment.

Opinion of Third person/ Expert opinion

The term 'opinion' means something more than mere relating of gossip or of hearsay. It means judgment or belief, that is a belief or conviction resulting from what one thinks on a particular question. What a person thinks in respect to the existence or non-existence of a fact is opinion, and whatever is presented to the senses of a witness and of which he receives direct knowledge without any process of thinking and reasoning is not opinion. As a general rule, the opinions of a third person's are irrelevant in evidence law. They form a part of "*res inter alios acta*" which means any act done between two persons does not harm or benefit others.

But, there are cases in which the court is not in a position to form a correct opinion (e.g. when the question involved is beyond the range of common experience or common knowledge), without the help of persons who have acquired special skill or experience in a particular subject. In these cases, the rule is relaxed, and expert evidence is admitted to enable the court to come to a proper decision. The rule admitting 'expert evidence* is, thus, founded on necessity. Thus, Sections 45 to 51 deal with the cases when the opinions of third parties become relevant.

Opinion of Experts

Section 45 & 46 of the Indian Evidence Act, 1872 speaks about, "Opinions of experts" & "Facts bearing upon opinion of experts". Section 45 permits only the opinions of an expert to be cited in evidence.

Who is an expert?

An expert witness is a person who has skill, knowledge, devoted time and has undergone training in a field he deems to be an expert. An expert witness is one who has devoted time and study to a special branch of learning, and thus is specially skilled on those points on which he is asked to state his opinion. *"Ramesh Chandra Agarwal v. Regency Hospital Ltd., AIR 2010 SC 806"*. An expert is not a witness of fact but the evidence provided by him has an advisory character. It is the duty of the expert witness, to provide necessary information and scientific criteria to

enable the judge to form his own independent opinion. An experienced police officer may be permitted to give 'expert' evidence as to how an accident may have occurred.

An expert opinion will not be read into evidence unless he is examined before the court and is subjected to cross-examination. It is upon the Court to determine whether the skills and knowledge amounts to an expert's opinion. Both plaintiff and respondent have the privilege to bring in an expert to assert and supplement evidence.

The opinion provided by the expert will be considered admissible evidence after the Court has scrutinized the method employed and opinion generates conviction. If the expert cannot be present due to extenuating circumstances, his opinion can be taken in a way of affidavit, written questionnaire, telephonic conversation or even video conferencing.

However, in practice, the value of an expert opinion is not more than the value of the eye witness account. In case the eye witness account is inconsistent with that of the expert opinion, direct evidence (i.e. eye witness account) is to be given priority. In case the eye witness account is totally contradictory to that of the expert opinion then the credibility of the eye witness account is to be seen. If the eye witness account is believed to be credible then the eye witness account is to be taken and conviction can be done on its basis even though expert evidence is going against it.

Therefore, the expert opinion is just an opinion and the court can form its own opinion even if it is totally contradictory of the expert's opinion. So, the courts have to give due regard to the expert's opinion but they are not bound by it.

"Prem Sagar Manocha v. NCT of Delhi, 2016 SC 290"

In case the question was arised that can an expert be tried for perjury? This question was discussed in this case. This case was in relation to the ballistic expert in the Jessica Lal murder case.

In this case, the defence said that there was another man in the crime scene other than the accused who fired and due to which Jessica Lal was killed.

The ballistic expert said that two bullets have been fired by two different guns. But he also said that he is not saying anything conclusively and all this is just his opinion. Later when the accused was convicted and it was proved that the accused was the one who fired the gun the ballistic expert was convicted of perjury. On

appeal to the Supreme Court, the Apex Court quashed the order for perjury saying that an expert is not a witness we only take his opinion.

Police personnel who are having certificates of technical knowledge and also are having long experiences of inspection examination and testing of arms and ammunition must be held to experts in firearms examination.

Areas wherein an expert opinion is required

1. Foreign law

   Law which is not implemented or applicable in India is considered foreign law. Law which is not in force in India is foreign law. A judge is required to interpret and apply all the laws of the land however it is not expected from a judge to be an expert in foreign law as well. There is no necessity to call in an expert as foreign law can also be proved under Section 38 by production of a book printed by the authorities. Foreign law is considered a question of fact. In the question of Hindu Law and Mohamedan Law, the opinion of the expert would be irrelevant as the onus to interpret and rightfully implement the laws is upon the Court.

2. Science & Arts

   The terms Science and Arts are broadly constructed to inculcate various fields under this category. These terms include all subjects pertaining to Science or Art. These terms are not limited by the narrow understanding of 'science' and 'arts'.

3. Medical

   The opinion of a medical officer and reports are generally considered as evidence. The opinion of the doctor who conducted the initial post mortem or inspected the injuries of the victim supersede the opinion of the subsequent doctor who formulates opinion based on X-ray reports, post mortem reports and other medical tests. However, if the essential tests are not preformed and opinion is formulated on limited grounds, the opinion of the medical officer will not be relied upon. Test such as DNA test which are highly conclusive in nature are relied upon unless mishandling or corruption of the report is proved. In certain cases, wherein the question of legitimacy of child is in question, DNA test are directed as a routine procedure, but reasons for the same are to be recorded.

"Shah Nawaz v. State of U.P. (2011) 13 SCC 751"

Ascertaining age – It has been held that evidence for ascertaining age ignoring the date of birth given in the mark sheets and school certificates will not hold good. Medical evidence as to determining the age is to be taken only in cases where prescribed method of ascertaining the age are not available.

"Amol Chauhan v. Jyoti Chauhan, AIR 2012 MP 61"

Medical examination of potency – medical evidence can be taken in cases relating to the potency of the spouse. In this case, the wife filed a divorce petition on the grounds of impotency of the husband, the court ordered for a medical examination of the husband's potency.

"Aruna & Anr. v. Mukund & Ors., Crl. Appeal No. 2063/2010, SC"

Judgment delivered in **October 2019**. In case of Medical Negligence - the Supreme Court reiterated that examination of a report of an independent medical expert is crucial before proceeding against a doctor accused of medical negligence. Earlier, the Apex Court had in *"Jacob Mathew v. State of Punjab & Anr., (2005) 6 SCC 1"*, laid down guidelines governing the prosecution of doctors for the offence of criminal negligence, punishable under Section 304A of IPC.

In the present case, the Appellants Aruna along with another had impugned the order passed by the Nagpur bench of the Bombay High Court, whereby the order of the Sessions Court, discharging them from the charges of Section 304A read with Section 34 IPC was quashed. It was their case that the impugned order had been passed without taking into account the above directions issued by the Supreme Court.

Considerably, the Trial Court had framed charges after examining the witnesses. However, revision of the said order was allowed by the Sessions Court which went on to discharge the Appellants. This order of discharge was subsequently questioned before the high court, which set aside the order of discharge and restored the order of the Magistrate.

Noting that the courts below had not proceeded in conformity with the above said Supreme Court ruling and had not obtained any expert opinion, the bench of Justices Arun Mishra, Vineet Saran and S. Ravindra Bhat said,

> *"As admittedly, no medical expert has been examined in this case, we set aside the impugned orders passed by the courts below and remand the case to the trial court to examine the witnesses and to take the view of the medical expert on behalf of the complainant and only thereafter, to form an opinion whether any charge is made out in the case or not."*

4. Handwriting

The opinion of a handwriting expert is admissible under Section 45 of the act, however it is not binding. The evidence of handwriting cannot be considered a

conclusive proof. Thus, conclusion cannot be solely derived from it. The opinion of a handwriting expert requires further corroboration to be considered reliable either direct or through circumstantial evidence. The Supreme Court gave guidelines for proof of documents; by direct evidence, by expert's evidence and finally by court through the method of comparison. The opinion of handwriting experts is also applicable in criminal cases.

"State of Maharashtra v. Sukhdev Singh, 1992 SCR (3) 480"

In this case the court has laid down the principles of judging opinion of handwriting expert, namely;

a. The identification done through handwriting does not share the same merit as identification done through finger prints. In comparison more weight is given to finger prints as opposed to handwriting.
b. Corroboration is required as handwriting is evidence is a weak form of evidence and cannot be relied upon solely.
c. The genuineness of the specimen handwriting as that of the suspect must be established.
d. Expert's competence, reliability and ability needs to be established before the Court.
e. The reason for the expert's findings and opinion should be based on a scientific principle and should be convincing in nature.
f. The Court should be caution in basing its judgment on the opinion of the expert.

"Padum Kumar v. State of U.P., Crl. Appeal 87/2020, SC"

The Supreme Court reiterated that without independent and reliable corroboration, the opinion of the handwriting experts cannot be relied upon to base the conviction. The bench of Justice R. Banumathi and Justice AS Bopanna before acting upon the opinion of the hand-writing expert, prudence requires that the court must see that such evidence is corroborated by other evidence either direct or circumstantial evidence.

The contention taken in this appeal was that, without proving that the accused has forged the signature in delivery slip, the conviction of the appellant under Sections 467 and 468 IPC cannot be sustained.

> On this Supreme Court observed, *'Of course, it is not safe to base the conviction solely on the evidence of the hand-writing expert. As held by the Supreme Court in "Magan Bihari Lal v. State of Punjab (1977) 2 SCC 210"*

that "expert opinion must always be received with great caution……..it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule of law." 17. It is fairly well settled that before acting upon the opinion of the hand-writing expert, prudence requires that the court must see that such evidence is corroborated by other evidence either direct or circumstantial evidence.

However, in this case, the Court noted that the courts below have not based the conviction solely upon the opinion of the hand-writing experts. The bench said, the evidence of hand-writing experts is only a corroborative piece of evidence to corroborate the evidence of other prosecution witnesses.

5. Finger-Impression

   Examination of finger prints as opposed to handwriting is a matter of science. Since finger prints cannot be changed nor can there be several opinions pertaining to the same. Such evidence can be admissible in Court without corroboration. Furthermore, finger prints are unique and no man can have same finger prints.

6. Foot prints

   Foot impression does not have same evidentiary value as finger prints. The science of foot impression is archaic and rudimentary. Thus, it cannot be considered reliable with proper corroboration.

7. Firearms

   The ballistic reports are used to establish that a particular bullet came from a specific firearm. The science of ballistics is helpful to determine the distance, severity and the type of weapon that was used to commit a crime. The report of ballistics is often considered essential in cases where firearms are used. The report is admissible without calling the expert to appear as a witness. If report is provided without examining the wound or the firearm but done through examining the pictures, such a report was considered unreliable. Therefore, the firearms or ballistic expert must formulate his opinion through his own findings and observation.

8. Drugs & Narcotics

9. Electronic Evidence

   As per Section 79-A of the Information Technology Act, 2000 (21 of 2000), in the matter of examination of electronic evidence, the opinion of the examiner is a

relevant fact. And, also in Section 45-A Indian Evidence Act, but Section 45-A will come into play only when the electronic evidence is produced duly complying with the terms of Section 65-B.

10. Other kind of experts

    Motor vehicles inspector, evaluation of property, tracker dog, psychological autopsies, ear print comparison, palm impressions, chemical analyzer, nautical assessors among others.

Evidentiary value of Experts

The Evidence Act only provides about the relevancy of expert opinion but gives no guidance as to its value. The opinion of an expert should be supported by the facts and circumstances of the cases, contradiction due to other evidence or fallacies in the findings of the expert render the evidence inadmissible and unreliable. An expert's opinion is not binding upon the court. Further the opinion of an expert cannot supersede evidence of an attesting witness.

The value of expert opinion suffers from various drawbacks'. There is the danger of error or deliberate falsehood. "These privileged persons might be half blind, incompetent or even corrupt." It would be highly unsafe to convict a person on the sole testimony of an expert. Therefore, a conviction cannot be based solely on the opinion of an expert without substantial corroboration.

Conflicts of opinions of experts lead to the discretion of the Court in forming its decision looking into the signatures on such documents. An expert can only formulate an opinion if all the required material is provided to him, if his opinion is based on incomplete documents, it cannot be relied upon. The opinion of the expert should be limited to the content referred to him, anything beyond that would not be admissible in the Court.

"S. Gopal Reddy v. State of A.P, AIR 1996 SC 2184"

In this case the court observed that expert evidence are just a mere opinion and not the substantive or a probative evidence; according to the procedural rule the opinion or the inference of the expert is not safe as they don't have any independent value so they must be corroborated with the circumstantial evidence.

Opinion as to Handwriting when Relevant

Section 47 of the Indian Evidence Act, 1872 speaks about, "Opinion as to handwriting when relevant". Section 47 of the Indian evidence act says that when the court has to ascertain whether a certain document is written or signed by a particular person or not then the opinions of persons, who are acquainted with the handwriting of that person, as to whether the document in question is written or signed by that person or not will be relevant.

According to this section the a person is said to be acquainted with the handwriting of another person if he has seen that person write or he has received documents from that person or when in the regular course of business he receives the documents that are supposed to be written by that person have been habitually submitted to him.

For example: - If we suppose 'A' is the secretary of 'B', the owner of a firm and thus 'A' has to submit to 'B' a written report written by 'A' himself about the daily business carried out by the firm. When the case before the court is if a document is written by 'A' or not then the opinion of 'B' is relevant in that matter since 'B' used to be acquainted with the writings of 'A' in the daily course of business.

Modes of Proving Handwriting: -

The Evidence Act recognize the following modes of proving handwriting:

i. By the evidence of the writer himself.
ii. By the opinion of an expert (Section 45).
iii. By the evidence of a person who is acquainted with the handwriting of the person in question (Section 47).
iv. By the court itself comparing the handwriting (Section 73).

Opinion as to Digital Signature when Relevant

Section 47-A of the Indian Evidence Act, 1872 speaks about, "Opinion as to digital signature when relevant". Section 47-A says that when the question before the court is about the authenticity of electronic evidence of any person then the opinion of the certifying authority who issued the electronic certificate will be relevant.

Opinion as to Existence of Right or Custom

Section 48 of the Indian Evidence Act, 1872 speaks about, "Opinion as to existence of right or custom when relevant". Section 48 says that when the court has to see whether a general custom or right exits or not then the court can take the opinions of people who are likely to know about the existence of such customs or rights. For

the purpose of this section general custom means a custom that is applicable to a considerable class of people.

In case of a custom which is related to one family only then the senior member of the family is to be questioned to look for the authenticity of such customs and if it is a custom followed by the entire community then the senior member of the community is to questioned.

Section 48 of the Act, widens the scope of experts. Thus, historians can be referred to, in cases where the relevant fact is pertaining to customs and rituals.

Opinion as to Usages, Tenets, etc.

Section 49 of the Indian Evidence Act, 1872 speaks about, "Opinion as to usages, tenants, etc. when relevant". Section 49 speaks about the opinions about the usage tenets etc. when relevant. It says that when the Court has to form an opinion as to

1. The usages and tenets of any body of men or family, or
2. The constitution and government of any religious or charitable foundation, or
3. The meaning of words or terms used in particular districts or by particular classes of people,

then the opinions of persons having special means of knowledge thereon are relevant facts.

Opinion on Relationship

Section 50 of the Indian Evidence Act, 1872 speaks about, "Opinion on relationship when relevant". This section says that whenever the court has to form an opinion as to the relation between two persons then the opinion of any other person who is having the special means of knowledge regarding that by being a member of the family or by any other means is a relevant fact. However, it is provided that such opinion will not be sufficient in proving a marriage under the Indian Divorce Act, 1869 and also in prosecution under Sections 494, 495, 497 or 498 the Indian Penal Code, 1860.

"Bant Singh v. Niranjan Singh, (2008) 4 SCC 75"

This case is related to the knowledge about property as family member– When there was a property dispute in a family and the plaintiff contended that the defendant's mother was actually his sister then an 80 years old witness was produced who was the brother-in-law of the defendant's mother. He had all the

knowledge about family affairs and also attended the marriage of the defendant's mother. He was supposed to have a special means of knowledge.

Grounds of Opinion when Relevant

Section 51 of the Indian Evidence Act, 1872 speaks about, "Ground of opinion when relevant". It says that whenever opinion a living person becomes relevant then the grounds on which his opinion is based also becomes relevant. The opinion of an expert by itself may be relevant, but would carry little weight with a court unless supported by a clear statement of what he noticed and upon what he based his opinion.

For example: - If an expert is giving his opinion on something then all those experiments performed by him because of which he reached that opinion also becomes relevant.

Character – When Relevant

Character evidence plays a pivotal role both in civil and criminal law. The conduct and character of a man is used to determine in guilt since centuries. However due to evolution in law and judiciary evidentiary value and reliance on character has decreased, the general principle being it is difficult to establish poor character, further judging by character would mean deviation from facts of the case to an ambiguous and subjective matter. No conviction can be based on the character of a person as it would imply judging the past action or personal life of a person.

The term 'character' under Section 55 definition breaks down the term into two things which is reputation and disposition, where the former means the opinion that people, in general and the latter means the habitual behavior of a particular person. Both English and Indian Law does not provide an accurate definition of the term.

Character is "a combination of peculiar qualities impressed by nature or by the habit of the person, which distinguish him from others". In respect of the character of a party, two distinctions must be drawn, namely between the cases when the character is in issue and is not in issue and when the cause is civil or criminal. To what extent is the character, general reputation of a person relevant in civil or criminal proceedings has been made clear by (Section 52-55).

In Civil Cases Character to Prove Conduct Imputed, Irrelevant

Section 52 of the Indian Evidence Act, 1872 speaks about, "In civil cases character to prove conduct imputed irrelevant". This section says that in respect to the

character of a person in a suit, it is relevant to establish that the character of the person is relevant to the issue in the case. This section is applicable for civil cases. It excludes evidence of character from being given only for the purpose of rendering probably or improbable any conduct imputed to the party.

For example: - If a person is charged with negligent driving he cannot give evidence of the fact that his character and conduct has been such that he could not have been guilty of negligence.

The reason is that the court has to try the case on the basis of its facts for the purpose of determining whether the defendant should be liable or not. The court has not to try the character of the parties and the evidence of character will not only prolong the proceedings but will also unnecessarily prejudice the mind of the judge one way or other. Further, in civil cases, the previous convictions of the defendant are irrelevant.

Section 52 also lays down that a fact, which is otherwise relevant, cannot be excluded from evidence only because it incidentally exposes or throws light upon a party's character. This is an exception to the general principle laid in Section 52. The court may form its own conclusions as to the character of a party' to a suit as exhibited by the relevant facts proved in the case, and draw an inference that he might probably have been guilty of the conduct imputed to him.

Evidence can be given of a party's character when his character is itself a fact in issue. Where, for example, an action is brought for divorce on the ground of cruelty; the cruel character of defendant, being a fact in issue, the plaintiff can lead evidence of it. The character of a female chastity has been received in evidence in action for breach of promise for marriage.

In Criminal Cases Previous Good Character Relevant

Section 53 of the Indian Evidence Act, 1872 speaks about, "In criminal cases previous good character relevant". This section is applicable in criminal cases, wherein the character of the person accused is relevant. The simple principle is that when a man has lived an honest life, it is improbable that he will depart from it and do an act inconsistent from it.

The principle upon which good character may be proved is that it affords a presumption against the commission of crime. This presumption arises from the improbability. However, character evidence is a very weak form of evidence and for it to have persuasive value, corroboration is imperative.

Evidence of Character or Previous sexual experience not relevant

Section 53-A of the Indian Evidence Act, 1872 speaks about, "Evidence of character or previous sexual experience not relevant in certain cases". This section was brought in after 2013 amendments. Due to the growing sexual crime against women and the repetition of the same, it was imperative to draft a section pertaining to the evidence of a character of pervious sexual experiences which may or may not be relevant in certain cases. This section works to aid the victim of rape.

This section applies to offences of India Penal Code mentioned below and even an attempt to commit such offences will also attract the application of this section.

Sections 354	Assault or criminal force to woman with intent to outrage her modesty
Section 354-A	Sexual harassment and punishment for sexual harassment
Section 354-B	Assault or use of criminal force to woman with intent to disrobe
Section 354-C	Voyeurism
Section 354-D	Stalking
Section 376	Rape
Section 376-A	Intercourse by a man with his wife during separation
Section 376-B	Intercourse by public servant with woman in his custody
Section 376-C	Intercourse by superintendent of jail, remand home, etc.
Section 376-D	Gang Rape
Section 376-E	Punishment for repeat offenders

This section makes the character of the victim or her past sexual experiences irrelevant and inadmissible in the Court.

Previous Bad Character Not Relevant, Except in Reply

Section 54 of the Indian Evidence Act, 1872 speaks about, "Previous bad character not relevant, except in reply". This section states that the poor character of the accused is irrelevant in a criminal proceeding till the point the defendant attempts to establish his good character. In other words, the prosecution cannot lead evidence of the bad character of accused as part of its original case. They can produce evidence of bad character only in reply to the accused showing his good character.

Criminal cases also admit of certain exceptions. There are certain cases in which evidence of a prisoner's bad character can be given:

1. To rebut prior evidence of good character (Section 54).
2. The character is itself a fact in issue (Explanation 1 to Section 54).

For example, in a prosecution for rape, the bad character of prosecution (raped woman) may be a fact in issue for it may afford a defence to the accused. Under Section 110, Cr.P.C., a person is to be bound down if he is by habit a robber, a housebreaker, etc.

3. A previous conviction is relevant as evidence of bad character in criminal cases (Explanation 2 to Section 54). Under Section 71, IPC if it is proved that a person is a previous convict he shall be sentenced to much longer term of imprisonment than would ordinarily have been awarded to him.

Character as Affecting Damages

Section 55 of the Indian Evidence Act, 1872 speaks about, "Character as affecting damages". This section states that the character evidence provided in civil cases is such that can affect the amount of damages that are to be received is relevant and admissible in the Court of Law. This section limits the definition of character to reputation and disposition, however evidence provided under Section 54 may have general reputation and general disposition. Reputation means what is thought of a person by other or general opinion of others, whereas disposition means texture of the mind. Disposition implies one's own individual opinion of another person's character.

It may be noted that the evidence of those, who know the man and his reputation is admissible. Evidence of those who do not know the man but have heard of the reputation (hearsay evidence) is not admissible. In civil cases, good character may not be proved in aggravation of damages however, bad character is admissible in mitigation of damages provided that it is justifiable.

In cases of defamation general bad reputation of plaintiff may be proved and in cases of breach of promise of marriage general character for immorality is relevant. In civil cases, damages for seduction or rape, the evidence pertaining to the character of the accused may be allowed if it can affect the damages to be received.

Facts which need not be proved

There are some facts which even though relevant they need not be proved, that means evidence need not be given of such facts usually because either the court knows about it or the opposite side had already admitted them. In the evidence act, these types of facts are dealt in Sections 56 to 58 of the Indian Evidence Act, 1872.

Fact judicially noticeable need not be proved

Section 56 of the Indian Evidence Act, 1872 speaks about, "Facts judicially noticeable need not be proved". According to this section, all such facts of which the court will take judicial notice need not be proved. Judicial notice is a rule in the law of evidence which allows certain facts to be introduced in the court as evidence if the truth of such facts are so well known or notorious that it can't be reasonably doubted. It is thus a tool which the judge can accept without having a party to prove it through evidence this allows the court to fast forward the proceedings and letting the judge accept some notorious or well-known facts.

Facts of which Court must take judicial notice

Section 57 of the Indian Evidence Act, 1872 speaks about, "facts of which court must take judicial notice". Section 57 lists out 13 facts regarding which the court has to take judicial notice. In those 13 items mentioned in the section items 1 to 3 comes under the topic of law and custom, items 4 to 7 comes under the topic of public administration and items 8 to 13 comes under the head of common knowledge.

It is provided that besides those cases explicitly mentioned in the section, the court has to take judicial notice in matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

It is also provided in this section that if the court is asked by any person to take judicial notice on any matter then the court can refuse to do so unless the books or documents or other things as the court may find it necessary to examine before taking the judicial notice is provided.

The real difficulty here is to distinguish between facts. For example, if we are asked to distinguish between a book of history and a book referred to for the purposes of Section 35 to 37. The real difference is that in case of matters judicially noticed the court is merely refreshing its memory, the court actually knows about the fact but still it refers to the book to refresh its memory whereas in the case of book tendered as evidence the court doesn't know the facts or the information that is given by the book.

"Ujagar Singh v. Mst. Jeo, 1959 AIR 1041, SC"

The court has to deal with a custom of Punjab that sisters have to be excluded during the distribution of property by collaterals. In this case, this custom was said to have been established by the Rattigan's Digest. The court, in this case, held that it has not a uniformly recognised custom to exclude sisters during inheritance of

non-ancestral property by collaterals. The court said that since it is not a uniformly recognised custom it thinks that the Rattigan's Digest is not correct in this matter. Thus, the court did not take judicial notice of the said custom and stuck to the general rule that sisters should also be included during the inheritance of property by collaterals. Since the court did not take judicial notice the fact that sisters should not be included during inheritance of non-ancestral property by the collaterals need to be proved, according to section 48 of the Indian evidence act, by the party who asserts it.

Facts admitted need not be proved

Section 58 of the Indian Evidence Act, 1872 speaks about, "Facts admitted need not be proved". Section 58 talks about admissions of the parties to a case. This section says that the facts admitted by a party during hearing or before hearing in writing or by any rule of pleading in force at the time of the case need not be proved and the court can take judicial notice of such facts, however, this section also says that if the court wants it can ask for proof of those admissions.

Admissions are made deliberately during or before a judicial proceeding in contemplation that judicial notice will be taken of such admissions. However, the court can ask for proof if it feels the need for the same. The admission made by a party in some earlier suit can be used against it in subsequent suits too. The admissions made by a party specifically are called express admission whereas a specific denial of certain facts may lead to implied admission.

The purpose of these sections is to curb out the time wasted by proving the facts that are well known or are of common knowledge. Such obvious facts are automatically taken into notice by the court. then comes admission, only when the court thinks that the admission needs to be proved the ourt can ask for proof, this happens generally when the court thinks that the admission is done in collusion of coercion or similar.

Oral Evidence

There are two methods of proving a fact; one is by producing witnesses of fact (oral evidence), and the other, by producing a document, which records the fact, in question (documentary evidence).

Section 59 and 60 of the India Evidence Act mainly deals with oral evidence other than that there are many sections in the act that also deals with oral evidence such as Section 22 and 22-A deals with oral admissions and Chapter 6 of the Indian evidence act which deals with the exclusion of oral by documentary evidence.

Proof of facts by oral evidence

Section 59 of the Indian Evidence Act, 1872 speaks about, "Proof of facts by oral evidence". Section 59 says that all facts except contents of documents and electronic documents may be proved by oral evidence. For producing evidence on contents of documents and electronic records proof must be according to Chapter 5 of The Indian Evidence Act, 1872.

All statements, which the court permits or requires to be made before it by witnesses in relation to the matters of fact under inquiry, are called 'oral evidence'. In general, the evidence of witnesses is given orally, and this means oral evidence. A witness who cannot speak may communicate his knowledge of the facts by signs or by writing and in either case it will be regarded as oral evidence.

Oral evidence must be direct

Section 60 of the Indian Evidence Act, 1872 speaks about, "Proof of facts by oral evidence". According to Section 60 of the evidence act oral evidence should be direct. This means that a witness can tell the court of only a fact of which he has the first hand knowledge (eye-witness) in the sense that he perceived the fact by any of the five senses. If the statement was not made in his presence or hearing and he subsequently came to know of it through some other source, he cannot appear as a witness, for his knowledge is a derived knowledge and is nothing but a "hearsay evidence" which is considered not relevant.

This section gives the conditions in which oral evidence can be given. Section 60 refers to 4 cases in which oral evidence is given they are seeing, hearing, perceiving, and forming an opinion. The section says that for oral evidence to be valid in these cases the evidence has to be given by the persons themselves who sees, hears, perceives or forms the opinion in question.

The first provision to Section 60 is that the opinions of experts published in books out for sale can be proved by producing the book in the court if the author is unavailable or unable to give evidence himself or if it will be too expensive or it will delay the case too much to call the author as witness for the case.

The second proviso to Section 60 of the evidence act says that if while giving oral evidence a party refers to some material other than a document then the court can inspect and examine the material

If there is a concerned document then it has to be proved according to the rules given in Chapter 5 of the Indian Evidence Act, 1872.

Hearsay Evidence

The word 'hearsay' mean whatever a person is heard to say (rumour or gossip) or whatever a person declares on information given by someone else, or it may be synonymous with irrelevant A statement, oral or written, by a person not called as a witness (or statements made out of court) comes under the general rule of hearsay. Sec. 60 of Evidence Act is directed against avoiding or excluding hearsay evidence.

The test to distinguish between direct evidence and hearsay evidence is: It is direct evidence if the court, to act upon it, has to rely only upon the witness, whereas it is hearsay if it has to rely not only upon the witness, but some other person also. Thus, if X is charged with Y's murder, and if Z, in his evidence, states that "I saw X stabbing Y with a knife", it would a direct evidence. Instances of hearsay evidence would be the evidence of A that "Z told me that he had seen X stabbing Y" or that "Z wrote a letter to me stating that he had seen X stabbing Y" or that "I read in the newspaper that X had murdered Y".

It may be noted that hearsay evidence is not admissible even if not objected to, or even if consented to. The court has no discretion in this matter, except in certain exceptional cases. The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination. It is second-hand evidence; the person giving such evidence does not have any sense of responsibility.

Exception of Hearsay Rule

The courts have modified the rigid rule as to direct evidence by a number of exceptions;

i. Res gestae (Section 6) — A statement made by a person who is not a witness becomes relevant and admissible if the statement is part of the transaction in question.
ii. Admissions and confessions (Section 17-31) - An admission of liability or confession of guilt which takes place outside the court through the testimony of a witness to whom the admission or the confession was made. Such a witness is not a witness of fact.
iii. Statements relevant under Section 32 — These are mostly the statements of deceased person (dying declarations) or persons who are not available as witnesses.
iv. Entries in books of account kept in the course of business (Section 34); Entries in public registers (Section 35).
v. Statements of experts in treatises — See first proviso to Section 60.

vi. Sometimes, a slanderous statement made by a third person and heard by the witness will be relevant, not regarding the truth of the contents of the statements, but regarding the fact of the statement being made.

Documentary Evidence

Documentary evidence means all documents produced for the inspection of the court. Documents are denominated as "dead proof", as distinguished from witnesses who are said to be "living proofs". Documentary evidence is superior to oral evidence in permanence, and in many respects, in trustworthiness. Documentary evidence is dealt in Section 61 to 90-A of the Indian Evidence Act, 1872. Section 61 to 73A deals with the general rules for proving documentary evidence in various cases, Section 74 to 78 deals with public documents and Sections 79 to 90-A deals with presumptions as to documents. Documents are referred to any kind of writing or digital record etc. that is permanent.

Proof of contents of documents

Section 61 of the Indian Evidence Act, 1872 speaks about, "Proof of contents of documents". Section 61 gives the answer to the question that how the contents of the document may be proved. This section says that the contents of a document may be proved either by primary evidence (Section 62) or by secondary evidence (Section 63).

Primary Evidence

Section 62 of the Indian Evidence Act, 1872, defines the term "Primary evidence". Primary evidence is the best or highest evidence, or in other words, it is the kind of proof which, in the eyes of the law, affords the greatest certainty of the fact in question. Primary evidence of a transaction, evidenced by writing, is the original document itself, which should be produced in original to prove the terms of the contract, if it exists and is obtainable. Section 64 says that documents must be proved by its primary evidence only. However, there are certain exceptions given in Section 65 when documents can be proved by secondary evidence also.

Primary evidence is the original document that is produced in the court for its inspection. Explanations to Section 62 mention some special circumstances which are: –

1. When a document is executed in parts. In such cases, each part is the primary evidence of the document.

If the document is executed in counterparts and each counterpart is executed by one or some of the parties then each counterpart is the primary evidence against the parties executing it. The difference between the documents being executed in parts means that all parties will sign each part and the meaning of the document being executed in counter-part means that each part of the document is signed by one or more individual but not all of them.

Let's take an example to see the difference between a document been executed in parts and a document is executed in counterparts is that, let's assume that a document is executed in two parts between two parties than in the case of a "document being executed in parts" it means that both the parties sign both the parts of the documents and in case of document being executed in counterparts, it means that each part is signed by one party.

2. The second explanation says that where several documents are made by one uniform process such as printing, lithography or photography, each is the primary evidence for the contents of the rest.

While in cases where several documents are made in one single process from an original then they are regarded as the primary evidence for the rest of the copies but not of the original document. For example, if several placards are made by copying from a single original placard then one of those copied placards is said to be the primary evidence for the contents of the rest of the copied placard but not for the original placard from which it was copied.

Secondary Evidence

Section 63 of the Indian Evidence Act, 1872, defines the term "Secondary evidence". This section deals with secondary evidence. It talks about 5 different things that accepted as secondary evidence. They are:

1. Certified copy of documents.

2. Copies made by the original through a mechanical process. Here the mechanical process is important because it ensures the copies to be free from any kind of tampering or error to some extent. Earlier when the printing machine or the xerox machine was not invented then the copies used to be made by the court clerk manually, which led to a lot of errors and tampering. To avoid those issues and to ensure the accuracy of the copies mechanical process is included in this section.

Generally speaking, "copy of a copy" is not admissible as secondary evidence but the copies prepared by a mechanical process and copies of a copy compared with the original are secondary evidence.

3. Copies made from or compared with the original.

   Counter parts of the documents as against the parties who did not execute them. Similar, as in Section 62 when a document is executed in counterpart then each counterpart becomes the primary evidence against the persons executing them. In this section it is said that for those people who did not execute a counter-part of a document, that counter-part will become secondary evidence for him. Thus, a *"patta"* will be a secondary document against the lessee (tenant), as he did not execute it; and *"qabuliat"* will be a secondary document against die landlord, as he did not execute it.

4. Oral accounts of the contents of a document given by some person who has himself seen it (i.e. read the document).

When Secondary Evidence may be given

Section 65 of the Indian Evidence Act, 1872 speaks about, "Cases in which secondary evidence relating to documents may be given". Section 65 gives us 7 conditions in which a document can be proved by secondary evidence. They are:

1. When the original document or the primary evidence is not in the possession of the person who has to prove it. In this case, any secondary evidence of the contents of the document is admissible.
2. When the existence, condition and contents of the original have been proved to be admitted by the party against whom the document is supposed to be proved then the written admission is admissible.
3. When the original has been destroyed or lost or for some reason except for reasons of the party's own default or neglect, cannot do it in a reasonable time. In this case too any secondary evidence of the contents of the document is admissible.
4. When by the virtue of nature of the original document it cannot be easily movable then any secondary evidence of the contents of the document is admissible.
5. When the original is a public document within the meaning of Section 74 then a certified copy of the document, but no other kind of secondary evidence, is admissible.
6. When the certified copy of the original document is permitted to be produced as evidence by this act or any other law present in India then a certified copy of the document, but no other kind of secondary evidence, is admissible.
7. When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection then, evidence may be given as to the

general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

No Application to Produce Secondary Evidence

"Dhanpat v. Sheo Ram (Deceased) through L.R., Appeal No.1960/2020"

On **19th March 2020**, Hon'ble Supreme Court held that there is no need to file an application seeking permission to produce secondary evidence. The secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed.

The case was a civil appeal, in which the validity of a Will was under dispute. In a partition suit, the defendants had produced a Will, to deny the claim of the plaintiffs for share in the ancestral property. The certified copy of the registered Will was produced during the trial, on the ground that the original was lost.

On the challenge raised by the appellants in the Supreme Court regarding the production of secondary evidence, the bench a bench comprising Justices L Nageswara Rao and Hemant Gupta observed that-

> *"There is no cross-examination of any of the witnesses of the defendants in respect of loss of original Will. Section 65 of the Evidence Act permits secondary evidence of existence, condition, or contents of a document including the cases where the original has been destroyed or lost. The plaintiff had admitted the execution of the Will though it was alleged to be the result of fraud and misrepresentation. The execution of the Will was not disputed by the plaintiff but only proof of the Will was the subject matter in the suit. Therefore, once the evidence of the defendants is that the original Will was lost and the certified copy is produced, the defendants have made out sufficient ground for leading of secondary evidence. There is no requirement that an application is required to be filed in terms of Section 65(c) of the Evidence Act before the secondary evidence is led. A party to the lis may choose to file an application which is required to be considered by the trial court but if any party to the suit has laid foundation of leading of secondary evidence, either in the plaint or in evidence, the secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed."*

Rules as to Notice to Produce

Section 66 of the Indian Evidence Act, 1872 speaks about, "Rules as to notice to produce". This section says that a notice (to produce a document) must be given before secondary evidence can be received under Section 65 (a). The notice is to be

given to the party who has possession of the original document, or to his attorney or pleader. Notice should be given in a manner as is prescribed by law, and if there is no law on die point, such notice should be given as the court considers reasonable under the circumstances of the case.

Provided that such notice shall not be required in the following cases, or in any other case in which the court thinks fit to dispense with it:

1) When the document to be proved is itself a notice.
2) When, from die nature of the case, the adverse party (i.e. party in possession of document) must know that he will be required to produce it.
3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force.
4) When the adverse party or his agent already has the original in court.
5) When the adverse party or his agent has admitted that the original has been lost.
6) When the person in possession of the document is out of reach of, or not subject to, the process of the court (viz. a foreign ambassador).

A question arises: when the opposite party fails to produce the original when demanded and the court has accordingly admitted secondary evidence, can the party in possession subsequently produce the original of his own choice, 'the answer is "No". Section 164 clearly lays down that "where a party has required to another to produce a document and he has refused to do so, he can't afterwards use the document as evidence unless he obtains the other party's consent or the court's order".

The requirement of notice under Section 66 is to be strictly complied with. The other party cannot be restrained from producing the original where the notice to produce has not been given, nor can secondary evidence be given in such case.

Electronic Records as Evidence

Electronic records are considered as documentary evidence. Section 65-A and 65-B have been added by Information Technology Act, 2000. Section 65-A of the Indian Evidence Act, 1872 speaks about, "Special provisions as to evidence relating to electronic record". Electronic records are considered as documentary evidence. This section merely says that the contents of electronic records are to be proved in accordance with the provisions of Section 65-B.

Section 65-B of the Indian Evidence Act, 1872 speaks about, "Admissibility of electronic records". Section 65-B lays down that for the purpose of evidence, a certificate identifying the electronic record containing the statement and describing the manner in which it is produced by a computer and satisfying the conditions

mentioned above, and signed by an officer in charge of the operation or management of the related activities, shall be the evidence of any matter stated in the certificate; it shall be sufficient for a matter to be stated to the best of 'the knowledge and belief of the person stating it.

Subsection 1 of this section says that an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be a document.

Subsection 2 of this section gives us the conditions with regard to a computer output. The following conditions have to be satisfied in relation to a "computer output":

a) Information was produced during the regular course of activities by the person having lawful control over the computer's use.

b) Information has been regularly fed into the computer in the ordinary course of the said activities.

c) Throughout the material part of the said period, the computer was operating properly, or the improper operation was not such as to affect the electronic record or the accuracy of its contents.

d) Information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of activities.

Subsection 3 deals with cases where the concerned computer is more than one working together on in succession, then, in that case, all the computers will be regarded as constituting a single computer.

Subsection 4 of this section gives us certain things and says that a certificate has to be issued mentioning those things in case evidence is to be given under this section.

Subsection 5 of this section says 3 things:

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

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

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

Electronic Evidence in Breach of Right to Privacy (Not inadmissible)

"Deepti Kapur v. Kunal Julka, CM(M) 40/2019"

On **30th June 2020**, the Delhi High Court held that evidence collected in breach of the fundamental right to privacy alone would not make it inadmissible in court of law.

The CD in question purported to an audio-video recording of the wife supposedly speaking with her friend on phone and talking about the husband and his family in a derogatory manner. The wife had opposed the CD being brought on record on the ground that, the contents of the CD were not admissible in evidence since they were a recording of a 'private' conversation that the wife had had with a friend, which had been secretly recorded by the husband, without the knowledge or consent of the wife, in breach of her fundamental right to privacy. She relied on the right to privacy judgment- *"Justice K. S. Puttaswamy (Retd.) & Anr. v. Union of India & Ors, 1 (2017) 10 SCC 1"*.

The observation has been made by Justice Anup Jairam Bhambhani while deciding an appeal preferred by the wife from the order of the Family Court, allowing the husband to bring on record the evidence comprised in a Compact Disk that allegedly violated her right to privacy. The court observed that

> *"Since no fundamental right under our Constitution is absolute, in the event of conflict between two fundamental rights, as in this case, a contest between the right to privacy and the right to fair trial, both of which arise under the expansive Article 21, the right to privacy may have to yield to the right to fair trial. It must be borne in mind that Family Courts have been established to deal with what are essentially sensitive, personal disputes relating to dissolution of marriage, restitution of conjugal rights, legitimacy of children, guardianship, custody, and access to minors; which matters, by the very nature of the relationship from which they arise, involve issues that are private, personal and involve intimacies. It is easily foreseeable therefore, that in most cases that come before the Family Court, the evidence sought to be marshalled would relate to the private affairs of the litigating parties. In egregious cases, the Family Court may initiate or direct initiation of legal action against a litigating party or other person, who may appear guilty of procuring evidence by illegal means. Any party aggrieved by the production of such evidence would also be at liberty to initiate appropriate proceedings, whether in civil or criminal law, against concerned parties for procuring evidence illegally, although the initiation or pendency*

of such proceeding shall not make the evidence so produced inadmissible before the Family Court."

Use of Video Conferencing mode

Video conferencing as an evidence related to electronic record. A prayer was made for producing it by means of video conferencing. The court said that there was no bar on examination of a witness through video conferencing. This is natural part of electronic method therefore the prayer was therefore, allowed with usual safeguards.

The facility of recording evidence by video conferencing has been already accorded in criminal cases. The court said that there cannot be any seemingly objection to adopting the same procedure in civil cases also. But necessary precautions must be taken both as to identify witness and accuracy of the equipment used for the purposes.

For the purpose of recording evidence with utilization of video conferencing technology, discretion has been vested in the family court itself to record evidence through such process. By virtue of Section 10(3) of Family Court Act 1984, family courts are empowered to adopt their own procedure to arrive at a settlement or to get truth of the matter.

"Amitabh Bagchi v. Ena Bagchi, AIR 2005 Cal 11"

Recording the statements of a witness through video conferencing has been allowed in criminal cases and there should not be any objection to use it in civil cases too. In this case the court allowed recording the statements of the husband through video conferencing, while maintaining the usual safeguards. In this case, the court said that there was no problem for using an electronic method for recording the statements of a witness.

Tempering Electronic evidence

While allowing all forms of computer output to be admissible as primary evidence, the statute has overlooked the risk of manipulation. Tampering with electronic evidence is not very difficult and miscreants may find it easy to change records which are to be submitted in court.

However, technology itself has solutions for such problems. Computer forensics has developed enough to find ways of cross checking whether an electronic record has been tampered with, when and in what manner.

Requirement of 65-B Certificate

"State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600"

The Supreme Court made some exception on Section 65-B. In this case, the accused was convicted under various provisions of IPC and POTA. One of the main evidences produced in the court against the accused was the call records of the accused's phone. The court, in that case, said that Cellular phone records are secondary evidence since the primary evidence will the records maintained by the telecom servers. However, the court said that although the provision for the requirement of certification under Section 65-B (4) is not complied with still it would not be a bar to produce the evidence which is otherwise admissible under Section 63 and 65 of the Indian evidence acts.

"Anvar P v. P K Basheer (2014) 10 SCC 473"

Because of the Supreme Court decision in *"State (NCT of Delhi) v. Navjot Sandhu"* many cases certification was not done. In this case, the Supreme Court made certification compulsory saying that section 65B is a special provision and thus it has to be complied with.

In this case, some obscene songs on religion was played at an election centre those songs were recorded by the public and then copied in the computers and then from the computer they were copied in the CDs. These CDs were produced in the court without any form of certification.

A Three-Judge bench of the Supreme Court decided in this case that secondary evidence is required to be compulsorily accompanied by a certificate as under Section 65-B of the Indian Evidence Act thus, overruling the judgment of *"State (NCT of Delhi) v. Navjot Sandhu case (supra)"*.

"Shafhi Mohammad v. The State of Himachal Pradesh, SLP (Crl.) No. 2302/2017"

On **30th January 2018**, the Supreme Court overruled the 2014 judgment. In this case, a bench comprising of Justices AK Goel and UU Lalit came to the following observation and conclusions:

> *"The decision was given in "Navjot Sandhu case (supra)" that secondary evidence of electronic record is covered under Section 63 & 65 of IEA, was incorrect.*

The said Section 64-B (4) will only apply to certain cases in which the electronic evidence is produced by a person in possession and control of the said device. Whereas, in a case where a party is not in the possession/ control of the device from which the document is produced, such party cannot be required to produce a certificate under Section 65B (4). Also, the applicability of Section 63 & 65 cannot be held to be excluded and the procedure can be invoked.

Section 65-A and 65-B are clarificatory and procedural and are not a complete code on the subject."

Thus, the requirement of a certificate under Section 65-B (4) is not always mandatory and can be dispensed with, in the interest of justice. It also depends upon the facts of each case.

"Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors., Civil Appeal No. 20825-20826/2017 with Civil Appeal No. 2407/2018 and 3696/2018, SC"

On **14th July 2020**, The Supreme Court has held that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record.

A Three Judge Bench of the Supreme Court comprising Justices RF Nariman, S Ravindra Bhat and V Ramasubramanian delivered this judgment on a reference on the question "Is requirement of certificate u/s 65-B(4) Evidence Act mandatory for production of electronic evidence?" A two Judge Bench of Justices Ashok Bhushan and Navin Sinha had referred the question in view of the conflict between *"Shafhi Mohammad v. State of Himachal Pradesh"* and *"Anvar P.V. v. P.K. Basheer".*

The bench headed by Justice RF Nariman has however clarified that that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. The court said that the judgment in *"Anvar P.V. v. P.K. Basheer & Ors. (2014) 10 SCC 473"* need not be revisited, subject to the above clarifications.

Proof of Signature & Handwriting

Section 67 of the Indian Evidence Act, 1872 speaks about, "Proof of signature and handwriting of person alleged to have signed or written document produced". Section 67 says that when it is alleged that a document has been signed or written wholly or partly by an individual then the handwriting of that individual for that part has to be proved.

The parties may refer to Sections 45 and 47 of the act i.e. the opinion of experts and the opinion persons acquainted to the handwriting of the concerned person needs to be taken.

It is mandatory under this section that the handwriting is proved only by examining the person concerned in case the person is well and alive. In case it is not done then it would attract Section 114(g) of the Indian Evidence Act.

Proof of Digital Signature

Section 67-A of the Indian Evidence Act, 1872 speaks about, "Proof as to digital signature". This section is the same as Section 67; the only difference is that it deals with an electronic signature. It says that when any electronic signature of any person is to be affixed with any electronic recording then the concerned electronic signature has to be proved to belong to that of the person concerned.

Document to be attested

Proof of Document to be attested

Section 68 of the Indian Evidence Act, 1872 speaks about, "Proof of execution of document required by law to be attested". This section states that if it is required by law that a document is to be attested, then that attested document shall not be proved in the court without the presence of at least one of the attesting witness.

It provides that when the document is not a will then attesting witnesses are not required when the document is registered according to the provisions of the Indian Registration Act, 1908 unless it is specifically denied by the person by whom it purports to have been executed.

Section 68 deals with the proof of execution of the documents required by law to be attested and in that case one of the attesting witnesses is needed to be produced in the court. Execution means "the party by affixing his signature or mark has signified his assent to the contents of the document". It consists in "signing a document written out, read over and understood." To execute means to go through the formalities necessary for the validity of legal act. The term "attested" has not been defined in the Evidence Act. Section 3 of the Transfer of Property Act has defined the term as "a person has signed the document by way of testimony to the fact that he saw it attested.

In the case of wills, it is required by law that two attesting witness needs to be present. All these are needed to be proved by the party who relies on the document in the court of law.

All the procedure has to be observed when the validity or existence of the documents has been denied but the denial must be done by the person who has a

right over the document. For example: - the denial of a will by the son of the second wife who has no rights of succession over it is not effective.

"Bahadur Singh v. Puran Singh, AIR 2012 Raj 74"

For the purpose of this section, it is not required that the attesting witness will have to know the contents of the will but it is mandatory the testator should have put his signature of thumb impression in the presence of the witness.

"Govindbhai Chhotabhai Patel v. Patel Ramanbhai Mathurbhai, Civil Appeal No.7528/2019"

On **23rd September 2019**, the Supreme Court held that, when the execution of the gift deed was not specifically denied in the suit filed, it is not necessary for the Donee to examine one of the attesting witnesses in terms of proviso to Section 68 of the Indian Evidence Act, 1872.

The High Court dismissed the suit filed by the plaintiffs against the defendant on the ground that they had not denied the execution of the document but only alleged forgery and fabrication. It was further held that the subject property of the gift deed was not ancestral property, but a self acquired through the will executed in favour of the donor by his father.

The bench comprising Justice L. Nageswara Rao and Justice Hemant Gupta observed:

> *"We think that specific denial of execution of gift is an unambiguous and categorical statement that the donor did not execute the document. It means not only that the denial must be in express terms but that it should be unqualified, manifest and explicit. It should be certain and definite denial of execution. What has to be specifically denied is the execution of the document".*

The court noted that, in this case, the plaintiffs came out with the plea of forgery and fabrication of the gift deed which is based on different allegations and proof than the proof of document attested. While upholding the High Court judgment, the bench said:

> *"The facts of the present case are akin to the facts which were before the Kerala High Court in Kannan Nambiar. The appellants have not denied the execution of the document but alleged forgery and fabrication. In the absence of any evidence of any forgery or fabrication and in the absence of specific denial of the execution of the gift deed in the manner held in Kannan Nambiar, the Donee was under no obligation to examine one of the*

attesting witnesses of the gift deed. As per evidence on record, the Donee was taking care of the Donor for many years. The appellants were residing in the United States but failed to take care of their parents. Therefore, the father of the appellants has executed gift deed in favour of a person who stood by him. In the absence of any intention in the Will, beneficiary would acquire the property as self-acquired property".

Proof where no attestor found

Section 69 of the Indian Evidence Act, 1872 speaks about, "Proof where no attesting witness found". This section says that if none of the witnesses is available or if the document was executed in the United Kingdom, it must be proved that the executor's and one of the attesting witnesses' sign is in their own handwriting.

"V. Kalyanaswamy(D) by LRs. & Anr. v. L. Bakthavatsalam(D) by LRs. & Ors., Civil Appeal Nos. 1021-1026/2013, SC "

On **17th July 2020**, the Hon'ble Supreme Court held that, in a situation where both the attesting witnesses to a will are dead, it is sufficient to prove that the attestation of at least one attesting witness is in his handwriting.

In this case, at the relevant time, both attesting witnesses to the will in question were not alive. The will was sought to be proved by producing the copy of deposition given by one of the attesting witnesses to the Will in a proceedings under Section 145 of the CrPC. However, the High Court held that this deposition of one of the attesting witnesses to the Will did not establish due execution of the Will, in that, it did not establish the attestation of the Will by the other alleged attesting witness.

So the issue in the appeal before the Apex court was whether is it still the requirement of law when both the attesting witnesses are dead that: under Section 69 of the Evidence Act, the attestation as required under Section 63 of the Indian Succession Act, viz., attestation by the two witnesses has to be proved? or Is it sufficient to prove that the attestation of at least one attesting witness is in his handwriting, which is the literal command of Section 69 of the Evidence Act apart from proving the latter limb?

Answering this issue, the court noted that Section 69 of the Evidence Act manifests a departure from the requirement embodied in Section 68 of the Evidence Act. The relevant observations made in this regard, by the bench comprising of Justices Sanjay Kishan Kaul and KM Joseph, is quoted below

"In the case of a Will, which is required to be executed in the mode provided in Section 63 of the Indian Succession Act, when there is an attesting

witness available, the Will is to be proved by examining him. He must not only prove that the attestation was done by him but he must also prove the attestation by the other attesting witness. This is, no doubt, subject to the situation which is contemplated in Section 71 of the Evidence Act which allows other evidence to be adduced in proof of the Will among other documents where the attesting witness denies or does not recollect the execution of the Will or the other document. In other words, the fate of the transferee or a legatee under a document, which is required by law to be attested, is not placed at the mercy of the attesting witness and the law enables proof to be effected of the document despite denial of the execution of the document by the attesting witness."

The court further observed that in a case covered under Section 69 of the Evidence Act, what is to be proved as far as the attesting witness is concerned, is, that the attestation of one of the attesting witness is in his handwriting.

"Reverting back to Section 69 of the Evidence Act, we are of the view that the requirement therein would be if the signature of the person executing the document is proved to be in his handwriting, then attestation of one attesting witness is to be proved to be in his handwriting. In other words, in a case covered under Section 69 of the Evidence Act, the requirement pertinent to Section 68 of the Evidence Act that the attestation by both the witnesses is to be proved by examining at least one attesting witness, is dispensed with. It may be that the proof given by the attesting witness, within the meaning of Section 69 of the Evidence Act, may contain evidence relating to the attestation by the other attesting witness but that is not the same thing as stating it to be the legal requirement under the Section to be that attestation by both the witnesses is to be proved in a case covered by Section 69 of the Evidence Act. In short, in a case covered under Section 69 of the Evidence Act, what is to be proved as far as the attesting witness is concerned, is, that the attestation of one of the attesting witness is in his handwriting. The language of the Section is clear and unambiguous. Section 68 of the Evidence Act, as interpreted by this Court, contemplates attestation of both attesting witnesses to be proved. But that is not the requirement in Section 69 of the Evidence Act".

Admission by party to Attested Document

Section 70 of the Indian Evidence Act, 1872 speaks about, "Admission of execution by party to attested document". This section says that 'where the party to an attested document has admitted that he executed the document that is sufficient proof of the execution even if the document is required by law to be attested'. This 'admission' relates only to the execution and to be made in the course of the trial of a suit or proceeding. It must be distinguished from the admission mentioned in Section 22 and 65 (b), which relate to die contents of a document.

The admission must be unqualified. Thus, if a person admits his signature on a mortgage-bond, but denies that the attesting witnesses were present at that time, the bond will have to be proved under Section 68, by calling the attesting witnesses.

Proof when Attesting Witness Denies the Execution

Section 71 of the Indian Evidence Act, 1872 speaks about, "Proof when attesting witness denies the execution". Normally Section 68 has to be followed but in case it is not possible to follow Section 68 then Section 71 has to be followed. This section says that when the attesting witness denies or forgets the execution of the document it may be proved by other evidence.

Therefore, if the witness that was examined was not able to prove its contents and the other attesting witness though available was not called then the will was held to be not proved. The prove has to be done in accordance to Section 68 of the evidence act, Section 71 will come into play only when it cannot be proved in any by through section 68.

For example: - If one of the witnesses turned hostile and the other witness though available was not called for then the help of Section 71 cannot be taken.

Proof of Document not required by Law to be Attested

Section 72 of the Indian Evidence Act, 1872 speaks about, "Proof of document not required by law to be attested". This section says "An attested document, not required by law to be attested, may be proved as if it was unattested." To prove an attested document, one must prove (i) attestation, and (ii) signature. To prove an unattested document, one has to prove execution only.

Comparison of Signature etc

Section 73 of the Indian Evidence Act, 1872 speaks about, "Comparison of signature, writing or seal with others admitted or proved". This section simply says that any signature, writing or seal that has to be proved may be compared with any other signature, writing or seal that has been proved to the satisfaction of the court to have been written by the concerned person. It also says that the court can ask any person to write any words or figures for the prose of comparing it with the concerned document.

Section 73 does not make any difference between civil and criminal proceedings. It is not limited to parties to the litigation. By virtue of the expression "any person" used in Section 73, die court can direct even a stranger to give a specimen of his handwriting. It may be noted that where the case is still under

investigation and no proceedings are pending before the court, a person present in the court cannot be compelled to give his specimen handwriting.

In the absence of any admitted signatures, the court cannot in itself compare a disputed signature without the assistance of an expert.

"B. Raghuvir Acharya v. CBI, (2014) 14 SCC 693"

It was held by the Supreme Court that when a person claims that he is acquainted with the handwriting of the accused author but he was not able to produce the document in the court by which he claims to be familiar with the accused's handwriting then the court held that in that case the accused cannot be convicted.

"M. Narayananma v. Lakshmidevi, AIR 2015 NOC 680 (Kar)"

In this case, the plaintiff produced a thirty years old registered document. The court held that the since there was no sign of discrepancy in the signature on the document and the defendant produced no evidence to show that the signature on the document was not genuine then the benefit of Section 90 will be given to the plaintiff.

Public & Private Documents

The Indian Evidence Act recognizes two kinds of documents, viz. public and private. Section 74 of the Indian Evidence Act, 1872, defines the term "Public documents" and Section 75 of the Indian Evidence Act, 1872, describe the term "Private documents" as all documents other than Public documents.

Section 74 states 2 types of documents that can be considered as public documents. They are: –

1. Documents forming the acts, or records of the acts –– (i) of the sovereign authority, (ii) of official bodies and tribunals, and (iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country

2. Public records kept [in any State] of private documents.

Private documents, which are registered in public offices, also become public documents. For example, the memorandum and articles of a company registered with the Registrar of Companies; a private Waqf deed etc.

These documents held not be public document: - An application for a licence, a post-mortem report, an insurance policy, a private sale-deed registered under the Indian Registration Act, a "Panchnama" prepared by a police officer, A charge-sheet, arrest-warrant, judgment of court, affidavit, administrative report, etc. are public documents.

A 'public record' is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and permanent evidence of something written, said or done. Thus, an original receipt executed by any individual and registered under the Registration Act is not a public record as the original has to be returned to the party. Entries made by a police officer in the site inspection map and site map have been held to be public documents.

Certified copies of Public Documents

Section 76 of the Indian Evidence Act, 1872 speaks about, "Certified copies of public documents". This section says that when any document is in custody of a public officer which any person has the right to inspect, then the public officer has to give a copy of that document, on- demand, to that person. Any such copy should contain a certificate at its foot saying that it's a genuine copy of the original document. Such certificate shall also contain the date and name or his official title or where he can use his official seal, his official seal.

It also provides that under this section an officer who is authorized to deliver the copy shall be deemed to have been in his custody.

Proof of Documents

Section 77 of the Indian Evidence Act, 1872 speaks about, "Proof of documents by production of certified copies". This section states that the certificates given in Section 76 are to be used to prove the contents of the public documents or part of public documents of which they are purported to be parts. The fact of marriage can be proved by producing the marriage registration certificate.

Section 78 of the Indian Evidence Act, 1872 speaks about, "Proof of other official documents". This section, a list of other public document and the way to prove them is given.

Note: - Section 79 – 90 provides "Presumption as to Documents".

Exclusion of Oral by Documentary Evidence

There is a famous Hindi Saying *"likhtam ko bhaktam ki zaroorat nahi"* (there is no requirement of oral evidence of a written record). Where both oral as well as documentary evidence are admissible, the court may go by the evidence which seems to be more reliable. There is nothing in the Act requiring that the documentary evidence should prevail over the oral evidence. The provisions as to exclusion of oral by documentary evidence are based on the rule of 'best evidence'. Where the fact to be proved is embodied in a document, the document (primary or secondary evidence of it) is the best evidence of the fact. The maxim of law is whatever is in writing must be proved by the writing. Section 91 to 100 of the Indian Evidence Act, 1872 lays down provision relating to exclusion of oral by documentary evidence.

Section 91 and 92 deals with best evidence rule. However, the term best evidence rule is not explicitly written anywhere in the Indian Evidence Act, 1872. The 'best evidence' rule means that the best evidence of which the case in its nature is susceptible must always be produced. The rule does not require the production of the greatest possible quantity of evidence, but it is framed to prevent the introduction of any evidence which raises the supposition that there is better evidence behind it, in possession or under control of the party by which he might prove the same fact, and which is withheld by the party.

It is one of the cardinal rules of the law of evidence that the best evidence in possession of the party must always be given i.e. if a fact is to be proved by oral evidence, the evidence must be that of a person who had directly perceived the fact to which he testifies.

Evidence of Terms of Contract etc reduced to Document

Section 91 of the Indian Evidence Act, 1872 speaks about, "Evidence of terms of contracts, grant and other dispositions of property reduced to form of documents". This section says that whenever there is a question regarding a document then the documents shall be given in prove by producing the original copy of the documents before the court. The rule expressed in Section 91 is an exclusive rule as it excludes the use of oral evidence for the proof of the contents of the documents except in cases where secondary evidence is applicable for the proof of the documents.

This principle is made so strict and inflexible because the main essence of written documents is that in time of dispute the written documents can be produced as evidence. But if secondary evidence or oral evidence is made admissible in case of the original documents then the whole purpose of the written document is destroyed. So, the best evidence rule imbibed in Section 91 of the evidence act is

said to be the most inflexible. However, one important thing to note is that Section 91 applies only to contracts, grants and dispositions.

Section 91 of Evidence Act contains following 2 exceptions: -

1. Where the appointment of a public officer is required by law to be made by writing and the question is whether an appointment was made, if it is shown that a particular person has acted as such officer, that will be sufficient proof and the writing need not be proved. When the question is whether X is a High Court Judge, the warrant of appointment need not be proved, the only fact that he is working as a High Court Judge will be proved. Similar is the case when X appears before the court as a witness and says that he is a civil surgeon.

2. Wills admitted to probate in India may be proved by the probate. The document containing the will need not be produced. The word 'probate' means the copy of a will certified under the seal of the court of competent jurisdiction with a grant of administration to the estate of the testator.

The first explanation in this section says that where there is more than one document to prove a contract, grant or disposition then each and every document needs to be proved and the proof must be with the original document i.e. primary evidence or by secondary evidence where secondary evidence will be applicable.

The second explanation says that if there is more than one original for a single contract, grant or disposition then proving only one document will be sufficient. An example is the bills of exchange of which three are usually exchanged and also the bills of lading which are usually executed in duplicates and sometimes in triplicates. Where the document listed is in several parts each part is the primary evidence of the document.

The third explanation to the section says that when there is a question of evidence other than that of (i) contract, grant and disposition of property and (ii) matters required by law to be reduced to writing then the rule will not apply and any kind of evidence will be admissible. For example, the contract of marriage is not signed by either of the contracting parties but it is in the nature of a memorandum prepared by nikah khwan, then it is open to one of the parties to prove by other evidence, oral or documentary, that he or she has been married and also the terms.

Section 91 applies to third parties too. If a third person wants to establish a particular contract between two or more parties when the contract is in the form of writing or when under law such contract has to be in writing he can do so only by the production of such writing.

Section 91 of the evidence act mainly says that we should produce the original document for proving the contents of the same but however, it does not prohibit the parties to adduce some evidence in case the deed is capable of being construed differently for proving the way to understood it. Oral evidence can also be given in order to show that the recitals in a deed are nominal.

"State bank of India v. Mula Shakari Sakhar Karkhana Ltd. (2006) 6 SCC 293"

In this case, Supreme Court held that the court will judge the nature of the transaction by terms and conditions of the contract together with the surrounding and the attending circumstances only in a case where the document suffers from some type of ambiguity. Where no such ambiguity occurs regarding the document the court will not take such recourse.

"Hans Raj Agarwal v. CIT, (2003) 2 SCC 295"

In this case, Supreme Court held that the partition of property can be done orally. Where a document is drafted and the document clearly says without any ambiguity and in unmistakable terms that it is a deed of partition and that the parties have secured their entitlement of the property and consented to it then it cannot be held that the document is not the deed of partition and the same can be interpreted in some other way. The provisions of this section do not permit such interpretation of documents where there is no ambiguity whatsoever in the document in question.

"Aktiebolaget Volvo v. R. Venkatachalam (2009) ILR 6 Delhi 233"

The Delhi high court said that in case a party will suffer irreparable damages on loss of the original document, in that case, the original document can be kept in custody of the party rather than its own custody but they will be subject to frequent inspection by the court. The reason cited by the court was that while the courts work in too much time constraint and there are always so many document transactions going on in the court that the question of safety of the documents in the court becomes questionable. Further, the parties will get the documents can be received by the parties only under Order 13 Rule 9 of the CPC.

Exclusion of Evidence of Oral Agreement

Section 92 of the Indian Evidence Act, 1872 speaks about, "Exclusion of evidence of oral agreement". The provision in Section 91 is further supplemented by Section 92. This section says that if any contract, grants or disposition of property which is required by law to be in writing in form of document and if it has been proved

according to Section 91, then for the purpose of varying it, contradicting it or subtracting it parties or their representative is not required to give oral evidence and it is not admissible. Two points are proved from this section:

1. If any third party gives then it is admissible.
2. If any oral evidence is given which do not contradict the contract then it is admissible.

The rationale behind Section 92 is that the parties having made a complete memorial of their agreement, it must be presumed that they have put into writing all that they considered necessary to give full expression to their meaning and intention; further, the reception of oral testimony would create mischief and open the door to fraud.

Section 92 of Evidence Act has following exceptions: -

1. Validity of documents-

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

2. Matter on which document is silent-

   Evidence can be given of an oral agreement on a matter on which the document is silent. But the oral agreement should not be inconsistent with the terms stated in the document. The separate oral agreement should be on a distinct collateral matter, although it may form a part of the transaction. Further, the formality of the document is important; the more formal the document, the greater will be the court's reluctance to admit oral evidence. [Illustration (f), (g) and (h)]

3. Condition Precedent-

   This exception means that where there is a separate oral agreement that the terms of a written contract are not to take effect until a condition precedent has been fulfilled or a certain event has happened, oral evidence is admissible to show that as the event did not take place, there is no written agreement at all. This rule would never apply to a case where the written contract has been performed or acted upon for some time. [Illustration (i) and (j)]

4. Recession or modification-

   Where after executing a document, the parties orally agree to treat it as cancelled or to modify some of its terms, such distinct and subsequent oral agreement may be proved. However, where the contract is one which is required by law to be in writing, or where it has been registered lawfully, then proof cannot be given of any oral agreement by which it was agreed either to rescind the contract or to modify its terms.

5. Usage or customs-

   If there is the existence of any particular usage or customs by which incidents are attached to a contract then it can be proved. This means oral evidence is admissible to explain or supply terms in commercial transactions on the presumption that the parties did not intend to put into writing the whole of their agreement, but (impliedly) agreed that their contract was to be interpreted or regulated by established usages and customs, provided they are not inconsistent with the terms of such contract. Thus, oral evidence may be offered by the custom.

6. Relation of language of facts-

   Any fact may be proved which shows in what manner the language of a document is related to existing facts. This exception comes into play when there is latent ambiguity in a document i.e. when there is a conflict between the plain meaning of the language used and the existing facts. In such cases, evidence of the "surrounding circumstances" may be admitted to ascertain the real intention of die parties. Thus, the conduct of the parties can also be taken into account so as to find out what they might have meant by their words.

Ambiguous Documents

When a document is ambiguous i.e. either its language does not show the clear sense of the document or its application to facts creates doubts, how far oral evidence can be allowed to clarify the language or to remove the defect? Sections 93-98 lay down the rules as to interpretation of documents with the aid of such 'extrinsic evidence' (evidence from the outside).

Ambiguities are of two kinds: *ambiguitas patens* i.e. patent ambiguity (Section 93-94) and *ambiguitas latens* i.e. latent ambiguity (Section 95-97). A patent ambiguity means a defect which is apparent on the face of the document. In such cases the principle is that oral evidence is not allowed to remove the defect. A latent defect implies a defect which is not apparent on the face of the record, but is in the

application of the language (used in the document) to the facts stated in it. The general principle is that evidence can be given to remove such defects.

Proof of Patently Ambiguous Documents

Section 93 of the Indian Evidence Act, 1872 speaks about, "Exclusion of evidence to explain or amend ambiguous document". Section 93 says that the documents which are ambiguous in the face of it, there is no need to give any evidence to show its meaning or supply its defects.

Illustration: - If there is a deal between 'A' and 'B' for buying a horse for Rs.1000 or Rs.2000 then the evidence cannot be given to show what price was actually meant to be given since the document is ambiguous in its face.

The reason for the exclusion of evidence in such cases is that the document being clearly or apparently defective, this fact must be or could have been known to the parties and if they did not care to remove it then it is too late to remove it when a dispute has arisen. The removal of vagueness by giving extrinsic evidence is prohibited in this section because if the court would allow that it will essentially mean that the parties are making a new contract.

Section 94 of the Indian Evidence Act, 1872 speaks about, "Exclusion of evidence against application of document of existing facts". It says that when a document is plain in itself and when it applies to the existing facts accurately then the evidence cannot be given to show that the document was meant to be applied differently or it was not meant to be applied in such a way to those facts.

Illustration: - If 'A' says to 'B' "my estate at Rampur of 100 bighas". A is having an estate at Rampur of 100 bighas. In such a case evidence cannot be given saying that it was meant to be for an estate at a different place and of different size.

The principle behind this section is that the words of a written document has to be construed only according to their natural meaning and no acts of the parties can alter or qualify the words which are plain and unambiguous. This section applies only when the execution of the document is admitted and when there are no vitiating circumstances against it.

Proof of Latently Ambiguous Documents

Section 95 of the Indian Evidence Act, 1872 speaks about, "Evidence as to document unmeaning in reference to existing facts". This section says that if the facts in the document are plain in itself but it doesn't make sense with the facts then the evidence can be given to show that the document was mean to be used in

a peculiar sense. This section is based on the principle of *"falsa demonstratio non nocet"* which means that a false description does not vitiate the document.

Section 96 of the Indian Evidence Act, 1872 speaks about, "Evidence as to application of languages which can apply to one only several persons". This section says that when the language of the document was given in such a way that it might have been applied to anyone but it was meant to be applied to only one then evidence to show which one it was supposed to be applied is admissible.

Illustration: - It was written in the sale deed that 'A' intended to sell 'B' his white horse, however, 'A' is having 2 white horses so evidence can be given to show that which white horse 'A' meant to sell.

Where a pronote mentioned a date according to the local calendar and also according to the international calendar, the evidence could be offered to show which date was meant. Suppose if a Vakalatnama did not contain the name of the pleader after the word "Mr." in the printed form but bore the signature of the party as well as the pleader. Then the ambiguity in the document was not patent but latent which could be cleared up by extrinsic evidence under Section 96.

Section 97 of the Indian Evidence Act, 1872 speaks about, "Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies". This section says that when the language of the document is applicable partly to one set of facts and partly to another set of facts but the whole of it does not apply to anyone of them correctly, then evidence may be given to show which fact it was meant to apply.

Illustration: - 'A' agrees to sell to 'B', "my land at X in the occupation of Y". A has landed at X, but not in the occupation of Y, and he has landed in the occupation of Y but it is not at X. Evidence may be given of facts showing which he meant to sell.

Evidence for Illegible Characters

Section 98 of the Indian Evidence Act, 1872 speaks about, "Evidence as to meaning of illegible characters, etc". This section says that, evidence can be given to show the meaning of illegible or not commonly intelligible characters of: –

1. Foreign;
2. Obsolete;
3. Technical; and
4. Local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration: - A, sculptor, agrees to sell to B, "all my modes". A has both models and modeling tools. Evidence may be given to show which he meant to sell.

Where there is a popular or common word mentioned in the document, it will have to be construed in its popular meaning. If a word of technical or legal character is used then the meaning of the word has to be construed in its technical or legal sense. If evidence needs to be given of the secondary meaning of a word then first it needs to be proved that the word is supposed to be used in its secondary meaning and not in its primary meaning.

Evidence by Non-Parties

Section 99 of the Indian Evidence Act, 1872 speaks about, "Who may give evidence of agreement varying term of document". This section says that the persons, who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration: - 'A' and 'B' makes a contract of selling cotton and then they made an oral agreement that 3 months credit will be given to 'A'. This could not be shown as between 'A' and 'B', but it might be shown by 'C' if it affected his interests.

In Section 92 oral evidence by the parties to a contract is prohibited but the principle in Section 92 does not apply to third parties. Oral evidence by third parties is made applicable by this section. This section (Section 99) distinctly provides that people who are not parties to a document may give evidence tending to show a contemporaneous agreement varying the terms of the document.

In case of alienation of land in which a document was executed as a gift deed or mortgage. The claim of the plaintiff that the transaction was in-fact of a sale and the document was executed in the name of gift deed or mortgage in order to conceal its true nature. In such case, third-party purporting to the exercise some rights in the land can prove the transaction was, in reality, a sale or not.

Note: - Section 100 says that *"Nothing in Chapter 6 contained shall be taken to affect any of the provisions of the Indian Succession Act, 1925 as to the construction of wills"*.

Burden of Proof

Every judicial proceeding has for its purpose, to ascertain some right or liability. These rights and liabilities arise out of facts which must be proved to the satisfaction of the court. Section 101 to 111 lays down provisions regarding who is to lead evidence and prove the case. Sections 101 to 103 deals with the burden of proof in general while Section 104 to 111 deals with case where the burden of proof lies to a particular person. These rules are called rules relating to 'Burden of Proof'.

Meaning

The burden of proof means the obligation to prove a fact. Every party has to establish facts which go in his favour or against his opponent. The strict meaning of the term 'burden of proof' (onus probandi)* is that if no evidence is given by the party on whom the burden is passed the issue must be found against him. The phrase "Burden of proof" has two distinct meanings:

(1) Burden of establishing the case - i.e. the burden of proving all the facts or establishing one's case. It is fixed, at the beginning of the trial, by the statements of pleadings, and it is settled as a question of law, remaining unchanged under any circumstances whatever (Section 101).

(2) Burden of introducing evidence - It is always unstable and may shift from one party to another during the proceeding (Section 102-103). The burden must shift as soon as he produces evidence which prima facie gives rise to a presumption in his favour. It may again shift back on him, if the rebutting evidence produced by his opponent preponderates. This being the position, the question as to the onus of proof is only a rule for deciding on whom the obligation rests of going further if he wishes to win.

There is an essential distinction between "burden of proof" and "onus of proof". Burden of proof lies on the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.

*Onus probandi - The term merely means that if a fact has to be proved, the person in whose interest it is to prove he should adduce some evidence, however slight, upon which a court could find the facts which he desires the court to find. The onus is always on a person who asserts a proposition or a fact which is not self-evident.

The question of onus or burden of proof at the end of the case, when both the parties have adduced evidence is not of very great importance and the court has to come to a decision on a consideration of all materials. When the entire evidence,

which is possible on a subject, has already come before the court, from whatever source it may be, it is well settled that the question of burden of proof becomes immaterial. Burden of proof as determining factor of the whole case can only arise if the court finds the evidence for and against so evenly balanced that it can come to no conclusion. Then the onus will determine the matter and the person on whom the burden of proof lies will lose.

The party on which the onus of proof lies must, in order to succeed, establish a prim a facie case. He cannot, on failure to do so, take advantage of the weakness of his adversary's case. He must succeed by the strength of his own right and the dearness of his own proof.

Burden to prove facts

Section 101 of the Indian Evidence Act, 1872 speaks about, "Burden of proof". This section says that whenever a person wants the court to give judgment as to any legal rights or liabilities based on some facts of which he asserts then he will have to prove the existence of those facts.

Illustration: - 'A' desires a Court to give judgment that 'B' shall be punished for a crime which 'A' says 'B' has committed. 'A' must prove that 'B' has committed the crime.

Illustration says that the 'A' desires a Court to give judgment that B shall be punished for a crime which 'A' says 'B' has committed. 'A' must prove that 'B' has committed the crime." In this case the burden of establishing the case is on 'A' under Section 101 and the burden of introducing the evidence is also on 'A' under Section 103 because in Indian law a man is presumed to be innocent until he is proven guilty.

"Bhagwat Sharan Thr. LRs v. Purushottam & Ors., Civil Appeal No. 6875/2008"

On **3rd April 2020**, Supreme Court observed that the burden is on the person who alleges that the property is a joint property of an HUF to prove the same. The bench comprising Justices L. Nageswara Rao and Deepak Gupta observed while considering an appeal arising out of suit for partition that not only jointness of the family has to be proved but burden lies upon the person alleging existence of a joint family to prove that the property belongs to the joint Hindu family unless there is material on record to show that the property is the nucleus of the joint Hindu family or that it was purchased through funds coming out of this nucleus.

"Ashish Batham v. State of Madhya Pradesh, AIR 2002 SC 3206"

In this case, it was observed by Justice D. Raju that "Realities or Truth apart, the fundamental and basic presumption in the administration of charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however, strong or probable it maybe is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge is greater should be the standard of proof required.

"Krishna Prasad v. Ram Prasad, AIR 2001 Pat 1"

In this case, a lady gifted her property to her grandson. The lady was over 90 years old but she was completely infirm and she was totally intelligible. The gift was due to the natural flow of love as the done lost his mother and also his step-mother started torturing him. It was contended in the case that the transaction was a fraud transaction. The court held that burden of proving that the transaction was fraudulent was on the person who alleges it.

"Savithri v. Karthyayani Amma AIR 2008 SC 300"

In this case, there were suspicious circumstances regarding the execution of a will also there was an allegation of coercion. The court said that in that case, the burden of proof was on the party who alleged coercion.

On whom burden of proof lies

Section 102 of the Indian Evidence Act, 1872 speaks about, "On whom burden of proof lies". This section says that the burden of proof lies on the person who would fail in case no evidence is given on either side.

Illustration: - 'B' is in possession of a property. 'A' asserts that the property was given to him by B's father in a will. If no evidence is given on either side, 'A' would fail and 'B' would be allowed to keep the possession of the property. So, 'A' will have the burden of proof.

In an action for damages for negligence, if the defendant alleges contributory negligence on the part of the plaintiff, he must prove this fact, for his case would fail if no evidence were given on either side. This principle also verifies the fact that

the burden of proof lies upon the party who affirms a fact rather than upon one who denies it. A person claiming the benefit of adoption must prove valid adoption.

"Aldino Santos Braganza v. Marle Dos Santos Barganza, AIR 2008 NOC 2090 (Bom)"

In this case, there was a divorce case where it was shown that a letter was written by the wife's advocate to her husband making imputation that he is living an adulterous life. The court said that the burden of proving that it was not written with her consent or knowledge was on the wife.

Burden to proof the particular fact

Section 103 of the Indian Evidence Act, 1872 speaks about, "Burden of proof as to particular fact". Section 103 amplifies the general rule laid down by Section 101. This section says that the burden of proof of a particular fact lies on that person who wants the court to believe in its existence unless the law itself provides that the burden of proof lies on any particular person.

Therefore, this section says that the burden of proof lies on a person who asserts the affirmative or negative of a particular fact unless the evidence law or any other law in force specifically provides for the burden of proof to be on any particular person. So, this section says that the one who asserts have to prove.

The difference between this section and Section 101 is that in Section 101 the person who asserts the affirmative has to prove the fact, while in this section the person who asserts a particular fact will have the burden of prove whether it's positive or negative, affirmative or denying.

Section 39 of Cr.P.C. provides that every person should report to the nearest police officer or magistrate about certain offences that he knows or seen to have been committed. If he does not do that the burden of giving a reasonable excuse is upon him. This is one of the cases that the second part of Section 103 of the Indian evidence act provides i.e. "if the law itself provides that the burden of proof lies on any particular person". In this case, the law (here it is Section 39 of CrPC) provides the burden on the person who did not give information to the nearest police officer or magistrate.

Burden to prove to make evidence admissible

Section 104 of the Indian Evidence Act, 1872 speaks about, "Burden of proving fact to be proved to make evidence admissible". This section says that the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustration: - A wishes to prove a dying declaration by B. A must prove B's death.

This illustration says that the fact necessary to be proved is the dying declaration of B and the fact necessary to prove the dying declaration is that B is dead.

"Mahboob Sab v. Union of India, AIR 2011 Kart. 8"

In this case, the Railways contentions was that the person who died by falling from a train was not a bonafide passenger being without ticket, the court said that it was for the Railways to prove that fact.

Burden to prove that accused comes within exception

Section 105 of the Indian Evidence Act, 1872 speaks about, "Burden of proving that case of accused comes within exceptions". This section refers to the exceptions provided to the accused that will serve as benefit of 'the general exceptions of the Indian Penal Code or of any of the special laws'. The general principle requires the Court to presume innocence of the accused until proven otherwise and it is upon the prosecution to establish the guilt of the accused. Once the guilt is established, the onus then shifts to the accused who can take the defense of general exceptions in I.P.C.

The standard of proof upon the accused whilst claiming an exception under Section 105 is comparatively lower than that upon a prosecuting party in similar circumstances. An accused may not have to bring forth evidence to prove innocence beyond a reasonable doubt. However, an accused when asserting that his particular circumstances fall within an exception under the said provision, he alone has the onus of proving the same.

The fundamental principle of criminal jurisprudence is that an accused is presumed to be innocent, and the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. This general burden never shifts, and it always rests on the prosecution. Section 105 is an important qualification of this general rule. This section is an application, perhaps an extension of the principle laid down in Section 103. There is no conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused under Section 105.

Burden to prove fact specially within knowledge

Section 106 of the Indian Evidence Act, 1872 speaks about, "Burden of proving fact specially within knowledge". Section 106 is an exception to Section 101. This section says that when any fact is especially within the knowledge of any person,

the burden of proving that fact is upon him. In other words, any person who is said to be aware of a particular fact has the onus of proving such a fact is upon him. The section uses the term "Specially within knowledge" denoting that the possession of such knowledge also shifts the burden of proof upon the possessor. The word "specially" means facts that are pre-eminently or exceptionally within the knowledge of the person.

Illustration: - Body of B was found in the house of A. The onus is upon A to establish that even know body of the deceased was recovered from his house, his involvement in the crime is negligible. The inmates of the house are also required to provide an explanation. If the defendant fails to provide a viable explanation and fails to establish his innocence, this would form a chain of circumstantial evidence establishing the guilt of the accused.

Section 106 applies only to the parties to a suit or proceeding. It is designed to meet certain exceptional cases in which it would be impossible or very difficult for the prosecution to establish facts which are especially in the knowledge of the accused. If a person is found in possession of a stolen property immediately after the theft and he claims that there was no intention to receive stolen property, he must prove that fact, for that fact is especially within his knowledge. Similarly, in the case of plea of alibi, since only the person raising the plea knows that where he was at the time, burden lies on him to prove that fact. This section also come into play in the cases of custodial or dowry death, and, negligence of carriers of goods. The principle stated in the section is an application of the principle of *"Res ipsa loquitur"*.

"Ram Gulam Chaudhury v. State of Bihar, 2001 Cr LJ 4632"

In this case, a dead body was not found but there was clear witness by the eye witness that the victim was killed by the accused before they took away the body. No explanation was given by the accused as to the disappearance of the dead body. The court said that it can convict the accused people by drawing the presumption that the accused people had a reason to take away the dead body and the reason being that the death was caused by them.

"Geemol Joseph & Ors. V. Kousthabhan & Anr., Crl. Appeal No. 2535/2008'

On **26th July 2019**, the Kerala High Court held that when there is an alteration in the cheque with regard to the name of the payee, the burden is upon the complainant to prove that such alteration was made by the accused himself or that it was made with the consent of the accused.

Burden to prove the death of person

Section 107 of the Indian Evidence Act, 1872 speaks about, "Burden of proving death of person known to have been alive within thirty years". This section says when a person is shown to have existed within the last 30 years, the presumption is that he is still alive and if anybody alleges that he is dead, he must prove that fact. The presumption is not a very strong presumption. It can be rebutted even by the slightest evidence to the contrary.

Burden to prove that person is alive

Section 108 of the Indian Evidence Act, 1872 speaks about, "Burden of proving that person is alive who has not been heard of for seven years". This section says that if a person is not heard of for 7 years, the presumption is that he has died, and, if anybody alleges that he is still alive, he must prove that fact. Thus, seven years' absence creates rebuttable presumption of death.

There is a simple presumption of death and not of the time of death, for which an independent evidence is needed. The onus of proving that death took place at a particular time within the period of 7 years lies on the person who claims a right for the establishment of which that fact is essential.

Burden of proof as to Relationship

Section 109 of the Indian Evidence Act, 1872 speaks about, "Burden of proof as to relationship in the case of partners, landlord and tenant, principal and agent". This section says that where certain persons are shown to have acted as partners, or as landlord and tenant, or as principal and agent, the law presumes them to be so related and the burden of proving that they were never so related or have ceased to be so shall lie upon the party who says so. Thus, there is a presumption against change of status quo, namely that any existing state of things will continue as it is.

Burden of proof as to Ownership

Section 110 of the Indian Evidence Act, 1872 speaks about, "Burden of proof as to ownership". This section says that when a person is in possession of anything as owner, the burden of proving that he is not owner is on the person who affirms that he is not the owner.

The principle behind this section is that possession is the prima facie evidence of title and anyone who intends to oust the possessor must establish the right to do so. The principle will not apply if the possession is derived by force or fraud. The

term possession in this section has to be understood not as juridical possession but as actual present possession.

Proof of good faith in transactions

Section 111 of the Indian Evidence Act, 1872 speaks about, "Proof of good faith in transactions where one party is in relation of active confidence". This section says that when a person stands towards another in a position of active confidence, the burden of proving the good faith of any transaction between them lies on the person in active confidence.

Illustration: - The good faith of a sale by a client to attorney is in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

The term "active confidence" means relationship where person have power to influence the will of other. Relations of trust and confidence (i.e. fiduciary relation) include those of parent and child, lawyer and client, spiritual guru and his follower, principal and agent, partner and firm, doctor and patient, persons in authority and those over whom he exercises authority. In all such cases, the law imposes the duty of good faith upon the person occupying the position of trust and confidence, and he will have to prove that he acted in good faith before he can enforce the transaction against the other party. A contract with a 'pardanashin' woman attracts Section 111.

Presumption as to Burden of Proof

Section 111-A to 114 lay down certain presumptions & specific conditions that define the party upon which the burden of proof lies. These provisions envisage the exceptions to the doctrine of "Innocent until Proven Guilty". These enumerated conditions go against the doctrine by shifting the onus onto the accused to prove innocence, as opposed to the prosecution proving guilt.

Presumption as to certain offences

Section 111-A of the Indian Evidence Act, 1872 speaks about, "Presumption as to certain offences". This section states that a person accused of the commission of certain offences under the Indian Penal Code such as conspiracies against the government etc. in a disturbed area is presumed to be guilty and must prove his innocence, thereby putting the burden of proof onto him.

Presumption as to Legitimacy of child

Section 112 of the Indian Evidence Act, 1872 speaks about, "Birth during marriage, conclusive proof of legitimacy". Maternity is a fact and paternity is a matter of inferences or surmises. Section 112, which applies only to a married couple, lays down the rule for the proof of the paternity of an individual. "*Semper praesumiter pro legitimatione puerorum*' (it is always to be presumed that children are legitimate — legal maxim). Section 112 is an instance of law furthering social objectives by leaning against the tendency to bastardize the child.

This section says that in the event a child is born during the course of a marriage or within 280 days of its dissolution, he may be presumed to be the legitimate child of his father.

The time period of 280 days is there because it is the gestation period for a human embryo. So even if conception happened in the last day of marriage, we will still have to wait for 280 days until the child is born and if the child is born after 280 days then he will be presumed as the legitimate son of that man.

This section is based on the principle that when a particular relationship such as marriage is shown to exist then its continuance must prima facie be presumed.

The following important points, regarding Section 112, may be noted:

i. This section refers to the point of time of the birth of the child as the deciding factor and not to the time of conception of that child; the latter point of time has to be considered only to see whether the husband had no access to the mother.

ii. There is a presumption when a child is conceived and born during marriage that sexual intercourse took place at a time when according to the laws of nature, the husband could be the father of child.

iii. The presumption applies with equal force even where the child is born within a few days or even hours after the marriage. Further, it is immaterial that the mother was married or not at the time of the conception.

iv. Section 112 appears to provide a simple presumption of legitimacy which applies to children born during a marriage whether conceived before or after the marriage took place, and to children conceived during the marriage, whether born before the marriage is dissolved by the husband's death or otherwise.

v. Under Section 112, the only way to rebut the presumption is the proof of "non-access" between the parties to marriage. The phrase "non-access" implies non-existence of opportunity for physical intercourse. Non-access will have to be proved by direct or circumstantial evidence; non-access will have to be proved satisfactorily as the court favours the presumption of legitimacy. The father

would have the burden to prove that the child is not his or would owe the same obligations as he would to a legitimate child.

Lacunae in Section 112

The only exception under the law is non-access between the parties. This "non-access" refers to the non-existence of opportunities for sexual intercourse. This creates a legal lacuna with respect to cases where paternity may be disputed even when the parties had "access" to each other, for example, in cases of adultery. In such a case, due to the standard of "conclusive proof", a party with a legitimate case trying to dispute paternity will find themselves without remedy due to the inability to produce evidence. The exception to this law, i.e. "non-access" is not wide enough to cover all possible situations under the ambit of this law. Thus, the law is a draconian law based on morality with no relevance in the modern era.

DNA Test

The Indian Evidence Act was passed in the year of 1872 and since then, section 112 has neither been amended nor revised. At the time, there was little knowledge of forensic techniques and the concept of DNA had not yet been discovered. However, science and morality both have changed by leaps and bounds since then and in today's day and age, section 112 is no longer valid. The section must be revised to allow DNA testing when a prima facie case can be made to dispute paternity.

The DNA test cannot rebut the conclusive presumption envisaged under Section 112 of the Indian Evidence Act. The parties can avoid the rigor of such conclusive presumption only by proving non-access which is a negative proof.

"Narayan Dutt Tiwari v. Rohit Shekhar, (2012) 12 SCC 554"

The Hon'ble Supreme Court in this landmark judgment allowed the petition filed by a son seeking to declare him the natural born son of the man he claimed to be his father. The DNA test was allowed on the ground that every child has the right to learn about the truth of his/her origin and to ensure that the father does not shirk parenthood and bastardise the child.

The Hon'ble Court made a clear distinction between "legitimacy" and "paternity" and held that Section 112 of the Indian Evidence only intends to safeguard the legitimacy of the child and not its paternity. It is thus understood that the essential principle governing Section 112 of the Indian Evidence Act, is *"pater est quem nuptiae demonstrant"*. Therefore, though it can be argued that the availability of scientific technology, that can very well confirm paternity, diminishes the need for

such presumption in the first place, the person aggrieved still has to satisfy the test of "eminent need" to avail such scientific methods.

"Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik & Anr., CDJ 2014 SC 005"

In this case Hon'ble Supreme Court observed that-

> *"We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the Court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption".*

"Dipanwita Roy v. Ronobroto Roy, CDJ 2014 SC 867"

This case is in respect of the alleged infidelity of the appellant-wife. The respondent-husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person, who was the father of the male child born to the appellant-wife. It is in the process of substantiating his allegation of infidelity, that the respondent-husband had made an application before the Family Court for conducting a DNA test, which would establish whether or not, he had fathered the male child born to the appellant-wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant-wife's infidelity) through a DNA test.

The Supreme Court observed that-

> *"It would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied, that the direction issued by the High Court, as has been extracted herein above, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so".*

"Mahindra v. Smt. Mamta @ Guddi, CWP No. 7839/2019"

On **23rd May 2019**, Rajasthan High Court held that the courts have to be very careful and sensitive to the circumstances before passing orders for getting the DNA test conducted for establishment of paternity in a case. The court said that such a prayer ought not to be granted by the courts without considering all circumstances and looking at it from every angle as the way it could affect the lives of individuals cannot be denied.

However, relying on many Supreme Court judgments on the subject, the court did agree that application for seeking DNA test cannot be ousted merely because of presumption to be drawn under Section 112 of the Evidence Act. It found the reasoning adopted by the civil judge for rejection of the application for DNA test as incorrect.

Section 112 & The DNA Technology Bill, 2019

The DNA Technology (Use and Application) Regulation Bill, 2019 has been introduced to avail DNA technology "for the purposes of establishing the identity of certain categories of persons including the victims, offenders, suspects, under trials, missing persons and unknown deceased persons"

Section 34 of the DNA Technology Bill states that any information relating to DNA profiles, DNA samples and records which are maintained in a DNA data bank shall be made available for judicial proceedings, in accordance with the rules of admissibility of evidence and with relation to the investigation relating to civil disputes as specified in the schedule to the bill.

It can be safely inferred from the language in "judicial proceedings, in accordance with the rules of admissibility of evidence", that the DNA information

shall be made available to the concerned parties, only as per Section 112 of the Indian Evidence Act, i.e., if non-access as mandated by the provision is sufficiently proved by the aggrieved party.

The said Bill contains a Schedule which has been further classified into 4 parts, regarding the "List of matters for DNA filing". Part C of the schedule, states that "DNA identification technology" may be availed even in civil disputes and other civil matters which includes Parental disputes, both maternity or paternity, under sub classification (i) and includes issues relating to assisted reproductive technologies including surrogacy and in vitro fertilization under sub classification (iii).

Hence, it is clear that the Legislature does not want to preclude the parties from availing the DNA profiling technology services that are provided. The legislature merely intends to strike a harmonious balance between Section 112 of the Indian Evidence Act, to protect the sanctity of marriage; and at the same time, provide opportunity to the parties to disprove paternity through conclusive scientific methods, provided the preliminary question of non-access is sufficiently answered by the party aggrieved. The fundamental right against self-incrimination as laid down under Article 20(3) of the Constitution also should be given due regard.

Note: - The DNA Regulation Bill is still pending before the Parliament and is not an Act yet.

Proof of cession of territory

Section 113 of the Indian Evidence Act, 1872 speaks about, "Proof of cession of territory". This section says that a notification in the Gazette of India that any portion of British territory has, before the commencement of Part III of the Government of India Act, 1935, been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

This section was enacted to exclude the courts of justice to inquire into the validity of the acts of the government as to matters regarding cession of territory to any Indian state. However, this section is now obsolete as the Privy Council in a case declared that this section is ultra vires.

Presumption as to abatement of suicide

Section 113-A of the Indian Evidence Act, 1872 speaks about, "Presumption as to abatement of suicide by a married women". This section deals with the question of abetment of woman's suicide by her husband or any of his relatives. In such cases,

a presumption arises (the court may presume) that such a suicide has been abetted by the husband or his relatives, if the following two conditions are satisfied:

(i) The suicide was committed within a period of 7 years from the date of her marriage.
(ii) Her husband, or his relatives, has subjected her to 'cruelty' (as the term is defined in Section 498-A, IPC).

Such a presumption must, however, be drawn by the court after having regard to all the other circumstances of the case. Once these things are proved, abetment of suicide is presumed to exist. It will then be for the husband or his relatives to prove that the suicide in question was the woman's personal choice. If it is not a case of suicide, but of accidental death, the presumption of abetment does not arise.

Section 113-A does not create any new offence, or any substantive right, but merely a matter of procedure and as such is retrospective in operation. Where the wife's suicide took place more titan a month-and-a-half after the demand for dowry was met, and matters settled, then it would be unsafe, as well as unjust, to invoke the presumption of guilt under Section 113-A.

"Devkinandan v. State, 2003 Cr LJ 1502 (MP)"

In this case, the wife committed suicide by taking poison. Oral and documentary evidence suggested that the husband was dominating the wife and was subjecting her to mental cruelty. Her letters showed that she was being treated as a chattel. The court held that the actions of the accused were such as to drive his wife to commit suicide. Thus, the presumption under this section prevailed.

Presumption as to dowry death

Section 113-B of the Indian Evidence Act, 1872 speaks about, "Presumption as to dowry death". According to this section the court shall presume that a person has caused dowry death if evidence discloses that immediately before her death she has been subjected to cruelty or harassment or both for or in connection with the dowry, then the court shall presume that the person in question has caused the death.

According to this section, two things are needed to be proved in case there is a question with regard to the death of a woman. Firstly, she was subjected to cruelty or harassment soon before her death and secondly that the cruelty or harassment was in relation to the demand for dowry. Only cases satisfying these two conditions will come under this section.

Use of term Cruelty or harassment

Cruelty or harassment differs from case to case. It depends on the mindset so it differs from person to person. Cruelty can be of two types of physical cruelty and mental cruelty. Mental cruelty includes humiliating or ridiculing a woman, putting restraint in her movement, not allowing her to talk to the outside world, giving threats to her or her near and dear ones etc. Physical cruelty means actual beating or harming the body of the woman.

Every instance of physical or mental cruelty can put a lasting impact on the woman's mind. if there is any instance where her dignity is harmed those memories can cause a grave impact on the person's mind. However, in this section cruelty and harassment is not meant to be a single instance of cruelty or harassment it generally refers to a course of action stretched over a period of time.

Use of term "Soon before"

The term 'soon before' is not defined anywhere. The section says that the cruelty or harassment will have to happen soon before the death of the deceased in question only then we can presume that the death was caused due to dowry. The term would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. The term is relative and it is left in the court's discretion how soon is equivalent to 'soon before'. But the cruelty or harassment and the death of the deceased in question should not be too remote in time so that it can be safely considered that the effects of the cruelty or harassment are dissipated.

"Sultan Singh v. State of Haryana, Crl. Appeal No. 1366/2010"

On **26th September 2014**, the Hon'ble Supreme Court held that presumption under Section 113-B is a "presumption of law". On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:

1. The question before the Court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B, IPC).
2. The woman was subjected to cruelty or harassment by her husband or his relatives.
3. Such cruelty or harassment was for or in connection with, any demand for dowry.

4. Such cruelty or harassment was soon before her death.

"Sher Singh @ Partapa v. State of Haryana, Crl. Appeal No. 1592/2011"

On **9th January 2015,** the bench of Supreme Court comprising of Justice Vikramajit Singh and Justice Kurian Joseph has laid down certain rules of interpretation of provisions relating to cruelty meted out to wives and dowry deaths.

The Bench observed,

> *"As is already noted above, Section 113B of the Evidence Act and Section 304B of the IPC were introduced into their respective statutes simultaneously and, therefore, it must ordinarily be assumed that Parliament intentionally used the word 'deemed' in Section 304B to distinguish this provision from the others. In actuality, however, it is well nigh impossible to give a sensible and legally acceptable meaning to these provisions, unless the word 'shown' is used as synonymous to 'prove' and the word 'presume' as freely interchangeable with the word 'deemed'. "*

The Court hence found it imperative to construe the word 'shown' in Section 304-B of the IPC as to, in fact, connote 'prove'. The bench also commented on the requirement of burden of proof and observed that-

> *"The fundamental and vital question that the Court has to ask itself and find a solid answer to, is whether this evidence even preponderantly proves that the Appellant had treated the deceased with cruelty connected with dowry demands. It is only if the answer is in the affirmative will the Court have to weigh the evidence produced by the Appellant to discharge beyond reasonable doubt, the assumption of his deemed guilt."*

Further, interpreting the word "soon" as used in Section 304B, the Court observed that it necessarily indicates that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304B or the suicide under Section 306 of the IPC.

Once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt.

Therefore, as per the Court, the burden of proof weighs on the husband to prove his innocence by dislodging his deemed culpability, and that this has to be preceded only by the prosecution proving the presence of three factors, viz. (i) the death of a woman in abnormal circumstances (ii) within seven years of her

marriage, and (iii) and that the death had a live link with cruelty connected with any demand of dowry.

The Bench added that in this case, because of the insufficiency or the unsatisfactory nature of the facts or circumstances shown by the prosecution, the burden of proving his innocence needs shifted to the Appellant.

"Naresh Kumar v. State of Haryana, (2015) 1 SCC 797"

In this case, it was written in the suicide note that no one was responsible for her that and also, she wrote that all doors were closed on her and she had no other way. The court held that when all the available evidence categorically shows that there was a demand for dowry and ill-treatment by the husband and his relatives than just because it is written in the suicide note that no one was responsible cannot be taken as a conclusive proof that there was, in fact, no one responsible.

Presumption as to existence of certain facts

Section 114 of the Indian Evidence Act, 1872 speaks about, "Court may presume existence of certain facts". This section allows the court to presume certain facts such as that the possession of stolen property means that the person is the thief. Another example would be that when a person refuses to answer a question put to him in court, the presumption would be that if he had given the answer, it would be unfavorable for him. Various other cases have been enumerated in Section 114 which allow for the court to presume the existence of certain facts and accordingly shift the burden of proof. These presumptions generally go against the generally established principles of burden of proof.

A presumption of facts is an assumption resulting from one's experience of the course of natural events of human conduct and human character. Such experience can be used in daily life as well as in the business of courts.

Under this section, the court is entitled to draw an inference that an accused committed a murder if he is found in the possession of property which is proved to be in the possession of the murdered person or if the accused can point out where the property is concealed and admits having concealed it there and if he is not able to provide any reasonable explanation as to his possession of the victim's property.

"Salem Municipality v. P. Kumar, Civil Appeal No. 9-11/2014"

On **15th November 2018**, the Supreme Court held that presumption of continuity as envisaged in Section 114 of the Indian Evidence Act can be drawn backward also.

The high court had upheld the trial court order decreeing three suits filed by the plaintiff for declaration of title and permanent injunction.

The Supreme Court bench comprising Justice Arun Mishra and Justice Vineet Saran held that the finding recorded by the high court as to possession is clearly perverse and contrary to the revenue records and the Gazette notification of vesting of land in state issued in 1951. It is in this context, the bench made the aforesaid observation:

> "*It is no doubt true that under Section 114 of the Evidence Act, there is a presumption of continuance of a state of affairs once shown to have prevailed. It is open to the court under Section 114 to presume the continuity of any fact once shown to have prevailed. Such presumption of continuity can be drawn not only forward but backward also. Court can presume that such state of affairs might have existed in past also unless discontinuity is proved.*"

The bench said that, in the instant case, there is no affirmative evidence on record in the form of revenue record that the plaintiff's vendor was in possession on the date of abolition and thereafter plaintiff remained in possession at any point of time. Dismissing all the three suits, the bench also imposed cost of Rs. 1 lakh upon the plaintiff, observing that there was multiplication of various proceedings by filing three suits.

Presumption in Rape case

Section 114-A of the Indian Evidence Act, 1872 speaks about, "Presumption as to absence of consent in certain prosecutions for rape". According to Sec. 114-A, where the question before the court (in a prosecution for rape under Sec. 376 (2), IPC and where sexual intercourse by the accused is proved) is whether an intercourse between a man and a woman was with or without consent and the woman states in the court that it was against her consent, the court shall presume that there was no consent. The burden of proving becomes shifted to the accused. If he is not able to prove that there was consent, he becomes guilty.

The presumption under Section 114-A arises when the accused who commits rape is a police officer, a public servant, member of armed forces, management or staff of Jail/ Hospital, (relative, guardian, teacher or having position of trust) or he commits rape on a woman knowing that she is pregnant or when rape is a gang rape. This section has been added for drawing a conclusive presumption as to the absence of consent in certain prosecutions for rape.

Section 114-A was introduced because of the increasing number of acquittals of accused when the victim of rape is an adult woman. If she was really raped, it was very difficult for her to prove absence of consent; this provision has brought about a radical change in the Indian law relating to rape cases. This presumption would apply not only to rape cases, but also to cases of "attempted rape'.

"Yogesh v. State through Agassaim Police Station, Goa, Crl. Appeal No. 16/2015"

On **17th February 2018**, the High Court of Bombay at Goa acquitted an accused in a Rape Case finding that there was a deep love affair between the Accused and prosecutrix.

> *"It is evident that PW-1 not only continued with the relationship with the appellant after the first incident, but, also went to the extent of withdrawing the complaint by filing an affidavit in which, she has stated that she could not see the appellant behind bars, who was then under depression and was undergoing treatment at IPHB hospital, Bambolim and was desirous of withdrawing the complaint due to her personal reasons and emotions. This would clearly show that there was deep love affair between the appellant and PW-1. It cannot be said that the consent given by PW-1 was on account of any promise of marriage made by the appellant.*
>
> *The presumption under Section 114-A of the Evidence Act cannot take the case of the prosecution any further. It is true that the said presumption is a statutory presumption and the Court is obliged to draw such presumption, provided the foundational facts are established. However, the fact remains that such presumption is a rebuttable presumption. The accused can rebut such presumption on the basis of the evidence led by the prosecution and the attending circumstances, which have come on record."*

Doctrine of Estoppel

Estoppel is a principle of law by which a person is held bound by the representation made by him or arising out of his conduct. The term 'Estoppel' is derived from the maxim, "*allegans contraria non est audiendus"* which implies a person alleging contradictory facts should not be heard, and is the species of "*presumptio juris et de jure"*, wherein the fact presumed is taken to be true against the party stating the same.

Principle of Estoppel was established in the case of "*Pickard v. Sears, 1837 6 Ad & El 469, 474*", wherein a person by his words or conducts induces to another

person to believe a fact and subsequently acts according to that belief or to alter his previous position, the accused is barred from later changing his position.

Estoppel is a disability whereby a party is precluded from alleging or proving in a legal proceeding that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. The principle says that a man cannot approbate and reprobate or that a man cannot blow hot and cold at the same time or that a man shall not be allowed to say one thing at a time and different thing at other time. It must be noted that estoppel is only a rule of civil action and has no or limited application in criminal proceedings.

In criminal law, "Issue-estoppel" is recognized. According to this rule, evidence cannot be led to prove a fact in issue as regards which evidence has already been led and a specifis finding recorded at a criminal trial before a court of competent jurisdiction. Thus, it does not constitute a direct ban to the subsequent trial of a person for an offence other than the one arising out of the same transaction, for which such person was on trial previously resulting in acquittal or conviction in such trial. The rule only relates to the admissibility of evidence which is designed to upset a finding of fact recorded by a court at a previous trial.

Estoppel is dealt with in Section 115 to 117 of the Evidence Act. While, Section 115 contains the general principle of estoppel by conduct, Section 116 and 117 are instances of estoppel by contract. However, there are other recognized instances of estoppel, viz., The Indian Contract Act (Section 234), The Specific Relief Act (Section 18), The Transfer of Property Act (Section 41 and 43). Estoppels which are not proved by the Evidence Act may be termed 'equitable estoppels'.

Kinds of Estoppel

Following are the different kind of estoppels:-

1. Estoppel by Record

   It is mainly concerned with the effects of judgment and their admissibility in evidence, this form of estoppels deals with Section 11 - 14 of the Code of Civil Procedure and Section 40-44 of the Indian Evidence Act. It arises when a judgment has been given by a competent court and due to that a person, who was a party or his representative to the case already decided is estopped to reopen the case. This principle is not used in India but we use the principle of Res judicata to get the same effect. It should be noted that an appeal is considered to be the continuation of the same case and thus it will not come under the principle of Res-judicata.

2. Estoppel by Deed

When a party has entered into an engagement by a deed claiming certain fact, neither he nor his representatives can contest these facts later. This principle only applies between parties and privies. No estoppels can rise from material, which are non- binding and irrelevant to the matter. If a deed is tainted or fraud, no estoppel can arise from it.

3. Estoppel by Pais or Conduct

Estoppel in pais arises from an agreement, contract, act or conduct of misrepresentation, negligence and omission which has induced in the change in position in accordance with the acts or conduct of the other party. A man with his words or conduct induces other person to believe a fact and act in accordance with the same, which he would not have otherwise had he been aware of this misrepresentation, the estoppels prohibits the man from denying the existence of these facts. Estoppel in pais is dealt with under Section 115 to 117 of the Indian Evidence Act, 1892.

"Pranaya Ballari Mohanty v. Utkal University, AIR 2014 Ori 26"

It was said that a university cannot withdraw its results and say it's wrong after as long as 20 years. The candidate in question had acquired her PhD qualification and she was working as a lecturer. The university was held to have become bound by estoppel, wavier and acquaintance.

4. Equitable Estoppel

When a person tries to take a legal action that would conflict with his previously given statements, claims or acts, this legal principle would prohibit him from doing so. So, the plaintiff would be stopped from bringing a suit against the defendant who acted pursuant to the commands of the plaintiff. Estoppels which are not covered by the Evidence Act may be termed equitable estoppels. But according to Prof. V.P. Sarathi, this is a misnomer as estoppel was originally an equitable doctrine.

5. Estoppel by Silence

Where there is an inherent duty of one person to inform the other person of accurate facts and circumstances but remains silent, his failure to discharge this duty will work as estoppels against him. In a scenario there was no duty for the person to speak, no estoppel can be imposed. Silence of such a character which could lead to misrepresentation and subsequent fraud, this would operate as a ground for estoppel.

6. Estoppel by Acquiescence

When one party, through a legitimate notice, informs the other party about the facts of a claim, and the other party fails to acknowledge it, that is, neither he/she challenges it nor does refute it within a reasonable period of time. The other party now would be estopped from challenging it or making any counterclaim in the future. The other party is said to have accepted the claim though reluctantly, that is, he/she has acquiesced it.

7. Estoppel by Negligence

Ground of negligence in shown in the plea of estoppel as, the party owned a duty towards the general public or anyone else towards whom he has acted negligently through words or conduct. For plea of estoppel based on negligence to stand, the party must establish that the act of negligence was part of the transaction itself and it should be so connected with the result to which it led that it would be impossible to consider these two separately.

8. Promissory Estoppel

Doctrine of estoppel has gained a new dimension in recent years with the recognition of an equitable doctrine of 'promissory estoppel' both by English and Indian courts. The 'promissory estoppel' binds a party by his promise made to the other party, having faith in which the other party has taken an action. The party cannot make contracting or conflicting statements later on, neither he can go back on his words.

Promissory estoppels cannot be invoked if change in the representation made by a government official is beyond his powers. Government agencies are not entirely immune from the operation of promissory estoppels. Government agencies are required to work within the framework of the legal structure. Government agencies are not allowed to backtrack on their promises.

Doctrine of promissory estoppels cannot be build against those agreements which are in contravention of the law. If a promise made by an executive officer is beyond his power, no estoppel can be imposed. A mere promise to make a gift will not create an estoppel. It would require a clear and unequivocal promise to import the doctrine into a matter.

"LML ltd. v. State of Uttar Pradesh, (2008) 3 SCC 128"

In this case, Supreme Court observed that the doctrine of promissory estoppel is premised on the conduct of one party to another so as to cause the other party

to make changes as if the said representation will be acted upon. It provides for a cause of action it need not necessarily be a defence.

Difference between Estoppel & Res Judicata

Srl. No.	Estoppel	Res Judicata
1.	Estoppel is that rule which prohibits a person from contradicting what was earlier said by him in a court of law.	Res judicata is that principle which prohibits the other courts from deciding on the same matter, between the same parties which has already been decided by a competent court.
2.	Estoppel is based upon the rule of equity which is the natural law of the land.	Res judicata has been recognized by the law as a legal procedure.
3.	The rule of estoppel looks into the aspects of equity, justice and good conscience.	Res judicata deals only with the aspect of public policy.
4.	Estoppel arises from the words or the action or conduct of the party.	Res judicata arises out of the decision taken by the court, that is the final decision of the court.
5.	Estoppel bans a person from rebutting what has been once said by him before the court.	In this case, the court is banned from hearing the cases which has already been decided by a competent court.
6.	Estoppel prevents the parties from performing certain acts which is denying to what was earlier said by him.	Res judicata prevents the court from performing certain action which is dealing with the same case which has already been decided by some other court.
7.	The principle of estoppel has been incorporated from sections, 115 to 117 of the Indian Evidence Act, 1872.	The principle of Res judicata has been incorporated under section 11 of the Code of Civil procedure, 1908.
8.	Estoppel is implied through the actions or the conduct of the parties.	Based on previous decision given by a competent court, Res judicata is claimed by the parties.

Difference between Estoppel & Promissory Estoppel

Srl. No.	Estoppel	Promissory Estoppel
1.	Representation is made to an existing fact.	Representation of a future intention is made.
2.	It is supported by parties consideration.	It is supported by parties future conduct and not a consideration.
3.	Estoppel has been dealt in section 115 to 117 of the Indian Evidence Act, 1872.	There exists no provision in the Indian Evidence Act, 1872 which defines promissory estoppel.
4.	It is only available as a defence	It can be used as a cause for action to obtain damages.
5.	Estoppel has been dealt in tort law.	Promissory estoppel has been dealt in the Indian Contract Act, 1872.

Exception to Doctrine of Estoppel

There are various exceptions to the doctrine of estoppel:

1. No estoppel against a minor — Where a minor represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him, then in an action founded on contract, the infant is not estopped from setting up infancy as a plea. However, equity demands that he should not retain a benefit which he had obtained by his fraudulent conduct.

2. When true facts are known to both the parties - Section 115 does not apply to a case where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement.

3. Fraud or negligence on the part of other party — If the other party does not believe the representation but acts independently of such belief, or in cases where the person to whom representation is made is under a duty to make a further inquiry, the estoppel will not operate. Likewise, if there is a fraud on the part of the other party, which could not be detected by promisor with ordinary care, the estoppel will not operate.

4. When both the parties plead estoppel — If both the parties establish a case for application of estoppel, then it is as if the two estoppels cancel out and the court will have to proceed as if there is no plea of estoppel on either side. Further, if both sides had laboured under a mistake however bona fide or genuine, the plea of estoppel may not be available.

5. No estoppel on a point of law - Estoppel refers only to a belief in a fact. If a person gives his opinion that law is such and such and another acts upon such belief, then there can be no estoppel against the former subsequently asserting that law is different. One cannot be estopped from challenging the effectiveness of something (e.g. partition deed) for want of law (e.g. registration). Representations under Section 115 should be of facts, not of law or opinion.

6. No estoppel against statute/ sovereign acts - A rule of law cannot be nullified by resorting to the doctrine of estoppel. A person who makes a statement as to the existence of the provisions of a statute is not estopped, subsequently, from contending that the statutory provision is different from what he has previously stated. For example, where a minor has contracted by misrepresenting his age, he still can afterwards disclose his real age. It is a rule of law of contract that a minor is not competent to contract and that rule would be defeated if a minor not permitted to disclose his real age. Hence there can be no estoppel against the provisions of a statute.

Estoppel in Evidence Act

Section 115 of the Indian Evidence Act, 1872, defines the term "Estoppel". Estoppel is based on the principle that it would unjust, if a person intentionally by conduct or in any other manner has induced other person to believe and act upon such a representation, neither he or those representing can in a subsequent Court proceedings deny the truth. The accused does estoppels through omission, act or declaration. The doctrine established in this section is not a rule of equity rather rule of evidence, applied in the Court of law. The illustration mentioned in Section 115 is the case of "*Pickard v. Sears, 1837*".

Following are the three essential ingredients of Section 115 are:

1. A representation is made by a person to another;

   Representation of the existence of a fact may arise in any way — a declaration, act or omission. The focus of law of estoppel is the position in law of party who is induced to act. Thus, a person who is estopped or prevented from denying his representation may not have intention to deceive and may himself be acting under mistake or apprehension then the estoppel will nonetheless operate in such cases.

   Representation of a mere intention cannot amount to an estoppel. A representation as to the legal effect of an instrument (if not ultra vires) will create an estoppel. A representation may also arise from an "omission" to do an act which one's duty requires one to do. An estoppel will arise when the failure to

perform one's duty has misled another and also the duty should be a kind of legal obligation (Estoppel by negligence).

2. Other person believes it and acts upon such belief thereby altering his position; and

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

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

3. Then in a suit between the parties, the person who represented shall not be allowed to deny the truth of his representation.

   If the party to whom the representation was being made somehow recognizes that it was a false representation then he would not be entitled to the claim of the doctrine of estoppels.

Estoppel of Tenant & Licensee

Section 116 of the Indian Evidence Act, 1872 speaks about, "Estoppel of tenant and of license of person in possession". This section states that during the continuance of the tenancy, the tenant of the immovable property or any person claiming through such tenancy can deny to the fact that at the beginning of the tenancy it was the landlord who had the title over the immovable property. Further, the Section also explains that a person who came upon an immovable property by the license cannot deny the fact that the person from whom he got the license, that is, in whose possession the immovable property, had the title at the time when he got his license.

A relationship between a tenant and a landlord can be created either by written contract or verbal contract. The beginning of the tenancy can be marked by the taking of possession of the land, or by the payment of rent, or other circumstances. In licensor- licensee relationship the same rule operates like that in the landlord-tenant relationship. When a licensee obtains the possession through licence cannot deny the title to the licensor unless the relationship ceases to exist.

When Landlord plead Estoppel

In the following situations, the landlord can plead estoppel:

- When the tenancy itself stands disputed then the tenant can challenge the landlord's title on the property. The tenant would not be estopped from doing so.
- In cases where the tenancy has been moved by fraud, coercion, misrepresentation or mistake.

If no such circumstances occur than the tenants would be restricted by the doctrine of estoppel. However, the tenants are always at liberty to overturn the lease or change its status as a lessee.

Estoppel of acceptor of bill of exchange etc

Section 117 of the Indian Evidence Act, 1872 speaks about, "Estoppel of acceptor of bill of exchange, bailee or licensee". This section states that the acceptor of the bills of exchange cannot deny the person who is supposed to draw the bills, from drawing it or endorsing it. Also no bailee or licensee can deny the fact that at the time when the bailment and license began, the bailor and the licensor had the authority to make bailment or to give license.

1. The person accepting the bills of exchange can deny that the bills of exchange were really drawn by the very person who showed to have drawn it.
2. If the bailor mistakenly delivers the goods to some third party instead of the bailee, he can prove that a third party has the right over the goods bailed against the bailor.

This section demarcates that the person who accepts the bills of exchange although cannot deny that the person drawing the bills has the authority to draw or to endorse it but can deny that the bills were actually drawn by the person by whom it appeared to have been drawn.

A bailee or a licensee cannot deny that at the commencement of the bailment or license the bailor or the licensor have the authority to make the bailment or grant the license. But according to explanation 2 if the bailee delivers the goods to a third person then the bailee will have the right to prove that such person is having the right to such goods other than the bailor. In this section, the bailee and the license are placed in the same position as that of the tenant.

Competency of witness

Bentham, explains the 'witnesses' as the eyes and ears of justice. But the general definition of 'witness' is a witness is a person who voluntarily provides evidence to clarify or to help the court in determining the rights and liabilities of the parties in the case. Witnesses can either be the person related or experts with valuable input for the case. Pieces of Evidence are placed in the court on the basis of witness and even the genesis can be proved of the documents can be proved in the court.

Various types of witnesses are: -

- Prosecution Witness - A witness for the prosecution is a witness who is brought into the court in order to provide testimony which supports the prosecution's overall case or would produce some form of statement which helps to push the jury in favor of the prosecution's argument.

- Defense Witness - A witness summoned on the request of the defending party is known as a Defense Witness.

- Expert Witness - An expert witness, professional witness or judicial expert is a witness, who by virtue of education, training, skill, or experience, is believed to have expertise and specialised knowledge in a particular subject beyond that of the average person, sufficient that others may officially and legally rely upon the witness's specialized (scientific, technical or other) opinion about an evidence. [Section 45]

- Eye Witness - An individual who was present during an event and is called by a party in a lawsuit to testify as to what he or she observed. An eye witness must be competent (legally fit) and qualified to testify in court.

- Hostile Witness - A hostile witness may be defined as one who from the manner in which he gives evidence (within which is included the fact that he is willing to go back upon previous statements made by him), shows that he is not desirous of telling the truth to the court where therefore one comes across a witness of this description. [Section 154]

- Child Witness - The witness understands the questions, and ascertain in the best way it can, whether from the extent of his intellectual capacity and understanding he is able to give a rational account of what he has seen, heard or done on a particular occasion. [Section 118]

- Dumb Witness - A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs, but such writing must be written and the signs made in open Court. [Section 119]

- Chance Witness - If by coincidence or chance a person happens to be at place occurrence at the time it is taking place, he is called a chance witness.

- Accomplice Witness - A witness to a crime who, either as principal, accomplice, or accessory, was connected with the crime by unlawful act or omission on his or her part, transpiring either before, at time of, or after commission of the offense, and whether or not he or she was present and participated in the crime. [Section 133]

- Interested Witness - Interested witness is one who is interested in securing conviction of a person out of vengeance or enmity or A witness in a trial who has a personal interest in the outcome of the matter at hand.

- Stock Witness – A 'stock witness' is a person who is at the back and call of the police. He obliges police with his tailored testimony. Such a witness is used by the police in raid cases. Such witnesses are highly disfavoured by the judges.

Sections 118-121 and Section 133 (Accomplice) deal with the competency of the persons who can appear as witnesses. Section 134 lays down rule as to the number of witnesses required to give evidence in a case. A witness may be competent and yet not compellable i.e. the court cannot compel him to attend and depose before it (viz. Foreign ambassadors and sovereigns).

Who may testify

Section 118 of the Indian Evidence Act, 1872 speaks about, "Who may testify". This section says that all persons are competent to testify, unless the court considers that, by reason of tender age, extreme old age, disease (of body or mind), or infirmity, they are incapable of understanding the questions put to them, and of giving rational answers. Even a lunatic is competent to testify, provided he is not prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Thus, no person is particularly declared to be incompetent. It is wholly left to the discretion of the court to see whether the person who appears as a witness is capable of understanding the questions put to him and of giving rational answers. Thus, competency is a rule, while incompetency is an exception.

If a witness is a relative of the person who produces him, his statement cannot be discarded only for that reason, unless it is shown that the statement is a tainted one and was given only to benefit the person producing him. The credibility of the witness does not get affected merely because he is related to the deceased or does

not state the incident in the same language or manner which in the opinion of the court is natural.

Child Witness

Indian jurisprudence has accepted child witnesses as a part of the legal system. The Supreme Court has, on occasion affirmed that the test of competency, if satisfied by a child even as young as 5 years old, would allow him to be a witness. The view of the Supreme Court has been to discard age as a deciding factor in terms of disqualification. The Supreme Court has repeatedly affirmed that the testimony of children can be admitted as evidence, but the standard of scrutiny is to be maintained whilst ascertaining how much importance must be placed on each testimony.

When the child goes into a witness box it is the general practice for the judge to ask a few questions to see that the child is intelligible enough to give rational answers to those questions and has the rough idea between truth and falsehood.

Child witnesses are dangerous witnesses as they can be influenced very easily therefore uncorroborated evidence of child witness is unsafe and thus careful scrutiny of the evidence is suggested. Therefore, the testimony of a child witness must be scrutinized by the court in each single case so as to determine the relevance of the answers and the extent of comprehension. The Court must also ensure that the testimony is not tainted or doctored and that it is sufficiently reliable. It is a sound rule in practice not to act on the uncorroborated evidence of a child, but this is a rule of prudence, and not of law.

A minor is not competent to swear in an affidavit. He also cannot affirm statements recorded in an affidavit. An affidavit sworn by a child is not admissible under sections 4, 5 of the Oaths Act and Section 3 of the General Clauses Act. The courts should, however, always record their opinion that the child understands the duty of speaking the truth.

"P Ramesh v. State Rep by Inspector of Police, Crl. Appeal No. 1013/2019"

On **9th July 2019**, Hon'ble Supreme Court observed that child witnesses in a criminal case cannot be termed incompetent merely because they were unable to identify the person before whom they were deposing, i.e. they did not know the judge and the lawyers.

In this case, two of the prosecution witnesses in a murder case were minor children of the accused and the deceased. The Trial Judge did not record their evidence on the ground that they were unable to identify the person before whom

they were deposing, i.e. they did not know the judge and the lawyers. However, the child witnesses had stated that they had come to depose in evidence about the circumstances leading to the death of their mother. The Trial Court, based on other evidence on record convicted the accused under Section 302 and 498A of the Indian Penal Code.

The High Court, on the appeal filed by the accused, found that the grounds which weighed with the trial judge in declining to allow the recording of the evidence of child witnesses after initial questions were put to them were erroneous.

The bench comprising Justice D. Y. Chandrachud and Justice Indira Banerjee agreed with this view of the High Court and observed that the reason which weighed with the trial judge in preventing the evidence of child witnesses from being recorded was manifestly erroneous and would result in a miscarriage of justice. They stated before the trial judge that they were in court to tender evidence in regard to the circumstances pertaining to the death of their mother.

> *"In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."*

"Satish & Anr. etc v. State of Haryana, Crl. Appeal No. 757/2016"

On **26th May 2017**, the Supreme Court bench of Justices L. Nageswara Rao and Navin Sinha, confirmed the conviction of a woman for the murder of her husband, based on the testimony of her 12-year old son that he saw her presence in the room when his father was killed by two assassins, and that she asked him to leave the room on the biding of one of the assailants.

Both the trial court and the Punjab and Haryana High Court have found the child witness reliable and convincing. Justice Navin Sinha, who authored the judgment, observed that-

> *"We do find it a little strange, according to normal human behaviour, that at the dead of night, the appellant (the mother of the child witness), after witnessing an assault on her own husband, did not rush to the house of PW-1 (neighbour) for informing the same and sent her minor son for the purpose. The fact that she created no commotion by shouting and seeking help reinforces the prosecution case because of her unnatural conduct. We also cannot lose sight of the fact that the child witness was not deposing against another family member or a stranger, but his own mother. It would call for courage and conviction to name his own mother, as the child was grown up enough to understand the matter as a witness to a murder."*

Dumb Witness

Section 119 of the Indian Evidence Act, 1872 speaks about, "Witness unable to communicate verbally". This section says that a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, the evidence so given shall be deemed to be oral evidence.

The reason for insisting that the signs and the writing are to be made in the court is for the purpose that the court should interpret the signs or make sure that he clearly understood the question put forward to him before he writes. If a commissioner is appointed to take evidence all he can do is to see and interpret the signs made by the witness his interpretations can as well be different from what the judge interprets. If the witness happens to be deaf and dumb then the questions have to be written on and showed to him. But this can only be done if he is a literate person. A huge amount of care is to be taken while taking evidence from these type of witnesses. It is expedient for the witness as well the interpreter to take the oath before giving the evidence otherwise it would not be admissible.

Husband/ Wife of any party

Section 120 of the Indian Evidence Act, 1872 speaks about, "Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial". This section says that in all civil proceedings, the parties to the suit are competent witnesses. Therefore, a party to a suit can call as his witness any of the defendants to the suit. The plaintiff and the defendant can give evidence against each other. Husband and wives are, in all civil and criminal cases, competent witnesses against each other (In olden days, the husband and wife were one person in law).

Judge & Magistrate as witness

Section 121 of the Indian Evidence Act, 1872 speaks about, "Judge and Magistrate". Under this section a judge or Magistrate shall not be compelled to answer questions as to

(a) His conduct in court as such judge or Magistrate, or

(b) Anything which came to his knowledge in court as such judge or Magistrate, except upon the order of a court to which he is subordinate. He may be examined as to other matters which occurred in his presence while he was so acting.

A judge or magistrate is a competent witness. A judge can be witness to relevant facts as an ordinary man. If a judge is personally acquainted with any material or particular fact he may be shown as a witness in the case. If he saw something happen, he can testify to it even if it happened before him when he was presiding as a judge or magistrate. If, for example, the accused attempted to shoot down a witness while he was testifying before a judge, the judge may be questioned as to what he saw.

But, subject to this, no judge or magistrate can be questioned as to his judicial conduct or as to any matter that came to his knowledge while acting as such judge or magistrate. However, a judge can be questioned even as to judicial matters with the court's order. Moreover, a judge can waive his privilege and voluntarily offer to explain his conduct as such judge or magistrate. The privilege under Sec. 121 is also available to an arbitrator.

Number of Witness

Section 134 of the Indian Evidence Act, 1872 speaks about, "Number of witness". This section says that no particular number of witnesses shall in any case be required for the proof of any fact. How many witnesses are necessary for the proof of a fact is wholly left to the judgment of the court. As a general rule, a court can and may act on the testimony of a single witness, though uncorroborated. The court is not concerned with the number of the witnesses in a case but with the quality of those witnesses. If the court is satisfied with the testimony of either one of the witnesses, the other numerous witnesses contending similar testimony would be immaterial to the case.

This exclusively does not provide for any particular minimum number of required witnesses in a case, hence, testimony of sole witness in a case is credible if it is enough to prove the case beyond reasonable doubt.

Witness Protection Scheme

A witness is the one with the first hand information of the crime committed and plays a huge role in the investigation process as well revealing the truth behind the circumstances that led to the crime. Therefore, the witness protection scheme is necessary to encourage the witnesses to produce testimony in the court without the fear of being killed or tortured while helping the court in deciding the case.

Witness Protection Scheme, 2018 provides for protection of witnesses based on the threat assessment and protection measures inter alia include protection/change of identity of witnesses, their relocation, installation of security devices at the residence of witnesses, usage of specially designed Court rooms, etc. The Scheme provides for three categories of witness as per threat perception:

- Category 'A': Where the threat extends to life of witness or his family members, during investigation/trial or thereafter.
- Category 'B': Where the threat extends to safety, reputation or property of the witness or his family members, during the investigation/trial or thereafter.
- Category 'C': Where the threat is moderate and extends to harassment or intimidation of the witness or his family member's, reputation or property, during the investigation/trial or thereafter.

The quality of witness is kept over the quantity and need for a certain witness protection scheme has been identified considering the importance of the witnesses and the threats they are subjected to.

Privileged Communication

There are certain matters which a witness cannot either be compelled to disclose or even if the witness is willing to disclose, he will not be permitted to do so. Such matters are known as 'privileged communications'. Privileged communication is the communication between individuals who are in a protected relationship by the virtue of which, the details of their communication cannot be disclosed. Privileged communication exists to protect the disclosure of information during the subsistence of confidential or protected relationships. These communications are such that they may not be used as evidence in a court of law against the persons communicating due to the specific nature of their relationship.

The production of certain communications and documents is either privileged from disclosure or prohibited from being disclosed, as a matter of public policy or on the ground that the interest of State is supreme and overrides that of an individual.

Section 122-132 declares exceptions to the general rules that a witness is bound to tell the truth, and to produce any document in his possession or power relevant to the matter in issue. They deal with the privilege of certain classes of witnesses.

Communications during marriage

Section 122 of the Indian Evidence Act, 1872 speaks about, "Communications during marriage". This section states that a married person:

- Shall not be compelled to disclose any communication made to them during the marriage by their spouse or ex-spouse.
- They are not permitted to disclose anything without their spouse's or ex-spouse's consent even if they are willing to.

Under this section, it is irrelevant whether the communication was sensitive or confidential in nature or not. Any conversation or communication between a husband and wife is privileged no matter what the means of communicating was. If the communications are made before marriage or after the dissolution of the marriage that will not come under the privilege given by this section. However, the communications made during the marriage will be under the privilege under this section even after the marriage has been dissolved. Hence the phrase, "to whom he is or has been married" used in this section. Any communication made before the marriage or after its dissolution will not have this privilege.

The idea behind this privilege is that if testimonies are accepted from private communications between spouses, such testimonies have the power to destroy household peace among families and create a domestic broil. It will hamper the mutual trust and confidence between the spouses and weaken the marital bond.

However, this privilege is not absolute and information can be disclosed if:

- The person who made such communication or their representative gives free consent; or
- There is a suit between a married couple; or
- One of the spouses has been prosecuted for any crime committed against the other.

Affairs of the State

Section 123 of the Indian Evidence Act, 1872 speaks about, "Evidence as to affairs of State". This section prohibits any person from giving evidence which has been taken from unpublished documents that concern the affair of the state. This may only be done if the head of the concerned government department allows

disclosure. This is done in the interest of the security of the state and wellbeing of the public.

The phrase "Affairs of State" has not been per se described in this section or any other provision in this Act. So, it is not very practical for the judiciary to come up with a single definition of the phrase. Therefore, the Court must determine whether any documents fall under this category, depending upon the facts and circumstances of every case. However, it is clear that only the Court has the power to decide whether any document can be classified as an 'unpublished document of state affairs'.

Official Communications

Section 124 of the Indian Evidence Act, 1872 speaks about, "Official Communications". This section states that a public officer cannot be compelled to disclose any communication made to him in official confidence if he believes that such disclosure could harm the public interests.

While Section 123 talks about unpublished documents related to affairs of the state, Section 124 restrains the disclosure of all communication made in an official capacity, be it in writing or not and it is immaterial whether they relate to state affairs or not.

The privilege under this section is absolute. Although there is absolute discretion under this section for the officer who is asked to disclose the information by the court has the power to see if the matter really is a matter of public interest. If the court is of the opinion that it is not a matter of public interest then the court can compel the officer for its disclosure. In deciding whether the document is a matter of public interest the court can look into the document and decide that fact. If the court agrees to the claim by the officer then the document is given back to the officer without disclosing the matter to anyone else.

Although the term "Public officer" is not defined under the Act, here public officer will include all such officers who in discharge of their regular duties receive communications made to them in official confidence and are expected not to disclose any of that confidential information to others.

Secret Informants

Section 125 of the Indian Evidence Act, 1872 speaks about, "Information as to commission of offences". This section says that a Magistrate or a Police Officer cannot be compelled to reveal as to how they got any information regarding the commission of a crime. This section also says that a Revenue Officer cannot be

compelled to reveal as to how he got any information regarding the commission of any offence against the public revenue.

This section can be said to be present for the protection of sources because if sources of information will have to be disclosed then the sources will be embarrassed and will refuse to give such information.

Professional Communications

Section 126 of the Indian Evidence Act, 1872 speaks about, "Professional Communications". Professional privileged communication refers to the communication between a legal advisor and his client. The communication between two such persons in furtherance of the professional employment of the advisor is protected and the legal advisor cannot be made to disclose such information. The protection under this section extends to any person registered as a legal practitioner in India as the section specifies the category of "barrister, pleader, attorney or vakil" which in India means an advocate. It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

This principle is based on the fact that its inexistence would render advocates incapable of defending their clients. Clients would constantly worry about being exposed by their attorney and would not be inclined to share the entirety of details of their case. In the absence of such a prohibition, the solicitation of the best possible legal advice would not be possible.

Illustration: - 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 illustration is very clear. A man committed a crime of forgery he goes to a lawyer and says to him that, "I have committed the crime of forgery and I wish you to defend me". Since the defence of a criminal is not an offence this communication will come under the purview of this section. Even after the case is over and the lawyer is not anymore working under the person, he is not allowed to disclose the information unless the client consents as said in the explanation to this section.

If at the time of the communication, the parties were in a relationship of Legal Advisor & Advisee, the communication shall be considered privileged. In the event that the relationship is terminated, the privilege continues to exist. Any communication made with a lawyer before actually appointing him is not protected

under this section. This privilege however, is not absolute. The act itself states that under certain conditions, the privilege does not apply.

Following are the exceptions to Section 126.

(1) Communication made in furtherance of illegal purpose (proviso 1) — Such communications are not protected viz. where a client consulted a lawyer for the purpose of drawing up a bill of sale which was alleged to be fraudulent

(2) Crime or fraud since employment began (proviso 2) — If a lawyer finds in the course of his employment that any crime or fraud has been committed since the employment began, he can disclose such information. It is based on the rule that no private obligation can dispense with that universal one which lies on every member of society to disclose every design, which may be formed contrary to laws of society, to destroy the public welfare.

(3) Disclosure with express consent of client — This section has been enacted for the protection of the client and not of the lawyer. The lawyer is therefore bound to claim privilege unless his client waives it.

(4) Information falling into hands of third person — If the communication is overhead by a third person, he may be compelled to disclose it. The prohibition works against the lawyer, but not against any other person.

(5) Lawyer's suit against client — If the lawyer himself sues the client for his professional services, he may disclose so much of die information as is relevant to the issue.

(6) Joint interest — No privilege attaches to communication between solicitor and client as against persons having a joint interest with the client in the subject matter of communication e.g. as between partners, a company and its shareholders.

(7) Documents already put on record — No privilege is available in respect of such documents.

Note: - As per Section 127, the provision of Section 126 apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

No Privilege waived by volunteering evidence

Section 128 of the Indian Evidence Act, 1872 speaks about, "Privilege not waived by volunteering evidence". This section says that if the party making the communication under Section 126 gives evidence (at his own instance or otherwise) of the matter covered by the communication, that does not amount to a waiver of

privilege. Even if such party calls the lawyer as a witness, it will not amount to a consent to disclosure. But if he questions the lawyer on the very matter of the communication mat will amount to consent and by reason of it the lawyer can disclose the communication.

Confidential Communications

Section 129 of the Indian Evidence Act, 1872 speaks about, "Confidential communication with Legal Advisors". The bar of Section 126 is partially lifted by Section 129. In Section 126, the protection was given to the legal advisors and advocates that they can't be compelled to disclose information about their client unless the client consents. Here in section 129 of the Indian evidence act, the privilege is given to the client himself. The privilege, however, is subjected to a condition i.e. unless the person offers himself as a witness.

As soon as the person in question offers himself as a witness the privilege goes away but only to the extent of that information which may appear to the court as necessary to understand evidence given by him. The protection to the client is necessary because if there is no protection to the client then the protection given to the advocate under professional communication will become illusory.

Production of title deeds of Witness

Section 130 of the Indian Evidence Act, 1872 speaks about, "Production of title deeds of witness, not a party". This section says that an ordinary witness i.e. a witness who is not a party, cannot be compelled to produce — (i) his title-deeds to any property, (ii) any document by which he became the pledgee or mortgagee of any property, and (iii) any document which might tend to criminate him. But he can be so compelled if he has agreed to produce any such document with the person seeking its production.

Production of documents in possession of others

Section 131 of the Indian Evidence Act, 1872 speaks about, "Production of documents of electronic records which another person, having possession, could refuse to produce". This section is an extension of Section 130 and says that if any person is entitled to refuse the production of a document, the privilege or protection of the document/ electronic record should not suffer simply because it is in the possession of another person. Thus, a person in possession of other person's documents (e.g. attorney, vakil) is not compellable to produce them, unless that person (owner of documents) consents to their production.

Witness not excused to answer, which criminate him

Section 132 of the Indian Evidence Act, 1872 speaks about, "Witness not excused from answering on ground that answer will criminate". This section says that where a question put to a witness is relevant to the matter in issue in any suit or in any civil or criminal proceeding, the witness can be compelled to answer it and he cannot be excused from answering it simply because the answer would tend to criminate him to civil or criminal liability or to a penalty or forfeiture. Thus, it is not in the power of the judge to excuse a witness from answering if the question is relevant to the issue.

The proviso to this section, however, protects the witness in an important way. It provides that if a witness has been compelled to give an answer, his answer should not be used to subject him to any arrest or prosecution; nor the answer can be proved against him in any criminal proceeding. Thus, the answers, which die witness is compelled to give, should not constitute any evidence against him. But, if the answer is false, the witness may be prosecuted for giving false evidence (i.e. perjury).

The object of the law is to afford a party, called upon to give evidence, protection against being brought by means of his own evidence within the penalties of the law. The protection is not available when a witness voluntarily answers without any compulsion. When a witness objects to a question being put to him or when he asks the court to be excused from giving answer but he is compelled to give answers, he is said to be "compelled" to give evidence.

The compulsion referred to in proviso does not include the compulsion by the general law of the land (viz. fear of punishment under Section 179, IPC). This is a compulsion which acts against every witness and is inherent in the very idea of a person, being a witness. The giving of evidence is a matter of duty and not of compulsion. Further, Section 132, Evidence Act does not apply to a statement made by a person during an investigation under Section 161, Cr.P.C. A person who is interrogated under Section 161 by a police officer making an investigation is not a witness.

Accomplice

In the Indian Evidence Act 1872, the word accomplice has not been defined; it can, therefore, be presumed as used in the ordinary sense by the legislature.

The Black Law's dictionary defines an "accomplice" as a person who has participated in a guilty act and is liable in a criminal action, by being present at the place where crime has been committed by aiding or abetting in it even when he is absent from

the place where crime has been committed, the person participated having advised or encouraged it.

The Court defined accomplice as one who is associated with an offender or offenders in the commission of a crime or one who knowingly or voluntarily helps and cooperates with others in the commission of the crime. The term 'accomplice' may include all *particeps criminis* i.e., a partner in crime. However, there are two scenarios where a person can be held to be an accomplice, even when he is not. In cases where where he was a receiver of stolen property or an accomplice in a previous similar offence committed by the accused when evidence of the accused having committed crimes of identical type on other occasions was admissible to prove the system and intent of the accused committing the offence charged.

A person cannot be said to be an accomplice unless he consciously does the crime with the accused for which he could be convicted for the criminal act. A person who did not take part in the offence but was just present at the time of commission of the crime and he did not make any attempt in order to report about the commission of the crime nor did he made any attempt to prevent the crime cannot be said to be an accomplice to the crime.

Categories of Accomplice

A person is an accomplice when he participates in the commission on the same crime. There are two broad categories of modes of participation in crime.

(1) Principals in the first degree or second degree, and
(2) Accessories before the fact, or after the fact.

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 - When a person incites, counsels connives at, encourages or procures the commission of the crime becomes an accessory before the fact. These are those accomplices who counsel, incite, encourage or procure the commission of the crime. A person is an accessory before the fact if he participates in the preparation of the crime. They are not an accomplice. For a person to be accomplices, he must participate in the commission of the same crime as the accused person is charged with in the trial.

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.

Not an Accomplice

The following classes of persons are not accomplices:

(i) When a person, under threat of death or other form of pressure, commits a crime along with others, he is not a willing participant in it, but victim of such circumstances.

(ii) A person who witnesses a crime, and does not give information of it out of tenor.

(iii) Detectives, paid 'informers' and 'trap or decoy witnesses (to trap the accused) are not accomplices. A court may convict on an uncorroborated testimony of trap witnesses if it is satisfied of their truthfulness.

It is always for the judge to decide whether it is safe to rely and act upon a trap-witness. His partiality for the prosecution is a factor which can hardly be ignored.

Testimony of an Accomplice

Section 133 of Indian Evidence Act speaks about, "Accomplice as competent witness". This section says that when an accomplice is not a co-accused under trial in the same case," an accomplice is a competent witness and his evidence could be accepted and if the court feels that there is enough evidence to support the testimony of the accomplice then an conviction can be based on such a testimony.

But this competency that has been given to him by the process of law does not relieve him of the character of an accused. No accused should be forced to be a witness against himself. But in case an accomplice is given a pardon, on the condition that he is speaking the truth, and is not acting under any pressure, and he is not forced to give self-incrimination as is the rule given in Article 20(3) of the Constitution of India, 1950.

The law of evidence, as laid down in Sections 306 and 308, Code of Criminal Procedure, remains unaffected by this law. When an accomplice is pardoned, he is bound to make a complete and truthful disclosure. If he fails to do so, he would be tired of the charges levelled against him originally, and his statement would then be used against him under Section 308.

Important of Section 114 in Section 133

There is no contrast between Section 133 and Section 114. These are the two provisions dealing with the same subject. There is no opposition between Section 133 and Section 114, illustration (b) because the illustration only says that the court 'may' presume certain state affairs. It does not put a hard and fast guideline. Section 133 lays down the rule of law. But a rule of prudence is laid down in Section 114, illustration (b). It does not suggest a conclusive presumption. Section 133 gives an authorization to the courts to convict the accused on the corroborated testimony of an accomplice, but since the witness is himself involved in a criminal act, he may not be trustworthy.

When the Court feels that testimony of the accomplice may not be trustworthy then that the courts are guided by the principle laid down in Section 114 that if the Court finds it necessary, it can presume that the testimony given by the accomplice is unreliable unless his statements are supported or verified by some independent evidence. This rule of prudence has now come to be accepted as the rule of law by judicial legislation both in Indian and English law. Corroboration is necessary in case of testimony of an accomplice. The nature and extent of corroboration of accomplice evidence may necessarily vary with the circumstances of each case.

The reason of not trusting on the testimony or evidence given by an accomplice is the nature of the evidence. The evidence by an accomplice is already tainted since:

1. he is a person of low character who has participated in a crime and is therefore likely to have no regard to the sanctity of his oath;
2. he is interested in falsely destroying the facts in order to shift the guilt from himself; and
3. he has the inducement of either a promised or implied pardon for his own part in the crime, and is therefore likely to be biased in favour of the prosecution.

"Somasundaram @ Somu v. The State Rep. by the DCP, Crl. Appeal no. 403/2010, SC"

On **03rd June 2020**, Hon'ble Supreme Court observed that it would be unsafe to convict an accused solely based on uncorroborated testimony of an accomplice. The bench comprising of Justices Rohinton Fali Nariman, KM Joseph and V. Ramasubramanian said that an accomplice, to be believed, he must be corroborated in material particulars of his testimony. The bench observed that-

> *"The combined result of Sections 133 read with illustration (b) to Section 114 of Evidence Act is that the Courts have evolved, as a rule of prudence, the requirement that it would be unsafe to convict an accused solely based*

on uncorroborated testimony of an accomplice. The corroboration must be in relation to the material particulars of the testimony of an accomplice. It is clear that an accomplice would be familiar with the general outline of the crime as he would be one who has participated in the same and therefore, indeed, be familiar with the matter in general terms. The connecting link between a particular accused and the crime, is where corroboration of the testimony of an accomplice would assume crucial significance. The evidence of an accomplice must point to the involvement of a particular accused. It would, no doubt, be sufficient, if his testimony in conjunction with other relevant evidence 86 unmistakably makes out the case for convicting an accused.

Corroboration must be such that it renders the testimony of the approver believable in the facts and circumstances of each case. The testimony of one accomplice cannot be, ordinarily, be supported by the testimony of another approver. We have used the word 'ordinarily' inspired by the statement of the law in paragraph-4 in K. Hashim (supra) wherein in this Court, did contemplate special and extraordinary cases where the principle embedded in Section 133 would literally apply. In other words, in the common run of cases, the rule of prudence which has evolved into a principle of law is that an accomplice, to be believed, he must be corroborated in material particulars of his testimony. The evidence which is used to corroborate an accomplice need not be a direct evidence and can be in the form of circumstantial evidence."

The bench also discussed the procedure of making an accomplice an approver*:*

"An accomplice is in many cases, pardoned and he becomes what is known as an approver. An elaborate procedure for making a person an approver, has been set out in Section 306 of the CrPC. Briefly, the person is proposed as an approver. The exercise is undertaken before the competent Magistrate. His evidence is recorded. He receives pardon in exchange for the undertaking that he will give an unvarnished version of the events in which he is a participant in the crime. He would expose himself to proceedings under Section 308 of the CrPC. Section 308 contemplates that if such person has not complied with the condition on which the tender of pardon was given either by wilfully concealing anything essential or by giving false evidence, he can be put on trial for the offence in respect to which the pardon was so tendered or for any 88 other offence of which he appears to be a guilty in connection with the same matters. This is besides the liability to be proceeded against for the offence of perjury. Sub-section (2) of Section 308 declares that any statement which is given by the person accepting the tender of pardon and recorded under Section 164 and Section 306 can be used against him as evidence in the trial under Section 308(1) of the CrPC. An accomplice or an approver are competent witnesses. An approver is an accomplice, who has received pardon within the meaning of Section 306. We would hold, that as between an accomplice and an approver, the latter would be more beholden to the version he has given

having regard to the adverse consequences which await him as spelt out in Section 308 of the CrPC. as explained by us. It is also settled principle that the competency of an accomplice is not impaired, though, he could have been tried jointly with the accused and instead of so being tried, he has been made a witness for the prosecution."

Accomplice & Co-accused

Section 30 of the Indian Evidence Act says that the Court may consider the confession of co-accused as evidence. It may be noted that the confession of the co-accused must implicate himself as well as some other accused. Further, the confessions made at the previous trial will not be relevant. When they are jointly tried, but for different offences, in those cases, confession is not relevant. Further, the confession should be a free confession. A confession by a co-accused cannot be treated in the same way as the testimony of an accomplice:

1. The confession of co-accused is not 'evidence,' as it is not given in the presence of the accused, nor is it not recorded on oath, and nor its truth can be subject to cross-examination. However, when the accomplice evidence is taken on oath and tested by cross-examination, a higher probative value is thus given to it.

2. The basis of a conviction cannot be solely based on the confession of the co-accused. There is a need of corroboration of such evidence if such evidence is not corroborated and the court feels that confession of the co-accused is free and natural the court can consider it. A conviction cannot be termed illegal merely because it proceeds upon the corroborated testimony of an accomplice.

3. The philosophy of Section 30 is that confession of a co-accused gives a degree of sanction to the truth of his confession against others or himself.

Evidence of a co-accused is very weak evidence. The evidence of co-accused can be used only to corroborate other evidence on record if the confession affects himself as well as some other accused person.

Accomplice & Approver

An accomplice may be an approver also. The approver is an accomplice who is tendered pardon by the Court on condition that he makes true and full disclosure of the whole circumstances of the case. Approver has been dealt with under the provisions of Section 306 of Cr.P.C. He is known under Cr.P.C as an accomplice to whom the Court grants a pardon. Thus, an "approver" is always an 'accomplice,' but an 'accomplice' is not necessarily an approver. Section 306 tenders pardon to an accomplice. The approver's evidence is looked upon with great suspicion as he is

some way concerned or associated in commission of the same crime. But, if found trustworthy, it can be decisive in securing a conviction.

Examination of Witnesses

The examination of witnesses is an integral part of a criminal trial. Witness testimonies are one of the most reliable evidence because the person giving the statements has personally witnessed the event happen. It is a very important part of a criminal and civil trial. It is not important only for law students, it is also important for practicing lawyers to know the art and law related to examination of witness. Section 135–165 of the Evidence Act, 1872 deals with examination and cross-examination of witnesses. This article will cover each section one by one, along with case laws.

Order of Production & Examination of Witness

Section 135 of the Indian Evidence Act, 1872 speaks about, "Order of production and examination of witness". Primarily it is lawyer's privilege to determine the order in which the witnesses should be produced and examined. The order is to be decided by the party leading his evidence.

In Civil and Criminal Procedure, Order XVIII of C.P.C. and the Chapters XVIII, XX, XXI, XXII and XXVIII of Cr.P.C. deal with the manner of the examination of witnesses.

In civil cases, the party who has the right to begin i.e. on whom the burden of proof lies examines his witnesses first, and in criminal cases, the prosecution has to examine its witnesses first. However, Section 135 gives the power to the court to command or order in which the witnesses may be produced.

The witnesses should be examined one-by- one and when a witness is being examined, other witnesses to be examined afterwards must not be allowed to remain in the courtroom. If a witness remains so, his examination cannot be refused; however, a note is to be made to the extent that he was present in the courtroom when another witness was being examined.

"Radhika Gupta v. Darshan Gupta, (2005) 11 SCC 479"

In this case, the husband wanted to give divorce to the wife on the basis of mental illness. The high court, in this case, held that the woman should give her examination in chief or affidavit and then cross-examination and after that she can be allowed to give the medical examination. The Supreme Court observed in this case that she should be allowed to give evidence in the way that she wants. She

may give medical evidence first and then she may give her oral evidence if she so desires.

Judge to decide the Admissibility of Evidence

Section 136 of the Indian Evidence Act, 1872 speaks about, "Judge to decide as to admissibility of evidence". This section says that the judges have the power for the admissibility of evidence in the examination of witnesses and also check the statement of the witnesses which is given by the witnesses during the examination of witnesses that is relevant or irrelevant.

Scope of Section 136 of the Indian evidence act is very important as the witnesses comes in the court with the relevant statement because if the witnesses come in the court with irrelevant statement then judge of the court not admitted that statement of the witnesses in the case and due to this all the facts of the cases must be clear, this is also mentioned in the Section 5 of Indian Evidence Act all the facts of case must be relevant. There are some rules of Section 136 of the Indian Evidence Act.

- Rule 1

  If any fact proved in the case which is proposed by the party in the evidence then a judge may ask the party in what the alleged fact would be relevant or not. A Judge will decide the fact must be relevant. If the evidence would not be relevant then the judge would not allow the party from proving it as because it would only waste the time of the court. In such condition court may disallow evidence.

- Rule 2

  If the party suggested the fact of the evidence which is proved in the court and also depend on another fact of the evidence then the other fact must be proved before evidence of the first fact is given. For example dying declaration, if a person wants to prove a dying declaration then he must prove that the declarant is dead. Here admission of fact depends on condition. [Illustration (a) & (b)]

- Rule 3

  Rule 3 is the exception of rule 1 and 2. If there is a relevancy alleged fact is there which depends on the proof of another alleged fact. In this condition, the judge may allow in his discretion the first fact to be proved without proof of the second fact. But in this condition, the party must undertake to prove the second fact to the satisfaction of the court [Illustration (e)].

As per the above rules, the question of admission of witnesses in the witnesses is to be decided by the judge. First, he invested all the evidence with wide discretion then allow evidence to be placed on records.

Examination-in-chief

Section 137 of the Indian Evidence Act, 1872, defines the term "Examination-in-chief". When the party calls a witness in the examination of witnesses that is called examination in chief. Examination in chief is the first examination of witnesses after the oath. It is the state in which party called a witness for examining him in chief for the purpose of eliciting from the witness all the material facts within his knowledge which tend to prove the party's case. It is also known as Direct Examination.

There would be general questions asked in the examination in chief which is related to the facts of the evidence no leading questions are asked in the examination in chief. Leading questions are asked only in cross examination and re examination, first of all, prosecutor ask the question in the examination in chief in the criminal trial. The following are the objectives of Examination-in-chief.

- It overcomes the burden of proof legally sufficient.
- Remembered and understand.
- Persuasive.
- Hold the cross-examination.
- Contradictory and anticipatory and of evidence that the opposition will present.

In a criminal trial instituted by the State, the examination-in-chief is conducted by the Ld. Public Prosecutor (or the Ld. Special Public Prosecutor, as the case may be), who is to establish the case by asking questions from the witness and permitting the witness the answer to the same.

Role of Defence Lawyer in Examination-in-chief

it is stated that the role of a defence lawyer during examination-in-chief is the most ignored strategical aspect of defending an accused in a criminal trial and there are no books on this strategical aspect of law. Hence, ensuring a properly conducted examination in chief is key to a fair trial and for the same, the role of the Defence Lawyer is of extreme importance. Following are the important role of defence lawyer in criminal trial.

- Defence Lawyer should not a mere spectator but an active participant during the examination-in-chief:

  Considering the importance of the examination-in-chief, it is crucial that a Defence Lawyer is not a mere spectator during the examination-in-chief and it is

important that the Defence Lawyer is vigilant and carefully watches the entire examination-in-chief, so as to ensure that no legally impermissible evidence comes on record. It is the duty of the Defence Lawyer to raise legal objections regarding the impermissibility of the evidence led by the Prosecutor during examination-in-chief.

- Role of ensuring that accurate language is used in the recorded evidence:

  Many a times, the evidence is given by the witness in a vernacular language, however, the evidence is recorded after translating the same into the language of the Court (say, English).

  Thus, it is the most important role of the defence lawyer that what has been stated by the witness is accurately recorded, also in the exact sense in which the same is stated, so that when the same is subsequently referred to at the final arguments or at the Appellate Stage, the exact same sense comes out. (In case need be, the Defence Lawyer can also request the Court to record within brackets the exact vernacular language used, in order to subsequently have the exact sense of the manner in which the evidence is recorded)

  Remember, the use of 'wordings' in evidence can change the entire sense of the sentence / evidence. For example: - use of a simple word "thus" or "accordingly" in a sentence can give a sense of connectivity between two aspects, which, though may not be the case.

- Defence Lawyer is also to ensure that anything favourable to the Accused stated by the witness is not omitted to be recorded:

  The Defence Lawyer is also to ensure that anything favourable to the Accused stated by the witness is not omitted to be recorded in evidence and in case the same is missed, the Defence Lawyer should insist on the recording of the same. For example: - omission to record the words "May be" or "I suppose", which would show that the evidence is not certain in nature.

- To notice the body language of a witness:

  For a successful cross-examination, a Defence Lawyer is also required to notice the body language of the witness, in order to gauge the witness. This is essential for the Defence Lawyer to mould his manner of cross-examination according to the witness. A Defence Lawyer cannot adopt the very same body language towards each witness and has to modify himself.

  Here, thus, the understanding of human nature becomes very important for a Defence Lawyer. For example: - By understanding the nature of the witness in the movie Few Good Men, the lawyer was able to get the truth out.

- Request the Court to record the demeanor/ conduct of a witness:

  A Defence Lawyer must also request the Court to record the demeanor of a witness, in terms of Section 280 Cr.P.C. The recording of the demeanor of the witness helps the Court to appreciate the evidence better. Similarly, the superior courts, which would be presented with only the written evidence, would also be benefitted in case the demeanor of the witness is duly recorded by the Trial Court.

- Objection to examining by prosecution of an irrelevant witness:

  A witness, for being examined in a matter, ought to depose on relevant facts to the trial. In case the prosecution proposes to examine an irrelevant witness, which does not pertain to the charges framed by the Court (i.e., relating to facts in issue and relevant facts), the Defence Lawyer ought to object under Section 5 read with Section 136 Indian Evidence Act to the recording of his evidence and must insist that his objection is recorded.

- Objection to proof of proposed fact before proving other fact, upon proof of which only is the former fact admissible:

  The Defence Lawyer can also object if the prosecution attempts to proof a fact, proof of which is dependent upon proof of some other fact. Such an objection has to be raised in terms of Section 136 2nd Para/ Rule 2 of Indian Evidence Act.

- Objection to asking of a Leading Question:

  A Defence Lawyer should always be vigilant in hearing the question put by the Prosecutor and object to the same prior to the same being answered by the witness.

- Objection to Hearsay Evidence:

  A Defence Lawyer should always object the hearsay evidence because it is a settled principle of law that the facts to be deposed by a witness are to reflect his personal knowledge and hearsay is excluded, being inadmissible in nature.

- Objection to exhibition of Photocopy Documents or Electronic Evidence:

  Without fulfilling the conditions under Section 65 of Evidence Act, a photocopy or xerox document is inadmissible in nature and cannot be proved by a witness. In case the same is sought to be exhibited by the prosecution, the Defence Lawyer ought to object to the same.

  An electronic document can be brought into evidence, only if the same is accompanied with a certificate under Section 65-B of Evidence Act and thus, an electronic document, without such a certificate, cannot be proved by a witness.

In case the same is sought to be exhibited by the prosecution, the Defence Lawyer ought to object to the same.

- Objection to giving evidence contrary to a written document:

  In a criminal trial, there are occasions when the prosecution seeks to examine witnesses to give evidence contrary to a written record. However, as oral evidence, contrary to a written record, is barred under Section 91 and 92 of Evidence Act, thus, in case any such attempt is made, the Defence Lawyer should promptly object to the same.

- Objections to the Opinion by a non-expert Witness:

  If the opinion of a non-expert witness is sought to be introduced in evidence by the prosecution, then the Defence Lawyer must raise an objection regarding the same because the only set of people entitled to give an opinion are those persons categorized as experts under Section 45 of Evidence Act and none other.

Cross-examination

Section 137 of the Indian Evidence Act, 1872, also defines the term "Cross-examination". After the completion of the examination-in-chief, if the opposite party wants to, they can take over the witness and cross-question him about his previous answers. The opposite party may ask him any question regarding all the relevant facts and not merely the facts discussed during the examination-in-chief. This process is called cross-examination.

Cross examination is very important in the examination of witnesses, due to the cross-examination many facts get clear because in the cross-examination defendant analyse all the statements of the witnesses then asks cross question related to the statement which was given by the witnesses in the examination in chief.

If there was a death of defendant and cross-examination was only partly done. Then his evidence will be admissible as there is no provision under law that if the witness was not cross-examined either in full or part his evidence would be absolutely rendered inadmissible.

Cross-examination Procedure in Civil Case

All the witnesses in civil cases which are produced or examined by the court on the wish of parties must be presented before the court within 15 days from the date on which issues are framed or within such other period as the court may fix. Then parties have to file a list of witnesses in the suit. After that court can ask the witnesses for examination by sending summons or parties may call the witnesses by themselves. If the court issued a summons for asking the witnesses for the

examination then the expenses which arise due to the calling of witnesses by issuing summons has to be deposited by the parties. The money deposited by the parties in this condition is known as "Diet Money". The date on which the parties wish to produce and examine the witnesses in the court that is hearing. Now the hearing will decide the court on the date of hearing. Firstly, statements made by a plaintiff/ witness in their Evidence by way of Affidavit or in examination-in-chief, along with exhibited documents to be recorded. After that defendant ask cross-questions which were asked or given by the plaintiff/ witness in the examination in chief or in Evidence by way of Affidavit. And after the cross-examination is over at this stage the court will fix a date for final hearing.

Cross-examination Procedure in Criminal Case

There are different stages of cross-examination in criminal cases in the criminal trial in a warrant case instituted on the police report After the charges are framed, and the accused pleads guilty, then the court requires the prosecution to produce evidence to prove the guilt of the accused. The prosecution is required to support their evidence with statements from its witnesses. This process is called "examination-in-chief". The magistrate has the power to issue summons to any person as a witness or orders him to produce any document. After the examination-in-chief, cross-examination to be done by the counsel for the accused.

Canons of Cross-examination

While preparing for the cross-examination and at the time of cross-examination of a witness, it must be remembered that cardinal principles are always non-exhaustive and often molded as per the facts and circumstances of the case, the nature of the witness, the nature of the judicial officer supervising the trial, and also the nature of opposing counsel. Some of these basic tenets may be drawn as follows:

- Know the facts:

  A case file must be thoroughly read and as far as possible, read in chronological order along with the annexures/ exhibits/ reports attached. A conjoint reading of the pleadings or evidential-affidavits and the documents or evidence attached is always recommended, instead of, reading the documents dis-jointly. In the exercise, mark out the deficiencies and contradictions found in the documents or statements, as the case may be.

- Know the law:

  It is indisputable to state that good understanding of the substantive laws, the procedural laws, and the adjective laws is always quint-essential for effective cross-examination by any lawyer. This is because the questions of cross-

examination are generally based on relevant facts, pertinent to the case in hand, essential elements of an offence or transaction, and the procedure governing such offence or transaction.

- Sync the laws and facts:

  Identify the relevant statutory provision(s) and the facts of the dispute before framing a questionnaire for cross-examination. Read the provisions and mark out the essential elements categorically, despite having read the provisions on an earlier occasion(s). This assists an examining lawyer to prepare the questionnaire which syncs the statutory essentials with the relevant facts of the case in hand.

- Prior research on documents:

  Once the above-suggested exercise is done, the examining lawyer must examine whether the document(s)/ evidence which have not been produced by the witness are publically accessible i.e. public documents.

- Whom not to call:

  It is recommended not to call a person as a witness, to whom, the opposite party is bound or will call as a witness. This will give such an examiner an opportunity to cross-examine such a witness.

- Not the number:

  It must always be first appreciated whether a witness to be cross-examined, even avers anything against your client. It must be remembered that it is not the number of the witnesses produced or the number of witnesses cross-examined which determine the result of a trial. Every witness need not be compulsorily crossed.

- Never assume facts or make the witness introduce disadvantageous facts:

  It is a pertinent principle for an examining lawyer to not assume the existence of a fact unless such a fact by the witness in his examination-in-chief or evidence by way of affidavit has been averred so and it is not of very trifle nature.

- Switch after a favorable answer:

  In a situation where you receive a favorable answer, it is always recommended to quickly pass on other queries. Don't ever ask the same question again to show the triumph.

- Rapid questions:

  If the opposite party has a strong case or prepared witnesses, select the weakest point and put the questions rapidly at the same pitch of voice. This often derives the opportunity of the witness to imagine and manufacture the answer within such time. Such witness may be confronted with leading questions. Such questions often help in breaking the pre-arranged version of the party and calls for a spontaneous narrative.

- Maintenance of eye contact:

  It is essential for the cross-examiner to maintain eye contact with the witness, all through the cross-examination. The movement of the hands, eyes, the pitch of the voice, all speak.

Re-examination

Section 137 of the Indian Evidence Act, 1872, also defines the term "Re-examination". The party who attend the witness for the cross-examination shall be called re-examination. If the party not subjecting to cross-examination as per the court order then it is not safe to trust on examination in chief.

Difference between Chief, Cross & Re-examination

Srl. No.	Examination-in-chief	Cross-examination	Re-examination
1.	Examination-in-chief is an examination of a witness which is done by the party who filed the suit or case in the court.	Cross-examination is an examination of a witness which is done by the adverse party after the examination-in-chief.	Re-examination is an examination of a witness which is done by the parties to remove incompatibility which arises during the examination-in-chief and cross-examination.
2.	It is the first order.	It is the second order.	It is the last order.
3.	The purpose of examination-in-chief is to make a statement under oath of a witness in the court.	The purpose of cross-examinations is to test the truth of witness by challenging the honesty of his respect.	The purpose of re-examination is the examination of a witness which is done by the parties to remove incompatibility which arises during the examination-in-chief and cross-examination.
4.	No leading questions may be asked without permission of the court in examination-in-chief.	Freely asked leading questions in the cross-examination.	No leading questions may be asked in the examination and cannot introduce new matter without permission of the

			court.
5.	It is a part and package of a judicial proceeding.	It is essential to pull out the truth and also an essential part of a judicial proceeding.	It is not necessary in the examination of witnesses and it is not an essential part of a judicial proceeding.

Order of Examinations

Section 138 of the Indian Evidence Act, 1872 speaks about, "Order of examinations". This section says that first of all, witnesses shall be examined in the examination in chief afterword cross-examination by the opposite party if the opposite party desires, at last re examination by the first party if the first party calling the witnesses for the re examination. All the examinations of witnesses must relate to relevant facts, but the cross examination no need to be controlled to the facts to which the witness examine on his examination in chief. This section provides a wide scope for cross examination.

This section also says that the explanation of matters referred to in cross examination shall be directed by the re examination, and if new matter introduced in the re examination with the permission of the court the opposite party may further cross-examine upon that matter.

The following important points may be noted:

(i) Cross-examination can extend to all the relevant facts, whether touched in the examination-in-chief or not.

(ii) A witness cannot be thrown open to cross-examination unless he is first examined-in-chief. The case where the prosecution did not examine its witness and offered him to be cross-examined, then this amounts to abandoning one's own witness. Such an approach seriously affected the credibility of the prosecution case.

(iii) When a fact is stated in examination-in- chief and there is no cross-examination on that point, naturally it leads to the inference that the other party accepts the truth of the statement. But there are several exceptions to this rule:

a. Where the witness had notice before hand,
b. Where the story itself is of an incredible or romantic character,
c. Where the non cross-examination is from the motive of delicacy,
d. Where counsel indicates that he is not cross-examining to save time, and
e. Where several witnesses are examined on the same point, all need not be cross-examined.

(iv) A cross-examination follows upon the examination-in-chief, unless the court, for some reason, postpones it. The court may permit the person who calls a witness to cross-examine him under some circumstances.

(v) If a witness after being examined in chief does not appear to subject him to cross-examination his evidence become valueless.

(vi) A co-defendant in a case can be cross-examined by another co-defendant when their interests are adverse to each other.

(vii) The proper limit of re-examination is to confine it to an explanation of the matters dealt with in cross-examination. If the re-examination introduces new matter, the adverse party will have the right to cross- examine the witness over that new matter.

(viii) An order of re-examination can be made by the court on an application by a party. It is not restricted to the court's own motion.

Examination of Non-Witness

Section 139 of the Indian Evidence Act, 1872 speaks about, "Cross-examination of person called to produce a document". This section says that no cross-examination of such person who was summoned to produce a document.

Apart from witness testimonies, there are numerous other forms of evidence admissible in the Court of law. Documentary evidence as described in Indian Evidence Act is one of them. A person might be called just in order to produce a document. Section 139 says that such a person called in for producing documents, does not become a witness. He can be examined in order to establish the credibility of the document. But, he cannot be cross-examined unless he has been called as a witness.

Witness to Character

Section 140 of the Indian Evidence Act, 1872 speaks about, "Witness to character". This section says that the person who gives the testimony regarding the character of a person may be cross-examined and re-examined, the act of causing something to move up and down with quick movements his credit. The character evidence helps the Court to estimate the value of evidence given against the accused in criminal cases.

Leading Questions

Section 141 of the Indian Evidence Act, 1872, defines the term "Leading questions". This section defines leading questions as any question suggesting the answer which the person putting it wishes or expects to receive. a leading question is that which

signals to the witnesses the real or obligated fact which the prosecutor expects and desires to have confirmed by the answers leading to questions.

In other words, a question is leading one when it point to witness the real or obligated fact which the examiner expects and desires to be confirmed by the answer. The circumstances in which the question arises determined whether a question is leading or not. Leading questions can be very dangerous, because they can be formulated in a way which slants results, and the same holds true for leading questions used in media interviews.

For example: - It is relevant to tell to the court as to where a witness lives, the question to be asked to him should be "where do you live"? and then he may tell where he lives. If the question is framed like this, "do you live in such and such place", the witness will pick up the hint and simply answer "yes" or "no". This is a leading question. It puts the answer in the mouth of the witness and all that he has to do is to throw it back.

Some more examples of leading questions are: -

- Is the plaintiff (Karan) your father? Have you not lived for 8 years with him?
- Is not your name Bhavna? Do you reside at Hari Nagar?
- Shivangi ji, you were at Heaven's bar on the night of June 29, weren't you?

Generally, the answers of leading questions are given by yes or no. But it cannot be said that in order to stamp a question leading the answer to it must be as yes or no.

Advantages of asking leading questions

The advantages of asking leading questions are as follows: -

- To conserve time:

  Time is precious, and more so in the modern world. However, once there is a debate or discussion even on the most trivial subject, no amount of time might suffice to arrive at useful conclusions. Once a certain amount of time is expended, the opponent might be able to escape defeat by appealing to the busy schedule and his need to go. Thus in spite of all the energy spent, the apologist might have to go home without coming to the real issues. Thus some strategy to conserve time by eliminating unnecessary discussion is essential. Leading Questions play a very important part here by separating the significant from the trivial and the useless.

- To lead into a definite direction:

  As said before, though all interrogation involves asking questions, not all such interrogation leads into definite directions. Leading involves aiming at a goal and

then asking questions in a manner to lead the respondent into that definite direction. This can be achieved only if the general and aimless questioning is abandoned and leading questions asked.

- To get to the root of the problem:

  A logical analysis of statements, cause and effect, deductions, and other ways of reasoning often uncovers many hidden assumptions. Further, often the issues involved are so complex that the discussion goes on without ever touching the root of the problem. Only leading questions can expose the hidden assumptions and the root cause of the problem being discussed.

- To convince the Respondent:

  Often the person responding the apologist is not convinced of truth, or is not willing to see the truth. Affirmations made by the apologist do not create much impact because the logical thinking and reasoning has passed only through the apologist's mind. Often the issues involved are so complex, that the opponent is unable to see it unless he is forced to go step by step through his process of reasoning and deduction. Only leading questions can help the apologist to force the opponent to go through the steps needed to arrive at truth.

When leading questions must not be asked

Section 142 of the Indian Evidence Act, 1872 speaks about, "When they must not be asked". This section says that leading questions should not be asked in examination-in-chief or re-examination of they are objected to. The Court may give the permission of leading questions to pull the attention of the witness which cannot otherwise be called to matter under inquiry, trial and investigation. The witness must report for what he himself had seen.

This section provides exceptions to the general rule stated above. By the order of the Court, examiner may put leading questions in examination-in-chief or re-examination.

1. As to matters which are begin.
2. Which are unchallenged.
3. Matters in which the opinion of the Court have already been proved.

The Court can allow a party examining his own witness to put leading questions by way of cross examination. These are exceptions under Section 154 of Indian Evidence Act.

When leading questions must be asked

Section 143 of the Indian Evidence Act, 1872 speaks about, "When they must be asked". This section says that leading questions can be freely asked in cross-examination.

The reason why leading questions are allowed to be put to an adverse witness in cross-examination is that the purpose of a cross-examination being to test the accuracy, credibility and general value of the evidence given, and to shift the facts already stated by the witness, it sometimes becomes necessary for a party to put leading questions in order to elicit facts in support of his case, even though the facts so elicited may be entirely unconnected with facts testified to in an examination-in-chief.

Evidence as to matter in writing

Section 144 of the Indian Evidence Act, 1872 speaks about, "Evidence as to matters in writing". This section enables parties to a case to apply Section 91 and Section 92. This section is meant to be read along with those two sections. This section refers to both cross-examination and re-examination.

This section says that any witness who is about to give evidence as to a contract, grant or other disposition of property, may be asked whether it was not in writing, and if he says that it was, the opposite party may object to such (oral) evidence being given until the original document is produced or until the party producing the witness is entitled to give secondary evidence of it.

An explanation appended to the section says that a witness may give oral evidence of statements made by other persons about the contents of a document, if such statements are themselves relevant facts.

For example: - The question is whether A assaulted B, evidence is offered through the mouth of C that he heard A saying to D that B had written him a letter accusing him of theft and that he will take his revenge. This statement about the letter may be proved though the letter itself is not produced because the statement is relevant as showing A's motive for the assault.

Cross-examination on previous statements

Section 145 of the Indian Evidence Act, 1872 speaks about, "Cross-examination as to previous statements in writing". This section lays down the procedure by which a witness may in cross-examination be contradicted by his previous statement in writing or reduced into writing. A witness may be asked in cross-examination

whether he made a previous statement in writing relevant to the matters in issue, different from his present statement without such writing being shown to him or proved. But, if it is intended to contradict him by the writing, his attention must be drawn to it.

It is to be noted that a previous statement used to contradict a witness does not become substantive evidence. The only purpose to contradict with a previous statement is to prove that the statement made in the court is not reliable.

This section provides for one of the methods (methods mention in Section 138, 140, 146-148, 153-155) in which the credit of a witness may be impeached. The object of the provision is either to test the memory of witness or to contradict him by previous written statement Further, the witness is given a chance of explaining or reconciling his statements before the contradiction can be used as evidence (by calling his attention to those written parts). It is essential to fair play and fair dealing with a witness.

Section 145 is not attracted in the case of admissions. Admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness-box or not and whether that party when appearing as a witness was confronted with those statements in case he made a statement contrary to those admissions.

In Criminal Case, evidence recorded can be used to contradict under Section 145. Section 162 of Cr.P.C. imposes a bar on the use of any statement made by any person to a police officer in the course of investigation, except for the purpose of contradicting the witness under Section 145. For example: - The statements in the FIR made by the witness can be used.

Lawful Questions

Section 146 of the Indian Evidence Act, 1872 speaks about, "Lawful questions in cross-examination". This section says that when a witness is cross examined he may in addition to the questions hereinbefore mentioned to be asked any questions which given:-

1. To test his veracity/ truth;

   "Testing the veracity of a witness" means ascertaining his honesty as to advise the court to what extent the witness is creditworthy. A witness may always be subjected to a strict cross-examination as a test of his veracity or accuracy, his understanding, his integrity, his basis and his means of judging.

2. To find out who he is and what is his position in life; or

   Questions can also be asked to find out his 'position in life' i.e. who he is, what he does, what is his source of livelihood or whether he is a genuine or a professional witness. It is common practice to make inquiry into the relationship of the witness with the party on whose behalf he is called business, social or family and also to inquire as to his feeling towards the party against whom his testimony is being given.

3. To shake his credit, by injuring his character, while criminate him, or might expose him to punishment or forfeiture

   "Shaking the credit of a witness by injuring his character" means to expose his respectability i.e. whether he is a respectable man and whether his character and conduct are such that he can be trusted to tell the truth to the court. This kind of questioning of the witness is known as "cross-examination as to credit". However, questions should not be directed towards laying bare with private life of the witness. The credit of a witness can be said to have been shaken only if it can be shown that he is not a man of veracity, and not that he is of bad moral character.

   However, the section does not permit to adduce any evidence or ask any questions in cross-examination that may include the victim's moral character or previous sexual experience with any person.

The words in Section 146 "in addition to the question hereinbefore mentioned to" have reference to the 2nd Para of Section 138 which is "the examination and cross examination of a witness must relate to relevant facts".

When witness to be compelled to answer

Section 147 of the Indian Evidence Act, 1872 speaks about, "When witness to be compelled to answer". This section says that if any question related to a relevant issue of the case, then Section 132 shall be applicable. Section 132 says that a witness will have to answer the question notwithstanding that the answer may criminate him.

Section 147, Evidence Act, empowers a Court to compel a witness to reply to a relevant question and it follows, therefore, that if he refuses to answer a question, immediate action should be taken against him in the interest of a fair trial. If the Court fails in its duty, it hampers the course of justice and brings the tribunal into disrepute.

Except in cases where a witness is protected by public policy or some kind of privilege or where oral evidence is excluded by the documentary, a witness is compellable to answer any question that is put to him at cross-examination. All cross-examination must be relevant to the issues or to the witness's credit.

Note: - Section 148 to Section 152 are enacted to protect the witnesses from improper cross-examination.

Court to decide when question to be asked

Section 148 of the Indian Evidence Act, 1872 speaks about, "Court to decide when question shall be asked and when witness compelled to answer". This section says that when in the course of a cross-examination the question asked to the witness is not relevant to the facts, but is asked only to shake his credit by exposing his character, the court has to decide whether or not the witness shall be compelled to answer it. The court may warn the witness, if it thinks necessary that he is not bound to answer it.

In deciding as to whether a witness should be compelled or not to answer a question the court shall have regard to the following considerations:

(1) Proper questions: If the court is of the opinion that the truth of the imputation could seriously affect the court's opinion as to credibility of the witness the court should allow the question. Thus, in cases of rape, the prosecutrix may be cross-examined as to her connection not only with the accused but also with other men. However, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to her.

(2) Improper questions: Questions are improper if the truth of the imputation is very remote in time or is of such a character that it would not affect at all or would affect only very slightly, the credibility of the witness as to the matter on which he gives evidence. Questions are also improper if there is a great disproportion between the importance of the imputation and the importance of his evidence.

(3) If the question is proper and the court asks the witness to answer it, but even so he refuses to do so, the court may, if it sees fit, draw the inference that the answer if given would be unfavorable to the witness.

No question without reasonable grounds

Section 149 of the Indian Evidence Act, 1872 speaks about, "Question not to be asked without reasonable grounds". This section says that any questions referred to

in Section 148 are to be asked only when there are reasonable grounds to ask such questions that might injure the witness's character or expose him.

For example: -

(a) A barrister is instructed by an attorney or vakil that an important witness is a kidnapper. This is a logical ground for asking the witness whether he is a kidnapper.

(b) A witness, of whom nothing whatever is known, is asked at random whether he is a kidnapper. There is no logical ground for the question.

Procedure when question is without reasonable ground

Section 150 of the Indian Evidence Act, 1872 speaks about, "Procedure of court in case of question being asked without reasonable grounds". This section deals with the procedure to be followed by the court in regards to circumstances where an advocate asked question without any reasonable grounds. A report has to be sent by such court to the high court or other authority to which such barrister, pleader, or vakil or attorney is subject in the exercise of his profession giving circumstances of the case in which such defamatory questions were asked without reasonable grounds. The scope of this section is limited to those questions as were asked under circumstances mentioned in Section 148.

Indecent & Scandalous questions

Section 151 of the Indian Evidence Act, 1872 speaks about, "Indecent and scandalous questions". This section empowers the court to prohibit asking any questions to the witness which are indecent or scandalous unless it is having a bearing on the case. If it is relevant to the case it can be asked. A fact that is relevant to a case cannot be said to be scandalous.

It is to be noted that a counsel is entitled to present the evidence as best as he can to prove that the complaint and the witness are fake and they are not speaking the truth but he should not do personal attacks on the complainant and the witness by questioning matters that are not borne out by the facts of the case nor is he entitled to use abusive language against them.

Question intended to insult or annoy

Section 152 of the Indian Evidence Act, 1872 speaks about, "Question intended to insult or annoy". This section says that where a question is calculated to insult or irritate or through paper in itself, appears to the Court needlessly offensive in form, the Court must be between for the protection of the witness.

No Evidence to contradict answer testing veracity

Section 153 of the Indian Evidence Act, 1872 speaks about, "Exclusion of evidence to contradict answer to questions testing veracity". This section says that if any question has been asked and the witness has answered it and it only causes injury to the witness's character, no evidence shall be given to contradict him unless he answers falsely, in which case he will be charged for giving false statements. There are two exceptions to this section, which are:

- If a witness has been asked whether or not he was previously convicted. On denial of the witness, the evidence regarding the proof of his previous conviction can be given.
- If a witness has been asked a question that impeaches is impartiality, on denial of witness, he may be contradicted. It means that if a party has sufficient grounds to believe that the witness is not impartial, they may contradict him and try to furnish proof.

The object of this section is to prevent trials from extending to an unreasonable length. If every answer has to be given on every fact asked under Section 146 and it is made the subject matter of fresh enquiry then a trial might never end. These matters are after all not of prime importance beyond what is said in the exceptions.

For example: - Kamal Taneja claims to have seen Arvind at Delhi on a certain date; Kamal is asked whether he himself was at Haryana that very day or not; Kamal denies it. Evidence is adduced to show Kamal was actually in Haryana. The evidence is admissible, not as contradicting Kamal on the fact which affects his credit but as contradicting the alleged fact that he saw Arvind in Delhi on that same date.

Question by party to his own witness [Hostile Witness]

Section 154 of the Indian Evidence Act, 1872 speaks about, "Question by party of his own witness". This Section allows party, with the permission of the Court, to cross examine his own witness in the same way as the opposite party. Such cross examination means that he can be put.

1. Leading question under Section 143 of the Act.
2. Questions about his previous statement in writing under Section 145 of the Act.
3. Questions to be given to test his truth, to discover who he is and what is his place in life or shake his credit under Section 146 of the Act.

This is clear from Section 154 itself which does not say that a person who calls a witness may cross-examine him in certain circumstances but that he might put questions to him which might be put in cross-examination by the adverse party. That is not the same as cross-examining him. The utility of cross-examination under Section 154 of the evidence act is that by it the court can more readily get the truth out of its witness as the witness turned hostile against the party who called him.

The permission for cross-examining one's own witness should not be granted to the party at the mere asking. The granting of permission is entirely the discretion of the court. The discretion conferred by Section 154 is apart from any question of hostility. It is to be liberally exercised whenever the court from the witness's demeanour, attitude, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice.

It is to be noted that there is no pre-condition to first declare a witness hostile, adverse or unfavourable and then grant permission to contradict him and to ask questions which might be put during cross-examination, in case the witness shows any sort of inconsistency or contradiction from his previous statement(s).

Hostile Witness

A 'hostile witness' (the term has not been used in Indian law, unlike English law) is one who from the manner in which he gives the evidence shows that he is not desirous of telling the truth to the court. A witness who is gained over by the opposite party is also termed as a hostile witness. An 'adverse' or 'unfavorable' witness is one called by a party to prove a particular fact, who fails to prove such fact or proves an opposite fact.

The inference of the hostility of a witness would be drawn from the answer given by him and to some extent from his demeanour, attitude, etc A prosecution witness can be declared hostile when he resiles from his previous statement made under Section 161 or 164, Cr.P.C. Besides this, when a prosecution witness turns hostile by stating something which is destructive of his prosecution case, the prosecution is entitled to get this witness declared hostile.

A witness cannot be said to be hostile:

1) Whenever his testimony is such that it does not support the case of the party calling him or is not in accord with the evidence of other witnesses.
2) When he has not been produced out of the fear that he might disfavour the party who has to produce him.

3) Only because he gives inconsistent or contradictory answers (e.g. at a Sessions trial, a witness tells a different story from that told by him before the Magistrate).

Evidentiary value of Hostile witness

The whole testimony need not be rejected, nor such witness can be regarded as a wholly reliable witness. The court can rely upon that part of the testimony which inspires confidence and credit. The testimony of a hostile witness requires close scrutiny because he is contradicting himself, and that portion of his statement, which is consistent with the prosecution or defence, may be accepted. The testimony of a hostile witness can be used to the extent to which it supports the prosecution case. The whole of the evidence so far as it affects both parties favourably or unfavourably must be considered for what it is worth.

Impeaching credit of witness

Section 155 of the Indian Evidence Act, 1872 speaks about, "Impeaching credit of witness". This section gives us four ways by which the credit of a witness can be destroyed by the adverse party or by the party who calls him: –

1. evidence of persons that the witness is unworthy of credit;

2. proof that the witness (i) has been bribed; (ii) has accepted the offer of a bribe; or (iii) has received any other corruption inducement; and

3. former statements inconsistent with the present evidence.

In examination-in-chief a witness cannot be asked the reasons for his belief that another witness is unworthy of credit. Such questions can only be asked in cross-examination. Whatever reasons he may give shall not be contradicted, but if the answer is false, he may be prosecuted for giving false evidence.

Section 155 of the Act orders for challenging the honesty or truth for credit of the witness. Sections 138, 140, 145 and 154 provide for challenging the honesty or truth for credit of a witness by cross examination. Section 146 permits questions injuring the character of a witness to be asked to him in cross examination. Section 155 makes a different method of discrediting a witness by allowing independent evidence to be led.

Under Section 145 of Indian Evidence Act a witness can be cross examined and opposed only with that previous statement which was made in writing or was decreased to writing. That Section is not relevant to oral previous statements. The clause(3) of the Section is so give voice that statements, written or verbal, may be

used to challenge the honesty or truth the credit under it but where the previous statement is in writing the provisions of Section 145 should be followed.

It is to be noted that "Tape recording" is admissible under Section 155 sub clause (3) to challenge the honesty or truth the credit of the witness. Before taped statement can be trusted upon the time and place and accuracy has to proved.

Note: - Section 156 & 157 laid down the rules relating to corroboration (i.e. evidence which supports the testimony of a witness).

Corroboration of evidence

Section 156 of the Indian Evidence Act, 1872 speaks about, "Questions tending to corroborate evidence of relevant fact, admissible". This section provides for the admission of evidence given for the purpose, not of proving a particular fact but of testing the truthfulness of the witness. This section says that when the evidence of a witness requires to be corroborated, he may be questioned (apart from the main event) as to any other circumstances which he observed at or near to the time or place where the main fact happened, if the court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Section 157 of the Indian Evidence Act, 1872 speaks about, "Former statements of witness may be proved to corroborate later testimony as to same fact". This section says that for corroborating the testimony given by a witness with respect to a question of fact the former statement which was made at or about the time* of the occurrence of the fact can be taken into consideration for corroboration or for corroboration the court can also take the statement made by the witness before a legal authority who is competent to investigate the matter.

*At or about the time: -

This Section provides an exception to the general rule of excluding indirect evidence and so in order to bring a statement within the exception the duty is cast on the prosecution to abolish by clear evidence to nearness of time between taking position of the fact and the making of the statement. There can be no fast and hard rule. The main test is whether the statement was made as early as can fairly be awaited in the circumstances of the case, and before there was an opportunity to be a tutor to someone or intermixture. The word "at about the time" must mean that the statement must be made at once or at least presently after when a fair opportunity for making it presents itself.

It may be noted that if the statement is made to an investigating authority, it would be usable even if it was made after gap of time viz. few days. Statements before an investigating officer arc not evidence (e.g. FIR) but can be used for corroboration or contradiction. The First Information Report (FIR) can be used to corroborate the testimony of the maker of it or to contradict him under Section 145.

Corroboration/ Contradiction of statements of person who can't found

Section 158 of the Indian Evidence Act, 1872 speaks about, "What matters may be proved in connection with proved statement relevant under Section 32 or 33". This section says that when the statement of a person who cannot be found or is dead is relevant under Section 32 or 33 and has been proved (e.g. a dying declaration), all matters which either confirm the statement or contradict it, may be proved. Evidence can also be given of any fact which might confirm or impeach the credit of the person who made the statement to the same extent as if that person had appeared as a witness and had denied upon cross-examination the truth of the matter suggested.

Thus, this section places a person whose statement has been used as evidence under Section 32 or 33 in the same category, as a witness actually produced in the court for the purpose of contradicting his statement by a previous statement made by him. No sanctity attaches to such statements simply because the person is dead or cannot be examined as a witness. His credibility may be impeached or confirmed in the same manner as a living witness.

Rule as to Refreshing Memory

We the humans sometimes tend to forget things and it is extremely important to keep remembering the entirety of the facts if we have been called as a witness. Someone's life could be at the line and our statements may help the Court serve justice to someone. A witness may be under a lot of pressure and due to all the stress he might need to refresh his memory. Sections 159-161 deal with the extent to which and the mode in which a witness may refer to a writing in order to refresh his memory while giving evidence.

Refreshing Memory

Section 159 of the Indian Evidence Act, 1872 speaks about, "Refreshing memory". This section says that a witness can refresh his memory while under examination. He may do so by referring to any writing* made by himself at the time of the transaction taking place regarding which he has been questioned, or so soon afterwards** as long as the Court considers it to be fresh in his memory. The

witness can also refer to any such writing made by any other*** within the aforementioned time frame, and decide whether it is correct or not. This section further says that the witness may use a copy or photocopy of a document with the permission of the Court in order to refresh his memory. For example: - Memorandum kept by the witness of some transactions through the accounts were not on a regular basis kept, were permitted to be used for refreshing memory; Withness can refresh his memory from Reports, Diaries, Certificates, Account books. Dying declaration, Notes of a speech, Panchnamas, Deposition, Notes of a Police Officer, Notes of a brief of a Barrister, and, even a Horoscope.

*Writing: -

The word 'writing' has been defined in the General Clauses Act as 'Aspect referring to 'writing' shall be made as including references to printing, lithography, photography and other modes of representing or multiplying words in a visible form' from this, it is clear that if the status of Section 159 are satisfied a witness can refresh his memory by writing, photography, lithography, printing or other modes of representing or multiplying words in a visible from.

It is to be noted that a witness who heard a speech may refer to his memory by referring to a newspaper account of it if he read it soon afterwards, and if, at the time he read it, he knew it to be correct. However, the tape-recording, not being a writing cannot be used for reviewing memory by witness.

**At the time of transaction or soon afterwards: -

Before a witness is permitted to review his memory from any writing made by him, the demands of Section 159, Evidence Act should be followed with. It must be shown that the writing was made by the testifier at the time of the transaction or so soon after that the Court regards it likely that the transaction was at the time good in his memory. A doctor, when he comes into the witness-box was given a slide of paper by a pleader. After looking at the slide the doctor deposed that he examined the complainant and found injuries on his person. He did not depose as to what the slide of paper was when it was made. It was held that the proof was not admissible.

A witness can review memory about the facts stated by him if the writing was made either at the time of the transaction or presently after the transaction.

***Writing made by other: -

A writing made by another person may be used for reviewing his memory by a witness if he read it soon after the preparation of writing and when he read it he knew it to be correct. From this, it cannot be deduced that the witness can review his memory by any writing made by a third person. In order that the writing of a

third person may be used for reviewing his memory, the witness must have the first hand knowledge of the facts decreased in writing. It is essential that the document should be prepared in the presence of the witness. If the document be prepared by another person and in the absence of the witness then it is necessary that the witness should have read it soon after the transaction and knew it to be correct.

This section does not require that the writing which is used to review the memory of a witness should itself be admissible in evidence. While a Panchnama was written by a police officer during an investigation, if it was directly read to the Panches and admitted by them to be correct, then Panches witness could review his memory by reading it. A statement recorded in writing by a police officer in the course of an investigation cannot be used in proof yet the police officer might use to review his memory.

Testimony to facts stated in documents mentioned in Sec 159

Section 160 of the Indian Evidence Act, 1872 speaks about, "Testimony to facts stated in document mentioned in Section 159". Unlike Section 159 which deals with cases where a reference to the writing revives in the mind of the witness a recollection of the facts. But it may be that even a perusal of a document does not refresh his memory i.e. it does not revive in his mind a recollection of facts. In Section 160, it is not necessary that the witness looking at the written instrument should have an independent or specific recollection of the matters stated therein. He may testify to the facts referred to in it, if he recognizes the writing or signature and feels sure that the contents of the document were correctly recorded'.

The difference between the Section 159 & 160 is that under Section 159, the document is not in itself evidence nor is it tendered. But under Section 160, the document itself is tendered and is evidence.

Right of adverse party as to writing used to refresh memory

Section 161 of the Indian Evidence Act, 1872 speaks about, "Right of adverse party as to writing used to refresh memory". This section says that any writing or document mentioned in Section 159 & 160 must be produced and provided to the opposite party if they require it. The opposite party may cross-examine the witness over the document if the need be. When a document is produced under Section 161, it becomes subject to a general inspection and cross-examination by the opposite party. But the cross-examination on the portion referred to by the witness does not make the document evidence against the cross-examiner.

Rule as to Production of Documents

Section 162-164 lay down the rules as to production and translation of documents.

Production of documents

Section 162 of the Indian Evidence Act, 1872 speaks about, "Production of document". This section says that a witness when summoned to produce a document must produce it if he has it in his possession. The principle underlying this section is similar to the English rule *'Subpoena Duces Tecum'* which means that when a witness is summoned by the court to appear with some documents in the court. If there are any objections with regard to its production or admissibility, then, the court to decide the validity of the objection. To enable the court to do so, it may hear the parties and may also ask them to produce evidence touching upon the validity or otherwise of the objections. The Court may also inspect the document unless it refers to matters of the state*.

In case the documents need to be translated, it can be done so by a translator who must keep the contents confidential. If the translator leaks the content of the said document, he shall be charged under Section 166, IPC for disobeying the law.

Section 162 makes it obligatory on the witness to produce the document summoned by the court and he has no right to decide whether the document shall be produced. Order XVI, Rule 6 of the C.P.C also provides that a person may be summoned to produce a document without being summoned to give evidence. Section 139 of the Evidence Act similarly provides that a person summoned to produce a document does not become a witness by the mere fact that he produces the document and he cannot be cross-examined.

*Matters of the state: -

Under Section 162, the court may inspect the document to determine on its admissibility, unless it refers to matters of State. Reading the Section 123 and 162 together, it becomes clear that the court cannot hold an enquiry into the possible injury to the public interest which may result from the disclosure of the document in respect of which privilege is claimed under Section 123. That is a matter for the authority concerned to decide.

But, the court is competent to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether evidence relates to an affair of State under Section 123 or not.

Giving document, called for & Produce on notice

Section 163 of the Indian Evidence Act, 1872 speaks about, "Giving, as evidence, of document called for and produced on notice". This section says that where a party has given a notice to another to produce a document and the document has been produced and has been inspected by that party, he is bound to use it as evidence if the party producing the document so desires.

This section applies not only to civil cases but also to criminal trials. It has no application where the document has already been produced before the court by any party to the case. The section comes into play when the party in possession or power of the document has not produced the same in the court and runs the risk of adverse inference being drawn against him or being debarred from producing the document in the court at a later stage of the proceedings unless his opponent becomes instrumental in seeking production and inspection of the document.

There is no authority for the proposition that the evidence, which is admitted under this section, must be deemed to be conclusive against the party who has inspected the document. A document so produced becomes 'evidence' only when it is produced for the inspection of the court and only then the court will pronounce upon its relevancy, admissibility and will call upon the party on whom the burden of proof lies to prove the truth of its contents and its genuineness. Cross-examination could be used for that purpose.

Use of Document Not Produced on Notice

Section 164 of the Indian Evidence Act, 1872 speaks about, "Using, as evidence, of document, production of which was refused on notice". This section says that where a party has been called upon by the other party to produce a document but the request was refused, such refusing party is no longer at liberty to produce the document of his own. It would require consent of the other party or permission of the court to enable him produce the document.

Where an opponent in possession of a document refuses to produce it on demand, he is afterwards forbidden to produce the document to contradict other party's secondary evidence. This is in one sense a proper penalty for unfair tactics or refusal to cooperate with the judicial process. The section does not enable a party to seek actual production of the document. It contemplates only a disability the fear of which may perhaps bring about a positive response. This section may not perhaps apply to criminal proceedings.

Power of the Judge

Section 165 of the Indian Evidence Act, 1872 speaks about, "Judges power to put questions or order production". This section says that the Judge has been given the power to ask any question to a witness or to a party, for the purpose of obtaining proper proof of relevant facts. Such question may be asked at any time and may take any form and the question itself may relate to a relevant or an irrelevant fact. The court may also order the production of any document or thing. No party or his agent shall be entitled to raise any objection to any such question or order, nor, without the court's permission, the witness shall be cross-examined as to any answer that he may give.

The object of allowing the judge to ask irrelevant questions was to obtain "indicative evidence" which might lead to discovery of relevant evidence. It may be noted that Order X, Rules 2 and 4, Order XVI, Rule 14 of C.P.C. and Section 311, Cr.P.C., have conferred similar powers on the court.

Section 165 confers vast and unrestricted powers on the court. The court may question the accused as to what he told to police although Section 162 of Cr.P.C. prevents parties from questioning the accused on that point. A judge may look at a police diary although not requested by either party and may question a witness on that basis. This may enable the judge to expose discrepancies in the statements of witnesses in the court and those recorded in the police diary.

Judge must show intelligent interest and put questions to witnesses in order to ascertain the truth. It is his duty to question witnesses on points which the lawyers for the parties have either overlooked or left obscure or willfully avoided. But, this he must do, without unduly trespassing upon the functions of the counsel of parties. He must not play a part of a party or a prosecutor, nor should he frighten or bully the witnesses.

Exceptions to Section 165:

A judge is empowered under Section 165 to put irrelevant questions to a witness, but he cannot base his judgment on irrelevant facts.

The first proviso to this section lays down that the judgment must be based on facts declared relevant by the Act and duly proved.

The second proviso lays down that this section shall not authorize any Judge to:

(i) Compel any witness to answer any question or to produce any document, which such witness would be entitled to refuse to answer or produce under Section

121-131 (privileges), if the questions were asked or the documents were called for by the adverse party;

(ii) Ask any question which it would be improper for any other person to ask under Section 148-149;

(iii) Dispense with primary evidence of any document, except in cases hereinbefore excepted.

Power of Jury or Assessors

Section 166 of the Indian Evidence Act, 1872 speaks about, "Power of jury or assessors to put questions". This section says that cases tried by assessors or jury then jury and assessors may put any questions to the witnesses however or by leave of the judge which the judge himself might asked and which considers proper.

Note: - This section has lost its importance as trial by jury or assessors has been abolished in the country.

Improper Admission & Rejection of evidence

Section 167 of the Indian Evidence Act, 1872 speaks about, "No new trail for improper admission or rejection of evidence". This section says

- Improper admission or rejection of evidence is not a ground for initiating a new trial or reversal of any decision;
- If there were enough evidence to justify the decision; or
- If the evidence that has been rejected had been received;
- The evidence rejected or improperly submitted should not be so significant that the decision could have been different if it was admitted.

Therefore, if an appeal is filed on the ground of improper exclusion of evidence or admission of evidence, the appellant must be able to prove that:

- There was improper admission or exclusion of evidence, and
- There has been a mockery of justice.

The object of this section is that "technical objections will not be allowed to prevail where substantial justice has been done." The section applies to civil as well as criminal cases. The matter of wrongful rejection or admission of evidence can be

raised either before a court of review or appellate court. It may be noted that Section 99, C.P.C. also provides that no decision is to be disturbed in appeal unless there is an error which affects the merits of the case. Section 465 of Cr.P.C. provides that a decision can be reopened on the ground of failure of justice and not otherwise.

Note: The Repealing Act, 1938, has repealed Section 2 and Schedule.



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